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United States v. Ameren Missouri—Electric Utility violated Clean Air Act by failing to secure permits for improvement to coal-fired generating units at one power plant but district court erred in imposing remedy that imposed compensatory emission limitations on another power plant's operations

Missouri has a state implementation plan under the CAA approved by the Environmental Protection Agency. Its plan incorporates the agency's prevention-of-significant-deteriorations regulations in 40 C.F.R. § 52.21. That section contains the two alternative tests for determining when modifications to existing emitting sources (such as coal-fired power plants) are "major" and therefore subject to a permit setting forth permissible emission limits. One is the actual-to-projected-actual applicability test under which baseline actual emissions are first calculated and then measured against projected emissions of a regulated pollutant (such as sulfur dioxide) at any point during a five- or ten-year period, depending upon design capacity, after the improved unit begins operation. The EPA regulation also provides for an exclusion from the projected emission calculation for "'that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions ... and that are also unrelated to the particular project, including any increased utilization due to product demand growth.'" *Id.* § 52.21(b)(41)(ii)(c). Finally, the CAA Title V "'require[s] each covered facility to obtain a comprehensive operating permit setting forth all CAA standards applicable to that facility.'" Missouri, as an adjunct to its SIP, issues these permits subject to EPA review and veto.

Ameren Missouri began operation of the Rush Island power plant in 1976 with one generating unit (Unit 1) and came on-line with a second (Unit 2) during 1977. Neither Unit has pollution devices to control for sulfur dioxide emissions. Component problems developed over time, and Ameren made improvements to Unit 1 in 2007 and Unit 2 in 2010. These improvements increased anticipated unit availability—i.e., decreased down-time—and increased capacity for Unit 2. Net increase in sulfur dioxide emissions of hundreds of tons per year followed once the improved Units commenced operations. The United States sued in 2011, alleging "that Ameren violated the CAA, the Missouri SIP, and Ameren's Rush Island Plant Title V Permit by performing major modifications on Units 1 and 2 without obtaining the necessary permits, installing pollution control technology, or otherwise complying with all applicable requirements." In a series of decisions, the district court agreed and eventually remedied the violations by ordering Ameren to apply for a PSD permit for the Rush Island facility, to propose and upon approval implement best-available-control-technology measures, and to reduce pollutant emissions at another Ameren power plant (Labadie Energy Center) "in an amount equal to Ameren's excess emissions at Rush Island." *United States v. Ameren Mo.*, 158 F. Supp. 3d 802 (E.D. Mo. 2016); *United States v. Ameren Mo.*, No. 4:11-cv-77-RWS, 2016 WL 728234 (E.D. Mo. Feb. 24, 2016); *United States v. Ameren Mo.*,

229 F. Supp. 3d 906 (E.D. Mo. 2017); *United States v. Ameren Mo.*, 372 F. Supp. 3d 868 (E.D. Mo. 2019).

Ameren appealed and raised five issues: (1) the Rush Island projects did not require permits under the Missouri SIP; (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 district court lacked jurisdiction over the Title V claims. The Eighth Circuit affirmed except for the remedial order directed to the Labadie facility. *United States v. Ameren Mo.*, No. 19-3220, 2021 WL 3700309 (8th Cir. Aug. 20, 2021).

As to the first three issues, the panel held, like the district court, that § 6.060(8)(4) of the SIP (Mo. Code Regs. Ann. tit. 10, § 6.060(8)(A)) expressly incorporated "'[a]ll of the subsections of 40 CFR 52.21 other than (a) Plan disapproval, (q) Public participation, (s) Environmental impact statements and (u) Delegation of authority are incorporated by reference" and accordingly the latter's permitting requirements under the actual-to-project applicability test in 40 C.F.R. § 52.21(a)(2)(iv)(c). The panel next addressed several claimed errors in the legal standards applied by the district court in determining the project's "major improvement" status. The panel began by concluding that the court correctly "held that 'while it remains EPA's burden to prove that Ameren should have expected the projects to cause an increase in emissions, the burden is Ameren's to prove that the demand growth exclusion applies.'" It then found that, in determining Ameren failed to carry its burden of showing entitlement to the exclusion, the district court had used the appropriate causation standard—i.e., proving that (1) "'*the unit* could have achieved the necessary level of utilization [so as to capture all emissions]'" during the baseline period and (2) "'the increase [in pollutant emissions] is not related to the physical or operational change(s) made to the unit.'" The panel lastly concluded that the district court did not err by 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.'"

As to the remedial issues, the panel held that the injunctive relief directed with respect to Rush Island's operation was expressly contemplated under 42 U.S.C. § 7413(b), which provides that "a district court 'has the authority to order [a defendant] to take appropriate actions that remedy, mitigate and offset harms to the public and the environment *caused by the [defendant's] proven violations of the CAA*.'" However, the relief directed against the Labadie facility went too far for the same reason. As the panel explained, "the government never provided notice of or alleged that the Ameren's Labadie plant committed a violation of the CAA. 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 CAA Title V issue turned on whether the district court possessed subject-matter jurisdiction over the United States' claim. Ameren argued "that the Title V violation 'is reviewable exclusively by the courts of appeals, not collaterally in civil ... enforcement actions in the district courts.'" Not so responded the panel:

> Title V's plain text "lists only two ways in which it can be violated: operating without a Title V permit or violating the terms of a Title V permit while operating a source."

> [¶] The district court expressly found that Ameren violated an express permit term prohibiting it from performing unpermitted major modifications. ... Under § 7413(b), the district court had jurisdiction to consider whether Ameren violated the express terms of its Title V permit.

Decision link: https://ecf.ca8.uscourts.gov/opndir/21/08/193220P.pdf