NO. 19-3220

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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

AMEREN MISSOURI,
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division Case No. 4:11-cv-00077
The Honorable Rodney W. Sippel

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Ameren Missouri ("Ameren") appeals an adverse judgment of the U.S. District Court for the Eastern District of Missouri, Eastern Division (the "District Court"), in a Clean Air Act (the "Act") enforcement case brought by the Environmental Protection Agency ("EPA"). Ameren asserts that the District Court wrongly found Ameren liable for not obtaining construction permits for projects at its Rush Island Energy Center ("Rush Island"). The District Court misinterpreted Missouri's regulations defining applicability of construction permitting. Missouri's regulations are clear and approved by EPA as part of Missouri's State Implementation Plan ("SIP"), and Ameren showed no permits were required.

The District Court assessed liability under federal regulations. Ameren showed no permits were required under those regulations, using established legal standards and EPA-approved methods, because any emissions increase resulted from growth in demand for electricity, an independent causal factor recognized by the regulations. But the District Court applied new—and incorrect—legal standards not articulated in the regulations, and found Ameren liable based on those standards.

Next, the District Court ordered legally-flawed injunctions at both Rush Island and a different plant, Labadie Energy Center ("Labadie").

Because this case involves several complex issues of first impression, Ameren submits that oral argument of 30 minutes per side would benefit the Court.

CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. of App. P. 26.1 and 8th Cir. R. 26.1A, Defendant-Appellant Union Electric Company d/b/a/Ameren Missouri makes the following disclosures:

1. Ameren Corporation owns 100% of the common stock of Union Electric Company d/b/a/Ameren Missouri.

2. No publicly held company traded on the New York Stock Exchange owns more than 10% of Ameren Corporation's common stock or Union Electric Company d/b/a/Ameren Missouri's preferred stock. Vanguard Funds are owned by individual funds who are in turn owned by shareholders and in that sense are publicly held. Vanguard Funds ownership of Ameren common stock exceeds 10%.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§1331, 1345, and 42 U.S.C. §7401 *et seq*. On September 30, 2019, the District Court entered a final judgment against Ameren. Ameren timely filed its Notice of Appeal on October 1, 2019. This Court has jurisdiction under 28 U.S.C. §§1291, 1294.

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STATEMENT OF THE ISSUES

1. Does Missouri's SIP require construction permits for projects that do not increase an electric generating unit's potential to emit? (*De novo* review).

> Mo. Code Regs. Ann., tit. 10, §10-6.060 (2006)
> *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)
> *U.S. v. Cinergy*, 623 F.3d 455 (7th Cir. 2010)

2. During the liability phase, did the District Court apply incorrect legal standards by (a) shifting the burden of proof on causation from EPA to Ameren; (b) applying new legal standards for causation; and (c) superimposing a separate reasonableness standard on the regulations' process for assessing emissions increases? (*De novo* review).

> 42 U.S.C. §7411(a)(4)
> 40 C.F.R. §52.21
> *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)

3. Did the District Court abuse its discretion by letting EPA's expert witnesses testify regarding undisclosed opinions on actual post-project emissions? (Abuse of discretion review).

> Fed. R. Civ. P. 26(a)(2)

4. During the remedy phase, were the injunctions ordered by the District Court legally flawed because the Labadie injunction (a) circumvented jurisdictional prerequisites; (b) contradicts this Court's *Otter Tail* decision; and (c) constitutes a penalty, which EPA waived; and (d) because both injunctions lacked Article III jurisdiction and statutory authorization? (*De novo* review).

Sierra Club v. Otter Tail Power, 615 F.3d 1008 (8th Cir. 2010)
Nucor Steel-Arkansas v. Big River Steel, LLC, 825 F.3d 444 (8th Cir. 2016)
U.S. v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013)
Kokesh v. S.E.C., 137 S. Ct. 1635 (2017)

5. Did the District Court lack subject matter jurisdiction over EPA's Title V claims? (*De novo* review).

42 U.S.C. §7661d
Sierra Club v. Otter Tail Power, 615 F.3d 1008 (8th Cir. 2010)
Nucor Steel-Arkansas v. Big River Steel, LLC, 825 F.3d 444 (8th Cir. 2016)

STATEMENT OF THE CASE

This case turns on whether Ameren should have obtained permits for projects it performed at Rush Island. Ameren primarily raises three legal issues subject to *de novo* review.

