

No. 04-15324-HH

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SIERRA CLUB and ALABAMA ENVIRONMENTAL
COUNCIL, INC.

Plaintiffs-Appellants

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

Brief of *Amici Curiae*

**Alabama Pulp and Paper Council and Business Council of Alabama
in Support of Petition for Rehearing or Rehearing En Banc Filed by
Tennessee Valley Authority**

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January 5, 2006

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

The Alabama Pulp and Paper Council (APPCO) is part of the Alabama Forestry Association (AFA). The AFA is a non-profit corporation that represents individuals and businesses involved in forestry in Alabama. Specifically, APPCO represents all twelve pulp and paper mills operating in Alabama and conducts governmental affairs and environmental regulatory work for Alabama's pulp and paper industry. Neither APPCO nor AFA has a parent company, and no publicly held company has a 10% or greater ownership interest in either organization.

Business Council of Alabama (BCA) is a non-profit corporation that represents approximately 5,000 businesses and industries in Alabama on governmental and business issues, including issues of environmental regulation, that impact its members' operations. BCA has no parent company, and no publicly-held company has a 10% or greater ownership interest in BCA.

Pursuant to 11th Cir. Rule 26.1-1, the following is a list of all persons and entities known to have an interest in the outcome of this case in addition to those listed in the Petition for Rehearing or Rehearing En Banc filed by Tennessee Valley Authority:

Alabama Forestry Association

Alabama Pulp and Paper Council

Business Council of Alabama

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P. Stephen Gidiere III

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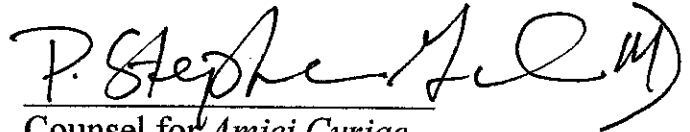

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**STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER
PARTIES**

Pursuant to 11th Cir. R. 28-1(f), Amici Alabama Pulp and Paper Council (APPCO) and Business Council of Alabama (BCA) adopt by reference the Statement of Issue Meriting En Banc Consideration contained in the Petition for Rehearing filed by Tennessee Valley Authority (TVA).

INTEREST OF *AMICI CURIAE*

APPCO and BCA respectfully submit this brief in support of TVA's request for rehearing. APPCO and BCA requested leave to file an amicus brief as part of the initial consideration of this case by the panel. That motion, however, was denied in a single-judge order, so the panel never had an opportunity to review or consider APPCO's and BCA's perspectives. *Sierra Club v. TVA*, No. 04-15324, Order on Motion to File Amici Curiae Brief (11th Cir. March 31, 2005). The perspective of private industry in Alabama is particularly important here because the panel decision impacts private businesses differently and more severely than it does TVA.

The twelve pulp and paper mills that are members of APPCO and many of BCA's members are subject to state opacity standards. APPCO and BCA are thus vitally interested in this case because the panel decision changes the law on opacity thereby exposing them to severe penalties for past actions without notice (something to which TVA is not exposed because of sovereign immunity) and fundamentally altering the way in which they must operate in the future.

SUMMARY OF THE ARGUMENT

This case is of exceptional importance; the panel decision has far-reaching impacts beyond those considered by the panel.

ARGUMENT

I. The Panel Decision has Far-Reaching Impacts

This case is *not* about alleged opacity violations at one power plant in north Alabama operated by TVA. It is about a new rule of strict liability created by the panel decision that impacts many types of industrial facilities across the State of Alabama, subjecting them to claims for severe civil penalties and new compliance obligations that are impossible to meet consistently.

Many members of APPCO and BCA are required by ADEM regulations or permits to install and operate continuous opacity monitoring systems (COMS) and to collect and report COMS data to ADEM. This COMS data is used by ADEM and plant operators as an indicator of performance and aids in the management of plant operations that affect opacity. For instance, elevated COMS readings could indicate conditions in a boiler causing inefficient or incomplete combustion of fuel or, alternatively, malfunctioning pollution control equipment like an electrostatic precipitator. But ADEM has *never* applied its credible evidence rule to allow the use of COMS readings to determine opacity compliance on a one-for-one basis.¹

The panel decision changes this (and does so retroactively). According to the panel decision, ADEM's 2% de minimis rule is invalid and "illegal" in practice. Slip op. at 27. There is no doubt about the implications of this holding—

¹ The evidence in the record is undisputed on this point. See Doc. No. 28, TVA Ex. 1 at ¶ 1(c); Doc. No. 28, TVA Ex. 2 at ¶¶ 21 & 22.

the District Court in this case has already announced that it understands the panel decision to mean that every time a subject facility in Alabama has (or had) a non-exempt COMS reading above 20%, it is in violation of the Clean Air Act. *See Nat'l Parks Conservation Assoc., Inc. v. Tennessee Valley Auth.*, No. 01-403-VEH, slip op. at 23-24 (N.D. Ala. Dec. 21, 2005) (attached) ("The Court of Appeals said that every time it can be shown with credible evidence that emissions from the Colbert TVA plant . . . fail to meet the 20% opacity requirement . . . the Colbert Plant is in violation of the Act."). This is a major change in the law.

