NO. 19-3220

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, and SIERRA CLUB, Plaintiffs-Appellees.

v.

AMEREN MISSOURI, Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Missouri

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Addendum to Response Brief of Plaintiff-Appellee Sierra Club

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:11-CV-00077-RWS**
	)	
AMEREN MISSOURI,	)	
	)	
Defendant.	)	

NOTICE OF WAIVER OF DEMAND FOR CIVIL PENALTIES IN THIS PENDING CLEAN AIR ACT ENFORCEMENT ACTION

Plaintiff United States of America, acting on behalf of the United State Environmental Protection Agency, hereby gives notice that it will not seek civil penalties against Defendant Ameren Missouri ("Defendant") for violations of the foregoing at its Rush Island coal-fired power plant located in Festus, Missouri: (a) the New Source Review ("NSR"), Prevention of Significant Deterioration ("PSD") provisions of the CAA, 42 U.S.C. §§ 7470-92 and applicable implementing regulations; (b) the federally approved and enforceable Missouri State Implementation Plan ("Missouri SIP"); (c) Title V of the Act, 42 U.S.C. §§ 7661-7661f; (d) federal regulations implementing Title V of the Act at 40 C.F.R. Part 70; and (d) Missouri's federally approved Title V program, 10 C.S.R. 10-6.065. During the remedy phase and in all other phases of this action, Plaintiff United States will seek only equitable and injunctive relief from the Court to redress the foregoing Clean Air Act violations. The United States will not seek and hereby waives its demand for civil penalties as referenced in Paragraphs 1, 54, 69, 74, 83, 92 and in Paragraph 7 of the Prayer for Relief in the Third Amended Complaint (ECF No. 249) for the Clean Air Act violations alleged in the instant action at the Rush Island Plant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:11-CV-00077-RWS**
	)	
AMEREN MISSOURI,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE JURY DEMAND

Plaintiff United States of America, acting on behalf of the United State Environmental Protection Agency, hereby files this memorandum in support of its motion to strike Defendant Ameren Missouri's demand for a jury trial from its pleadings. To simplify and streamline the trial in this case, the United States has withdrawn its demand for civil penalties; only equitable and injunctive relief is requested from the Court. As such, under the Seventh Amendment to the United States Constitution and Federal Rule of Civil Procedure 39, Ameren has no right to a jury trial absent the United States' consent. Ameren's demand for a jury trial should be stricken.

FACTUAL BACKGROUND

The Complaint in this action, as amended at ECF No. 249, sought civil penalties and injunctive relief from Ameren for alleged violations of the Clean Air Act and federally approved and enforceable Missouri State Implementation Plan (Missouri SIP) at Ameren's Rush Island coal-fired power plant. In its answer to the operative Complaint, Ameren requested a "trial by jury on all issues so triable." (ECF No. 250).

To streamline and simplify the issues for trial, at the start of the Court's November 18, 2015, hearing on the pending summary judgment motions, the United States notified the Court that it would not seek civil penalties against Ameren in this case, but instead only seek equitable relief. Specifically, and as stated in the notice filed on November 30, 2015 (ECF No. 696), the United States has withdrawn its demand for civil penalties in Paragraphs 1, 54, 69, 74, 83, 92 and in Paragraph 7 of the Prayer for Relief in the Third Amended Complaint (ECF No. 249) for the Clean Air Act violations alleged at the Rush Island Plant. Instead, in all phases of this action Plaintiff will seek only equitable and injunctive relief to redress Ameren's alleged violations.

APPLICABLE LAW

The Seventh Amendment to the Constitution codifies the common law right to a jury trial in federal court only for lawsuits in which legal rights are at issue, and not to actions in which only equitable rights and remedies are decided. U.S. CONST. AMEND. VII; Fed. R. Civ. P. 38(a); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 41 (1989). Courts apply a two-pronged test to determine whether a particular action will resolve legal rights, and provide a right to a jury trial, or whether the action will resolve only equitable rights. *Granfinanciera*, 492 U.S. at 42. First, the court compares the statutory claim to analogous 18th century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, and more importantly, the court determines whether the remedy sought is legal or equitable in nature by "examin[ing] both the nature of the issues involved and the remedy sought." *Terry*, 494 U.S. at 564; *Granfinanceria*, 492 U.S. at 42.

