

## PSD/Air Enforcement: U.S. District Court (Missouri) Addresses Injunctive Relief Authority



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The United States District Court (Eastern District Missouri) (“Court”) issued a February 27th Memorandum and Order (“Order”) addressing whether it had the authority to order injunctive relief for past violations of the Clean Air Act. See *U.S. and Sierra Club v. Ameren Missouri* 2019 WL 952108.

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

The Court previously determined on January 23, 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”).

Ameren is stated to have replaced the economizer, reheater, lower slopes, and air preheaters at Rush Island Unit 1 in 2007 and the economizer, reheater, and air preheaters at Rush Island Unit 2 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 SO<sub>2</sub> emissions by decreasing forced outages and load limitations.

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

Ameren moved for summary judgment making three arguments:

- The Clean Air Act only authorizes courts to order injunctive relief for ongoing violations (the United States Environmental Protection Agency [“EPA”] had withdrawn its claim for civil penalties to simplify/streamline the trial).
- The Court cannot determine what constitutes Best Available Control Technology (“BACT”) because that would remove permitting authority from the Missouri Department of Natural Resources (“MDNR”) (violating the federalism inherent to the Clean Air Act.)
- Emission reductions cannot be ordered at the Ameren Labadie Energy Center because there was no conclusion that the company operated the power plant in violation of the Clean air Act.

EPA filed a cross motion for summary judgment arguing that an injunction requiring Ameren to obtain a PSD permit for Rush Island and the installation of BACT should be issued. The federal agency also argued there was no disputed material fact that flue gas desulfurization (“FGD”) constituted BACT for the Plant.

As to Ameren’s arguments, the Court rejected the argument that injunctive authority was not available for past violations citing *U.S. v. EME Homer City Generation L.P.* which stated:

. . . that the EPA “can still obtain an injunction requiring” compliance even five years after the “completion of a facility’s modification.”

The Court noted that there was no allegation that the statute of limitations had run in the Ameren matter.

Second, the Court rejected the argument that it is precluding MDNR from determining BACT, stating:

- The Plaintiffs have not asked the Court to write and issue a permit.
- Case does not law support the argument that the Court cannot determine what technology constitutes BACT.
- MDNR anticipates implementing court-ordered injunctive relief through the permit process.

Finally, the Court rejected the argument that ordering injunctive relief at a non-offending plant undermines the Clean Air Act’s statutory design and enforcement program and is not based on any legal authority. It also rejected the argument that such an order would be a penalty, and a legal remedy has been waived violating EPA’s own guidance.

The Court next addressed EPA’s Motion for Summary Judgment in which it asked that an Order be issued requiring Ameren to obtain a BACT – incorporating the PSD permit for the Plant. It had also argued that there was no dispute of material fact that FGD is BACT.

The Court determined that it must apply the four-factor eBay test to determine whether an injunction is an appropriate remedy. Ameren had argued that the e-Bay test is a fact-intensive inquiry and any BACT determination is site specific – therefore precluding summary judgment.

The Court concluded that Ameren offered evidence concerning a “balance of hardships” in “public interest.” It concluded there were disputes of material fact concerning the direct cost of installing wet FGD and other costs and economic impacts such as potential cessation of operations and whether more cost-effective control options exist. As a result, it held that Ameren could present these disputes of fact at trial to argue that the balance of hardships in public interest favor a remedy other than the one sought by EPA. Consequently, it denied EPA’s Motion for Summary Judgment.

A copy of the Order can be found [here](#).