II. Private Businesses Do Not Enjoy Sovereign Immunity from the Full Impact of the Panel Decision Like TVA Does

The panel decision impacts private businesses in Alabama *much more* than it impacts TVA. The panel decision affirmed the District Court's holding that TVA enjoys sovereign immunity from civil penalties for past opacity violations. Slip op. at 45. Private businesses in Alabama are not so fortunate; they do not have sovereign immunity. Thus, "every time" a plant reports or reported to ADEM a non-exempt COMS reading above 20%, it is subject to a claim for civil penalties under the Clean Air Act, which currently run as high as \$32,500 per day of violation. 42 U.S.C. § 7413(b); 40 C.F.R. § 19.4. Civil penalties for past violations can accumulate over a five-year period. *See* 28 U.S.C. § 2462. Thus, under the panel decision, just one non-exempt six-minute COMS reading over 20%

per day would subject a single source to over \$59 million in civil penalties—for readings ADEM considers to be in full compliance with its standard.

Above and beyond the practical and economic impact of such penalties, the panel decision creates significant due process concerns. *See Glazner v. Glazner*, 347 F.3d 1212, 1225 (11th Cir. 2003) (“The . . . Due Process Clause provides protection and repose, demanding fair notice. We have not found . . . an instance where the Supreme Court changed the established construction of a federal statute to make penalties apply retroactively to conduct that clearly appeared not to carry that penalty under federal law when the act was committed.” (citation omitted)).

The prospect of substantial civil penalties is no “Chicken Little” scenario. The panel decision throws open the courthouse doors for citizen suits seeking these exorbitant civil penalties by, among other things, taking an extremely liberal view of Article III standing. Under the panel decision, a citizen group can show the requisite standing to exact Clean Air Act civil penalties simply by showing that one of its members saw and disliked emissions from a smoke stack from some undefined distance away while driving “across a bridge” or engaging in recreational activities near the plant. Slip op. at 15-16. The panel decision does not require that the emissions viewed by the plaintiff be the *illegal* emissions complained of or that they actually impair the activities carried out by the plaintiff. *Id.* (The panel decision simply concludes, *with no record support*, that less opacity

“will lessen [plaintiffs’] injuries,” slip op. at 16.) In this way, the panel decision diminishes the causation and redressability requirements for Article III standing—requirements that this Court has taken very seriously in prior environmental cases. *See, e.g., Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003-04 (11th Cir. 2004); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993).²

Thus, the impact of the panel decision *in toto* is that massive civil penalties can be sought by almost anyone from sources previously considered to be in compliance. At a minimum, before creating such a situation, the Court should consider this case *en banc*, with input from all parties with a stake in the outcome.

III. A Power Plant is Not a Car, and a COMS is Not a Radar Gun

The panel decision rejects the reality (recognized by other courts, EPA, and ADEM³) that changing the method of measuring compliance with an emission

² The panel decision in this case is the first decision of this Circuit to consider Article III standing in the context of a Clean Air Act citizen suit against a source. APPCO and BCA raise the standing issue, not to expand the issues on rehearing, but to bring to the Court’s attention the full import of the panel’s holding that ADEM’s 2% rule is invalid.

³ *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1027 (D.C. Cir. 2000) (“We have recognized before that changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself.”); 58 Fed. Reg. 61640, 61644 (Nov. 22, 1993) (“The test method and the associated error can affect the implementation and stringency of any SIP-specified regulation.”). The record evidence on this point is undisputed. *See* Doc. No. 28, TVA Ex. 3, Roberson Decl. ¶¶ 8-9, 20; Doc. No. 28, TVA Ex. 2, Grusnick Decl. ¶ 26; Doc. No. 28, TVA Ex. 15, Park Dep. at 121-22.

limitation can affect the stringency of that limitation. As part of its rationale for rejecting this reality, the panel decision seizes upon and uses an analogy between the speed limit for cars and the opacity standard for power plants. Slip op. at 24. According to the panel decision, COMS is just like a radar gun—it simply increases the likelihood that pollution violators will be detected. *Id.* This analogy, though appealing in its simplicity, does not hold up.