A claim for civil penalties is analogous to an action in debt that was heard in English courts of law, and is generally legal in nature. If a legal claim is joined with an equitable claim,

the right to a jury trial on the legal claim, including all issues common to both claims, remains intact. *Tull v. U.S.*, 107 S. Ct. 1831, 1839 (1987); *S.E.C. v. Kopsky*, 537 F. Supp. 2d. 1023, 1026 (Sippel, J., E.D. Mo. 2008). However, when subsequent events leave only *equitable* rights to be determined, the right to a jury trial does not exist and is not preserved by the Seventh Amendment or Rule 38. *Whitson v. Knox County Board of Education*, 468 Fed. Appx. 532, 537 (6th Cir. 2012); *Wall v. Trust Co. of Ga.*, 946 F.2d 805, 809 (11th Cir. 1991) (no right to a jury trial existed after one of the plaintiff's claims was dismissed, leaving only an equitable claim); *Francis v. Dietrick*, 682 F.2d. 485, 486-87 (4th Cir. 1982) (no right to jury trial after plaintiff amended his complaint to withdraw a request for legal damages); *Anti–Monopoly, Inc. v. Gen. Mills Fun Grp.*, 611 F.2d 296, 307–08 (9th Cir.1979) (same); *Chevron Corp. v. Donziger*, 2013 WL 5526287, *2 (S.D.N.Y. Oct. 7, 2013) ("[I]t is well settled that when a party withdraws its damages claims and pursues only equitable relief, a jury trial is no longer available and issues must be tried by the Court.") (citations and quotation marks omitted).

Unless all parties consent, no jury trial may be held where no right to such a jury trial exists under the law. Fed. R. Civ. P. 39(a)(2).

ARGUMENT

The United States seeks equitable injunctive relief in order to bring Ameren into compliance with the Clean Air Act requirements, and to remediate the harm caused by Ameren's violation of those requirements. To ensure compliance, the United States seeks an injunction requiring Ameren to obtain the required NSR permits for its modification, to install and operate the required pollution controls, and to meet the emissions limits that apply to its modified generating units. The United States also seeks an injunction requiring Ameren to remediate and mitigate the harm to public health and the environment caused by the excess emissions that

resulted from its illegal modifications. (ECF No. 249, Prayers for Relief ¶¶ 1-6, 9). This Court has broad authority to grant such equitable relief, based on the evidence that will be developed and presented during any remedy phase in this case. *See, e.g.*, *United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1060-62 (S.D. Ind. 2008) (district courts have "the authority to order Defendants to take appropriate actions that remedy, mitigate and offset harms to the public and the environment caused by the Defendants' proven violations of the CAA").

Several courts, including the Eighth Circuit, have found that similar types of relief are equitable in nature and thus not subject to decision by a jury. *See e.g.*, *Entergy Arkansas, Inc. v. Nebraska,* 358 F.3d 528, 545-546 (8th Cir. 2004) (upholding denial of a state's jury trial request where district court ordered compensatory damages after finding an injunction was no longer practical); *Goettsch v. Goettsch*, 29 F. Supp. 3d 1231, 1237-1239 (D. Iowa 2014) (no right to jury trial when shareholder's request for judicial dissolution of a closely held corporation sought purely equitable relief); *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 541 F.Supp.2d 480, 483-484 (D. Conn. 2008) (no right to jury trial in enforcement action under the Connecticut Water Pollution Control Act by property owner seeking reimbursement of clean-up costs for PCB contamination); *see also State of California Department of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp. 2d. 1028, 1047 (C.D. Cal. 2002) (defendants in CERCLA actions are not entitled to jury trials because such actions seek purely equitable relief). Notably, the district court in *Cinergy* found that the same injunctive relief sought in this case – the installation of modern pollution controls – was not a "penalty" that would be barred by the applicable statute of limitations. *United States v. Cinergy Corp.*, 397 F. Supp. 2d 1025, 1031-1032 (S.D. Ind. 2005).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. AMEREN MISSOURI, Defendant.	)	No. 4:11-CV-0077 RWS

PLAINTIFF UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO STRIKE JURY DEMAND

The United States brought this lawsuit seeking three things: (1) to bring Ameren into compliance with the Clean Air Act; (2) to mitigate the harm caused by Ameren's violations of law; and (3) to obtain a civil penalty. The first two forms of relief are squarely within the Court's equitable authority. They aim to restore the status quo by first ensuring compliance with the law, and then redressing the harm caused by the tens of thousands of tons of pollution that Ameren never would have emitted had it followed the law. The third form of relief is now moot. The United States has already withdrawn its penalty claims and stated that it will seek only "equitable and injunctive relief." Doc. 696 at 1; Doc. 701 at 1. Now that the case only concerns equitable relief, Ameren has no right to a jury trial.