The first issue addresses interpretation of Missouri's SIP, the plain language of which states that construction permitting applies only to projects that increase potential emissions. Because it was undisputed that these projects would not increase potential emissions, no permits were necessary. Ameren is entitled to judgment as a matter of law.

The second issue addresses the legal standards that the District Court applied to determine liability. The District Court ruled that permits were required if a "reasonable power plant operator should have expected" that the projects would cause Rush Island to emit significantly more sulfur dioxide (SO_2). The District Court ruled that while EPA had the burden of proving that Ameren should have expected a significant emissions increase, Ameren had the burden of proving that any increase would be caused by demand growth, not the projects. Although Ameren separately challenges that allocation of the burden of proof, it nonetheless did prove that expected emissions increases were caused by demand growth. Ameren did so based on EPA-approved standards with evidence EPA did not rebut. The District Court found Ameren liable only by adopting new standards EPA urged in its post-trial brief, which required different evidence. That liability

finding should be reversed because it is based on the wrong legal standards, and judgment should be entered in Ameren's favor because it proved with unrebutted evidence demand growth under the correct standards. Ameren presents this evidence here not to challenge the District Court's factual findings, but to show the evidence the court did not address because it used the wrong legal standards—a legal, not a factual, disconnect.

The third issue addresses legal flaws affecting the multi-billion-dollar injunctions that the District Court ordered—installation of scrubbers at Rush Island and additional control equipment at Labadie, a different power plant. EPA never alleged wrongdoing, much less proved liability, at Labadie. The unprecedented injunction at Labadie circumvents regulatory enforcement prerequisites, contradicts this Court's *Otter Tail* decision, and constitutes a penalty, a form of relief EPA abandoned earlier in this case to avoid a jury.

Moreover, the injunctions against both Labadie *and* Rush Island grant relief the District Court did not have jurisdiction under Article III or statutory authority under the Act to order. These legal flaws require reversal of the District Court's remedy decision, or remand for proper determination of remedies, even if its liability finding stands.

I. Rush Island and the Projects at Issue

Ameren is Missouri's largest electric utility, with 1.2 million customers. (APP2166-2173). Ameren's power plants include nuclear, coal- and gas-fired,

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hydroelectric, and renewable facilities. (APP3251; APP2173-2174). The coal-fired Rush Island plant has two electric generating units ("EGUs" or "units"), Units 1 and 2. (APP1293 ¶4).

As a regulated public utility, Ameren must provide safe, reliable, and economical service to its customers. (APP2174-2175). Ameren developed a proactive maintenance program to fulfill that obligation, which placed Ameren's units among the industry's most well-maintained, as measured by the units' availability to operate. (APP2207-2209, 2223-2234; APP3200-3201, 3205; APP3048, 3051-3052, 3056; APP2277-2280, 2283-2285; APP3058; APP2182-2195; APP3059-3060; APP3015-3016.) In the mid-2000s, just before the projects at issue, Rush Island achieved 94% to 95% availability, meaning all of the units' malfunctions and breakdowns, taken together over 24 months, caused downtime of only 5% to 6%—the highest an operator could expect. (APP2210-2222, 2234-2252, 2245-2249; APP3281-3282; APP3256; APP1296-1298; APP2202-2203). In 2005, Rush Island generated record-high amounts of electricity. (APP3066, 3070). In 2006, it recorded the highest availability in plant history. (APP3065).

EPA has based its 20-year enforcement initiative against coal-fired power plants on a theory that utilities made older plants like "new" again through "major modifications" that eliminated breakdowns and "regained" availability. (APP3245). However, Rush Island's units already had very high availability during the "baseline" periods before the projects on which EPA based this suit. In fact,

both units had substantial available generating capacity that went unused, and even held portions of their capacity in reserve for emergencies or contingencies. (APP2313-2319, 2330-2338, 2340-2342, 2345-2346; APP3193-3194; APP2573-2576, 2608-2609; APP3272; APP2216; APP2179-2181; APP3252-3253; APP2058-2060, 2087-2088; APP2112-2113, 2122-2123; APP2347-2351, 2380-2398; APP3117-3118; APP3119-3149).

Of course, all EGUs, including Rush Island's, consist of thousands of components operating under harsh conditions. (APP2262-2268, 2270-2272). Any component can fail or degrade at any time, diminishing the unit's availability and efficiency. (APP2178; APP2267, 2270-2272). EGUs therefore require constant upkeep through periodic outages during which the operator takes the entire unit offline and performs scores of projects to fix and replace components. (APP2016-2018, 2020-2021; APP2181-2182; APP2287). Such outages require significant advanced planning, can last anywhere from several weeks to multiple months, cost tens of millions of dollars, and involve outside contractors. (APP2287-2297; APP2182-2190).