For one thing, a power plant is not a car. Cars can control their speed and acceleration in a precise manner and can brake quickly. Power plants cannot do the same with their emissions. Opacity is a highly variable condition, constantly changing in most cases, particularly with fossil fuel-fired boilers. Even under relatively constant operating conditions, six-minute COMS readings can show great variability over time. For example, with a boiler that burns coal, the combustion process and the constituents of flue gases constantly change during the course of a typical day. Opacity is affected by many factors, including the level of non-combusted carbon from different types of coal, sodium content of the coal, the amount of air needed, and the amount of moisture. It is undisputed that this variability cannot be avoided even with the most diligent operation and maintenance practices.⁴ *See, e.g.,* Doc. No. 28, TVA Ex. 2, Grusnick Decl. at ¶¶

⁴ Thus, if every six-minute COMS reading above the numeric 20% standard were considered noncompliance, the standard would be impossible to meet. *See, e.g.,* Doc. 28, TVA Ex. 2, Grusnick Decl. at ¶¶ 23, 28 (“Maintaining opacity levels

23, 28; Doc. No. 28, TVA Ex. 15, Park Dep. at 184-85; Doc. No. 28, TVA Ex. 16, Littrell Dep. at 161; Doc. No. 28, TVA Ex. 3, Roberson Decl. at ¶ 12.

And further, a COMS is not a radar gun. COMS measure and record opacity on a *continuous* basis. Radar guns are used periodically by individual police officers at times of their choosing; they are not continually pointed at a single car around the clock every second it is running. To make the analogy work, car drivers would be required to record their speedometer readings at all times and publicly report the data. Any person could then use the data to compel payment of penalties for even minor infractions. There are obvious practical and fairness issues with using such continuous speedometer readings to levy fines—just as there are with using COMS on a one-for-one basis.⁵

ADEM's 2% de minimis rule properly recognizes that changing the method of measuring compliance with an emission limitation can affect the stringency of that limitation, and it is a reasonable way to use COMS to show what Method 9 "would have" shown. *See* ALA. ADMIN. CODE r. 335-3-1-.13(2). The 2% threshold

below a 20% opacity standard 100% of the time for all discreet six minute averaging periods is not possible while operating a complex process such as a utility boiler." It is a well-established canon of construction that statutes and regulations should not be read to require an impossible or absurd result. *See Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996) (rejecting a literal "zero discharge" reading of the Clean Water Act where it was factually impossible for the party to have complied with a zero discharge standard).

⁵ A better car analogy would be vehicle emission testing. States with such testing only require compliance inspections periodically, not continuously. *See, e.g.,* GA. COMP. R. & REGS. r. 391-3-20-.12 (requiring vehicle emissions testing annually).

is a level pinpointed by EPA⁶ and other States⁷ and a level that ADEM has determined using air quality modeling is within a range that has no adverse effect on meeting and maintaining air quality standards in the State. Doc. No. 28, TVA Ex. 22 and 23.⁸

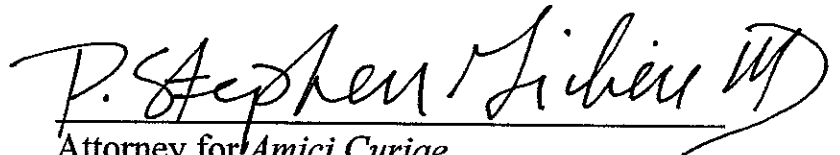
CONCLUSION

For all of these reasons, the Court should rehear this matter *en banc*.

⁶ See U.S. EPA, Region IV, Continuous Emission Monitoring ("CEM") Enforcement Plan, at Table 1 (May 5, 1989), available at <http://www.epa.gov/Region4/air/enforce/cep.pdf>.

⁷ See, e.g., *National Parks Conservation Association, Inc. v. TVA*, 175 F. Supp. 2d 1071 (E.D. Tenn. 2001) (finding Tennessee's 2% de minimis exception to be reasonable in light of more restrictive nature of COMS requirement).

⁸ It is also noteworthy that Alabama's 20% opacity limit is one of the more stringent compared to other States. See, e.g., FLA. ADMIN. CODE ANN. r. 62-296.405(a) (40% limit for quarterly tests); GA. COMP. R. & REGS. r. 391-3-1-.02(2)(b) (40% opacity limit); MS APC-S-1-3(1)(a) (40%).

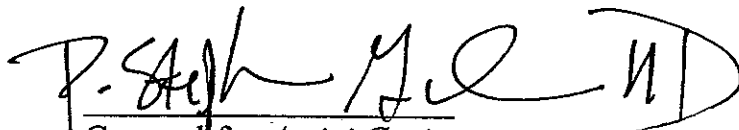

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitation set forth in
Fed.R.Civ.P. 29(d) and 35(b)(2).


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CERTIFICATE OF FILING AND SERVICE

I certify that the original and fifteen (15) copies of the foregoing document were filed on January 5, 2005, with:

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