Ameren readily concedes that "the primary remedy EPA seeks" is equitable and "comes with no jury right by itself." Doc. 710 ("Ameren Brief") at 2. Ameren also concedes that it has no procedural objection to the United States' motion. Indeed, the company notes that if the United States sought only the remedies that Ameren agrees are equitable, "we would be off to a bench trial." *Id*. Thus, the only question raised by Ameren's objection is whether three types of potential injunctive relief are in fact legal in nature. As described below, they are equitable.

I. Ameren has no right to a jury trial where the United States has committed to only seeking injunctive relief

The case law makes clear that the "relief *sought*" dictates whether a jury trial is required. *Tull v. United States*, 481 U.S. 412, 421 (1987) (emphasis added); *see also Granfinanciera v. Nordberg*, 492 U.S. 33, 42 (1989); *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 545 (8th Cir. 2004). Ameren concedes the point. Ameren Brief at 6 n.3 ("It is well-settled [that right to a jury trial] turns on the nature of the remedy *sought*, not the nature of the remedy ultimately awarded."). Here the United States has formally stated that it will only seek "equitable and injunctive relief." Doc. 696 at 1; Doc. 701 at 1. The Court can rely on that statement in finding that no right to a jury trial remains. *See Chevron Corp. v. Donziger*, 2013 WL 5526287, at *1 (S.D.N.Y. Oct. 7, 2013) (relying on filed notices and oral statement); *Kemp v. Tyson Foods, Inc.*, 2001 WL 1636512, at *1 and n.1 (D. Minn. Nov. 19, 2001) (noting that oral notice can suffice); *see also Armco, Inc. v. Armco Burglar Alarm Co.*, 693 F.2d 1155, 1158 (5th Cir. 1982) (jury trial right determined by issues, not pleadings). Thus, the amended complaint's prayer for relief is no longer the sole touchstone for the remedies the United States seeks. It must be read in light of the notice that the United States will only seek equitable relief.

Ultimately, the Court will ensure that any relief awarded is within its equitable authority. *See Westvaco* Opinion at 32 (describing factors to consider in mitigation, including whether relief "'bears an equitable relationship to the degree and kind of wrong it is intended to remedy.'") (quoting *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003)); *Cinergy*, 618 F. Supp. 2d at 967 (citing *Deaton* and ordering mitigation bearing an equitable relationship to the harm, while finding that further mitigation would be punitive). If there is any question about whether the United States' remaining requests for relief are equitable, the issue can be resolved after remedy trial – with the benefit of a full record.

II. Categories 5 and 6 of the United States' prayer for relief are designed to redress the harm from Ameren's violations, making them equitable in nature

Ameren principally objects to what it calls Categories 5 and 6 from the United States' prayer for relief.[2] *See* Ameren Brief at 6 (quoting Doc. 249 at 24-25). Category 5 (allowance surrender) is a subset of Category 6, which seeks "other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused" by Ameren's violations. Both forms of relief fit within what Ameren itself describes as equitable: remedies to "restore the status quo." Ameren Brief at 4.

As a starting point, "It goes without saying that an injunction is an equitable remedy." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). In other words, injunctive relief like that sought here is equitable. It is only considered punitive if crosses a line – if it "goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson v. Securities and Exchange Commission*, 87 F.3d 484, 488 (D.C. Cir. 1996); *see also Entergy*, 358 F.3d at 546 (finding monetary damages qualify as equitable relief where equitable relief would otherwise not fully cure violation); *United States v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998) (restorative wetlands injunction that did not "go[ ] beyond compensation for the injury caused by the defendant" was not a "penalty" under 28 U.S.C. § 2462).