Ameren, like many utilities, had operated on an 18-month planned outage cycle, but in the early 2000s it changed its philosophy, moving from an outage every other year to a much larger outage every six years. This would require performing much more work during each outage. (APP2186-2190; APP3012-3013). Under the six-year outage cycle, because Rush Island's units were 30 years

old, and a decade might pass between planning one outage and undertaking the next, Ameren would have to be even more proactive, replacing components before they began to fail. (APP2182-2195; APP3059-3060; APP3015-3047; APP2223-2234; APP3200-3203, 3206; APP3048, 3051-3053, 3056). In light of this fundamental change, Ameren began planning the first six-year-cycle outages at Rush Island—each involving over 100 projects—as early as 2003. (APP2185-2187; APP3012-3013).

This case involves four of the projects performed during Unit 1's planned outage in 2007, and three of the projects performed during Unit 2's planned outage in 2010, for which Ameren did not obtain construction permits (collectively, the "Projects"). (ADD1094 ¶25). These Projects entailed replacing heat-exchange components,[1] which absorb or radiate heat from the unit's boiler but do not themselves emit anything. (APP2018; APP2302-2304, 2306-2311). Replacing heat-exchange components is commonplace. *Pennsylvania v. Allegheny Energy, Inc.*, No. 05-885, 2014 WL 494574, at *14-15, *31 (W.D. Pa. Feb. 6, 2014); *Nat'l Parks Conservation Ass'n. v. TVA*, No. 01-71, 2010 WL 1291335, at *25-26, *29-30 (E.D. Tenn. Mar. 31, 2010). The new components were more efficient than

[1] Specifically, boiler tube assemblies called economizers, reheaters, and lower slopes, as well as air preheater baskets and rotors.

those they replaced. (APP2062, 2068, 2074-2080; APP2465-2469, 2474, 2483-2484; APP3191-3192; AP3267).

II. The Clean Air Act and the PSD Program

Congress "directed EPA to devise National Ambient Air Quality Standards (NAAQS) limiting various pollutants, which the States were obliged to implement and enforce." *Otter Tail*, 615 F.3d at 1011 (internal quotations omitted). EPA sets NAAQS at levels "to protect the public health" with "an adequate margin of safety." 42 U.S.C. §§7408(a)(2), 7409(b)(1); *Am. Trucking Ass'ns, Inc. v. E.P.A.*, 283 F.3d 355, 358 (D.C. Cir. 2002). "For areas with clean air" already attaining the NAAQS, like the area around Rush Island, Congress enacted the Prevention of Significant Deterioration ("PSD") program which seeks to prevent deterioration of the air quality in those areas. *U.S. v. EME Homer City Generation, L.P.*, 727 F.3d 274, 279 (3d Cir. 2013) ("*Homer City*").

The PSD program does not require emissions reductions; in fact, it allows emissions increases up to a point, and is intended to "preserve air quality" with only a "minimum of economic hardship." *Alabama Power Co. v. Costle*, 636 F.2d 323, 378 (D.C. Cir. 1979). EPA explained, "PSD is meant to allow economic growth and not compromise the air quality beyond the NAAQS." (APP1876-1888). Congress intended to give "operators both the ability and the incentive" to "replace parts indefinitely … so long as none of those changes cause an emissions increase." *U.S. v. DTE Energy Co.*, 711 F.3d 643, 651 (6th Cir. 2013).

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"The PSD program is primarily implemented by the states through … SIPs." *Otter Tail*, 615 F.3d at 1011. The Act requires each state to adopt a SIP that includes limits to prevent significant deterioration of air quality. 42 U.S.C. §7471. A state may accomplish this in one of two ways: (1) A state may be delegated EPA's authority to implement federal regulations found under 40 C.F.R. §52.21 ("delegated" states), or (2) A state may develop its own regulations, which, once approved by EPA, become part of the state's SIP and constitute the enforceable PSD program for the state ("SIP-approved" states). 42 U.S.C. §§7410, 7471. Missouri is a SIP-approved state. Missouri does not adopt the federal PSD program; rather, it implements its own construction permitting program as part of an EPA-approved SIP.

