

PSD/Air Enforcement: Federal Appellate Court (Eighth Circuit) Addresses Injunctive Relief Authority



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The United States Court of Appeals for the Eighth Circuit (“Eighth Circuit”) addressed in an August 20th Opinion whether a federal court had the authority to order injunctive relief for past violations of the Clean Air Act. See *United States and Sierra Club v. Ameren Missouri*, No. 19-3220.

The alleged past violations involved the Prevention of Significant Deterioration (“PSD”) provisions of the Clean Air Act.

The Eighth Circuit also addressed whether a facility should have obtained a PSD permit for projects undertaken at a plant.

A United States District Court (Eastern District Missouri)(“Court”) determined in 2017 that Ameren, Missouri (“Ameren”), violated the Clean Air Act by failing to obtain a PSD permit prior to making modifications to its Rush Island plant (“Plant”). The company is stated to have replaced the economizer, reheater, lower slopes, and air preheaters at Rush Island Unit I in 2007 and the economizer, reheater, and air preheaters at Rush Island Unit II in 2010.

The Court determined that the replacement of such components extended the natural life of the Plant. The changes are also stated to have increased SO2 emissions by decreasing forced outages and load limitations.

After determining Ameren’s liability for the Clean Air Act violations, the Court undertook a subsequent trial of the relevant remedies. Further, the Court allowed the Sierra Club to intervene in the next phase.

Ameren moved for Summary Judgment as to whether the Court had the authority to order injunctive relief for the past Clean Air Act violations. It rejected three arguments put forth by the company which included:

- The Clean Air Act only authorizes courts to order injunctive relief for ongoing violations
- The Court cannot determine what constitutes Best Available Control Technology (“BACT”) because that would remove permitting authority from the Missouri Department of Natural Resources (violating the federalism inherent in the Clean Air Act)
- Emission reductions cannot be ordered at the Plant because there was no conclusion that the company operated the power plant in violation of the Clean Air Act

After rejecting these arguments, the Court applied a four-factor *eBay* to determine whether injunction was an appropriate remedy. It concluded there were disputes of material fact concerning the direct cost of installing wet FGD and other costs and economic impacts. As a result Ameren was required to present

such disputes of fact at trial to argue that the balance of hardships and public interest favor a remedy other than the one sought by the United States Environmental Protection Agency (“EPA”).

Ameren’s appeal to the Eighth Circuit challenged both the liability determination and the decision in regards to the possibility of the Court imposing a remedy.

The Eighth Circuit affirms the Court’s liability determination. However, it reverses in part the remedy portion of the Court’s Order concerning the Plant.

Ameren raised five arguments in its Eight Circuit Appeal. They included:

1. the Rush Island projects did not require permits under the Missouri State Implementation Plan;
2. the Rush Island projects did not constitute major modifications;
3. the district court lacked jurisdiction under Article III and statutory authority under the CAA to enter the injunctions;
4. the injunctive relief ordered at Labadie is punitive, not remedial, and therefore prohibited; and
5. the Court lacked jurisdiction over the Title V claims.

In addressing the first argument, the Eighth Circuit reviews the relevant portions of the SIP including the definitions of the term “modification.” It concludes that the Court correctly held that the Plant required permits through application of the actual-to-projected-actual applicability test under 40 C.F.R. § 52.21(a)(2)(iv)(c). This federal regulation is incorporated by reference in the Missouri SIP.

In addressing the second argument, the Court discusses the phrase “major modification” and where the burden of proof on causation lies in this context. It holds that the Court did not apply an improper causation standard and was correct in holding that:

. . . no special standard of care evidence is required for the factfinder to be able to determine whether a reasonable power plant operator or owner would have expected the projects to cause a significant emissions increase.

Also rejected was the argument that the Court abused its discretion in admitting and relying on undisclosed expert opinions.

In regards to injunctive relief, the Eighth Circuit held that no notice was provided or alleged that the Plant committed a violation of the Clean Air Act. It states:

The plain language of § 7413(b) and caselaw make clear that the injunctive relief a district court may award must redress a violation of the CAA.

The Eighth Circuit holds that because Ameren committed no violation of the Clean Air Act at its Plant it lacks authority to authorize injunctive relief.

Finally, the Eighth Circuit rejected Ameren’s challenge to its jurisdiction over the Clean Air Act Title V claims. It determined that the Plant violated an express permit term of the Title V permit prohibiting it from performing unpermitted major modifications. As a result, under § 7413(b) the Court was held to have jurisdiction to consider whether the Plant violated the express terms of its Title V permit.

A copy of the Opinion can be downloaded [here](#).