

# Eleventh Circuit Opacity Cases and Credible Evidence

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# 1970 SIP

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20%/Ringlemann No.1 (Except)

60%/Ringlemann No. 3 -3 minutes/hour

Startup, shutdown load change.

(Note: no malfunction provision)

# 1976 Continuous Monitoring Required for FFFSG

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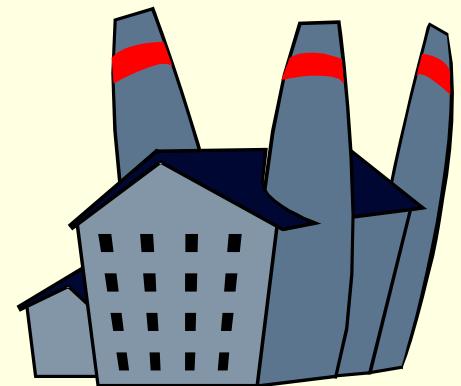
- Monitoring requirement added as an operation and maintenance tool
- Elevated values trigger enforcement determination
- Enforcement mechanism-Method 5 for PM  
Method 9 for Visible Emissions



# 1979 SIP Modification

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- Opacity rule modified to form of NSPS Subpart D
- 20% Opacity (Ringlemann equivalent dropped) with one 40% exemption per 60 minutes



# CREDIBLE EVIDENCE

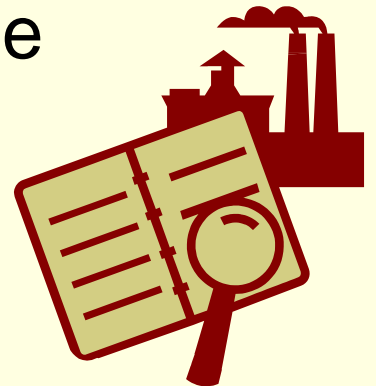
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- Included due to the threat of of SIP call
- 3 of 8 Region 4 presently have rules
- Effective May 20, 1999

# 2% De Minimis Rule

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- Codification of existing practice
- Recognizes that Credible Evidence as a matter of practicality make COMs compliance determiners.
- Accounts for periods of malfunction of furnace, steam generating equipment and pollution control equipment
- Recognizes that perfection cannot be attained.
- Became effective October 10, 2003



# AEC/Sierra Club Complaint

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- From TVA records almost 9,000 6 minute average opacity readings above 20% from 1997 to 2002.
- Requests
  - Declaratory and Injunctive Relief
  - Civil Penalties



# District Court Ruling

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- Federal Sovereign Immunity i.e. no penalty aspect
- Prior to May 20, 1999 no relevant regulation, therefore Credible Evidence not appropriate
- Deference to Alabama's reasonable discretion in its interpretation of its rules, 2% de minimis not exceeded for occasions after May 20, 1999.



# 11<sup>th</sup> Circuit Ruling

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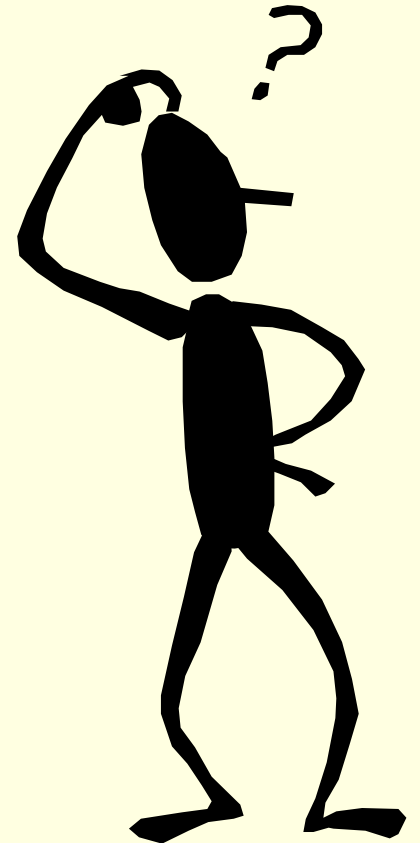
- Concurred on Sovereign Immunity
- Concurred on Pre May 20, 1999 readings above 20% were not violations under existing Regulations
  - Also stated that the Federal Credible Evidence Rule was reserved only for use by the Federal enforcement and was not available for citizen suits
- Disagreed with District Court on reasonableness of 2% De Minimis rule and its basis in law, remanded to lower court



# WHAT'S NEXT

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- En Banc Hearing-request denied
- Appeal
- Return to District Court
- Action by EPA on Alabama SIP



# Questions?

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