III. Under Missouri's SIP, Projects that Would Not Increase Potential Emissions Do Not Require Permits.

The Missouri SIP's "Construction Permits Required" rule specifies which sources are "required to obtain permits to construct," and "establishes requirements to be met prior to construction or modification of any of these sources." Mo. Code Regs. Ann., tit. 10, §10-6.060 (2006) (the "Permit Rule" or "§10-6.060").

The first part of the Permit Rule, Subsection (1), addresses the rule's applicability, stating several preconditions that must be satisfied for the rule to apply, including under Subsection (1)(C). §10-6.060(1)(C) (the "Applicability Provision"). Pertinent here is the Applicability Provision's prerequisite that the

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project under consideration must constitute either "construction" or "modification" for the Permit Rule to apply:

> **10 C.S.R. 10-6.060 Construction Permits Required**
>
> **(1) Applicability.**
>
> **(C) Construction/Operation Prohibited.**
>
> No owner or operator shall commence *construction or modification* of any installation subject to this rule [or] begin operation after that *construction or modification* … without first obtaining a permit from the permitting authority under this rule.

§10-6.060(1)(C) (emphasis added).

"Modification" means "[a]ny physical change, or change in method of operation of, a source operation … which would cause an increase in *potential emissions*." Mo. Code Regs. Ann., tit. 10, §10-6.020(2)(M)(10) (emphasis added). "Potential emissions" means the source's "maximum annual-rated capacity" to emit "assuming continuous year-round operation." *Id.* §10-6.020(2)(P)(19). "Construction" means "[f]abricating, erecting, reconstructing, or installing a source operation," *id.* §10-6.020(2)(C)(22), or replacing over half of the source, *id.* §10-6.020(2)(R)(2).

Thus, under the Applicability Provision, if the project is neither a "modification" nor "construction," then the Permit Rule does not apply and the project does not require a permit.

EPA repeatedly approved the Permit Rule, the Applicability Provision, and the relevant definitions into the SIP. 61 Fed. Reg. 7,714 (Feb. 29, 1996); 71 Fed. Reg. 36,486, 36,488 (June 27, 2006); 71 Fed. Reg. 38,997, 38,999 (July 11, 2006).

A. It Is Undisputed that the Rush Island Projects Would Not Increase the Units' Potential Emissions.

The District Court recognized as undisputed facts that "the projects … were not 'construction' as defined by the Missouri SIP" and "the projects were not expected to and did not increase the units' potential emissions," and so they were not "modifications" as defined by the SIP. (ADD1010-11 nn.4-5). Indeed, EPA "never alleged that the projects increased the units' potential emissions." (ADD1010).

Ameren engineers reviewed the Projects before they began, and concluded no construction permits were required because the Projects would not increase the units' potential SO_2 emissions. (APP2308-2311; APP2561-2568).

B. Ameren Moved for Summary Judgment Based on Missouri's SIP.

Given the unambiguous language of the SIP Permit Rule's Applicability Provision, and the lack of any factual dispute, Ameren moved for summary judgment that no permits were required. (APP1166-1181). In denying Ameren's motion, the District Court interpreted the SIP to read out the Applicability Provision in favor of applying federal regulations, and later incorporated that interpretation into its liability finding. (ADD1091-1092 ¶14).

IV. The Federal Regulations Require Comparing Pre- and Post-Project Emissions and Assessing If Any Increase Results from Demand Growth.

The District Court ruled that, under Missouri's SIP, permit applicability depends, not on the Permit Rule's Applicability Provision in Subsection (1), but exclusively on a later part of the rule, Subsection (8), which describes PSD permits. §10-6.060(8). Subsection (8) incorporates by reference federal regulations at 40 C.F.R. §52.21, which require PSD permits for "major modifications." 40 C.F.R. §52.21(a)(2)(iv)(a)-(c). Although in combination the Permit Rule's Subsections (1) and (8) require a PSD permit (as distinguished from other types of permits) for a project that is both a "modification" and a "major modification," the District Court disregarded Subsection (1)'s Applicability Provision and the SIP's definition of "modification," ruling that a project need not be a "modification" to require a PSD permit so long as it is a "major modification" under the federal regulations. (ADD1011; ADD1091-1092 ¶14).

The District Court determined liability solely by assessing whether the Rush Island Projects were "major modifications" under the federal regulations. Those regulations, discussed below, require comparing pre- and post-project emissions, assessing whether emissions would increase, and determining whether any increase results from growth in demand for electricity.