[2] Ameren also impugns the United States' "motives" for moving to strike the jury demand, then contends that those motives "do[n't] matter." Ameren Brief at 2. True enough. Even if they mattered, there is nothing improper in how the United States proceeded. Notably, until its last brief, Ameren itself had been telling the Court that the case was too complicated for a jury: "A case, like this, 'of such complexity, rife with technical issues, is not an ideal one for a jury to decide.'" Doc. 548 at 1 (citing *Cinergy*, 623 F.3d 455, 457 (7th Cir. 2010)). Now Ameren changes its tune and waxes eloquent on the need for a jury. Whatever Ameren's motives for doing so, the fact is that the matter is complicated. That complexity is compounded by the fact that the jury pool consists of those harmed by Rush Island's pollution and, Ameren claims, on the hook for the costs of injunctive relief. Ameren Brief at 2. Finally, the case will be easier to schedule and hear as a bench trial, allowing the Court to resolve Ameren's liability most efficiently.

A. Mitigation of harm is equitable relief

Mitigation of the environmental harm from Ameren's violations is equitable relief, as two courts hearing New Source Review remedy proceedings have found.

From the days of English common law, "courts of equity have enjoyed sound discretion to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (internal citations and quotation marks omitted); *see also Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 66-67 (1992); *Federal Trade Commission v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) (in enforcement action "all the inherent equitable powers of the district court are available for the proper and complete exercise of the court's equitable jurisdiction" unless limited by statute).

That equitable authority includes the power to order relief to mitigate and redress the harm from a violation. *See, e.g.*, *U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 339 F.3d 23, 31 (1st Cir. 2003) ("court may grant additional injunctive relief governing post-permit operations of the companies *insofar as the court is remedying the harm caused by their past violations*.") (emphasis in original); *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000) ("The authority to 'enforce' . . . is more than the authority to declare that the requirement exists and repeat that it must be followed" and thus that authority includes mitigation).

In keeping with the historic authority of the courts, EPA defines mitigation as "injunctive relief . . . to remedy, reduce or offset . . . harm caused by the alleged violations." Ex. 3, November 14, 2012 EPA Memo[3] ("Mitigation Memo") at 2. EPA's guidance goes on to explain

[3] *Available at* http://www.epa.gov/sites/production/files/2013-10/documents/2ndeditionsecuringmitigationmemo.pdf

that "the purpose of mitigation is to, as nearly as possible, restore the *status quo ante*." *Id*. at 4. In other words, mitigation aims to redress the harm from the violations and put the public and the environment back where they would have been if the violations had not occurred. As Ameren itself recognizes, "equitable remedies include 'those intended simply to extract compensation or restore the status quo'." Ameren Brief at 4 (quoting *Tull*, 481 U.S. at 421). That is precisely what the United States will seek in Categories 5 and 6.

Two courts have recently considered their authority to order mitigation for New Source Review violations. Both determined that mitigation of harm is available through the courts' equitable authority. The *Cinergy* court found that it had "the equitable authority to order a full and complete remedy for harms caused by a past violation." *United States v. Cinergy Corp.,* 582 F. Supp. 2d 1055, 1061 (S.D. Ind. 2008). Similarly, the *Westvaco* court has scheduled additional proceedings to consider a "remedial obligation to mitigate the harm caused." *Westvaco* Opinion at 35.

Notably, both courts had decided that civil penalties were not available because the statute of limitations had run. *Westvaco* Opinion at 13; *Cinergy*, 618 F. Supp. 2d at 959. Under the law, the running of the statute of limitations would also bar other punitive relief. *See Telluride*, 146 F.3d at 1246 (penalty not defined, so question is whether remedy is unrelated to or in excess of harm from violation). But both courts held that mitigation *was* available, as part of their equitable jurisdiction. *See Cinergy*, 618 F. Supp. 2d at 959 (noting that injunctive relief sought by United States, including mitigation, "was merely compensation for the injury caused by Cinergy's violation . . . and was not a penalty."). Had Ameren thought that forms of relief in *this* case beyond civil penalties were punitive in nature, it should have (and would have) moved to preclude them when it moved to bar certain penalty claims on statute of limitations grounds. *See* Doc. # 40. Ameren did not.