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A. The Multi-Step Process Required by the Federal Regulations

The federal regulations define a "major modification" as a change that causes a significant increase in "projected actual emissions" compared to "baseline actual emissions." *Id.* §§(a)(ii)(4)(c), (b)(2)(i), (b)(41), (b)(48). This comparison involves a multi-step process:

Step 1. An operator selects a consecutive 24-month period from the five years preceding the project (the "baseline period"), sums the unit's emissions from that period, and divides by two to calculate an annualized rate in tons per year ("tpy"), which are called "baseline actual emissions." *Id.* §52.21(b)(48).

Step 2. The operator forecasts future operations during the five years following the project, considering all relevant information including its "highest projections of business activity," estimates all emissions for that period, and identifies the consecutive 12-month period with the highest forecasted emissions, which are called the "maximum annual rate." *Id*. §52.21(b)(41)(i).

Step 3. Because the post-project "maximum annual rate" does not account for causation, and only emissions caused by a project can be included in the assessment under the regulations' "causation provision," 67 Fed. Reg. 80,186, 80,203 (Dec. 31, 2002), the operator next "shall exclude"—*i.e.*, subtract—the post-project emissions that:

- are unrelated to the project, and

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- could have been accommodated by the unit during the 24-month baseline period.

40 C.F.R. §52.21(b)(41)(ii)(c).

The causation provision specifically identifies "increased utilization due to product demand growth" as an example of emissions that are "unrelated to the particular project." *Id.* The regulations identify "the [operator]'s filings with the State … regulatory authorities"—*e.g.*, Integrated Resource Plans ("IRPs")—and "expected business activity"—*e.g.*, budget forecasts—as "relevant information" for assessing demand growth and excluding emissions due to it. *Id.* §52.21(b)(41)(ii)(a). EPA has also provided guidance regarding how to apply the causation provision.

For example, EPA has repeatedly explained that growth in demand for electricity in the system served by an EGU is demand growth unrelated to a project for purposes of applying the causation provision. The causation provision originally applied only to EGUs, not other sources, so in promulgating it EPA gave "careful consideration" to the unique nature of demand and causation in the electric generation industry. 57 Fed. Reg. 32,314, 32,327 (July 21, 1992). EPA explained that where "projected increased operations" are in response to an "independent factor" which "could have occurred and affected the unit's operations during the representative baseline period even in the absence of the physical or operational change," such increased operations "cannot be said to result from the change" and

therefore may be excluded from the forecast of future actual emissions. *Id.* at 32,327. EPA clarified that "system-wide demand growth" is an "independent factor[]." *Id.* at 32,326. It stated that "factors unrelated to the physical or operational change" include "an increase in projected capacity utilization due to the rate of electricity demand growth for the utility system … as a whole." *Id.*

Similarly, in Rule 30(b)(6) deposition testimony, EPA stated:

> What the rule provides is to exclude, subtract from the projection of future emissions any part of that emissions as can be attributable to demand growth, where "demand growth" refers to what the utility expects to be required to produce in the way of energy *system wide, not for a single unit, but system wide.*

(ADD3004; APP1893) (emphasis added).

EPA identified two specific ways to calculate the emissions that are due to demand growth and unrelated to the project. One, an operator can "easily calculate[] the projected [] system-wide increase in demand growth" by using its "annual forecasts of demand growth that were included in [its] 'Long-Term Forecast Report' submitted to the [state's] Public Utility Commission …."[2] And two, the operator can use utility production models—industry software programs

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[2] Pls.' Reply Mem. at 70 n.77, *U.S. v. American Electric Power Service Corp.*, No. 2:99-cv-01182-EAS-KAJ (S.D. Ohio) ("AEP Docket"), ECF #402 (Oct. 6, 2005).

like PROMOD or ProSym—to calculate a "reasonable projection of system wide demand growth."[3]

EPA has also explained, for purposes of applying the causation provision, how operators may calculate emissions increases that "could have been accommodated" by a unit during the baseline period. EPA approved two methods of calculating "could have accommodated" emissions in response to inquiries from two operators, Georgia-Pacific and Columbian Chemicals. Responding to Georgia-Pacific, EPA proposed calculating "could have accommodated" emissions by annualizing the emissions from the highest month of production during the baseline period. (ADD3007; APP3061-3064). When Georgia-Pacific applied EPA's proposed method, EPA approved, called it "correct," and published it on EPA's official website, where it remains today.[4] (ADD3005; APP3061). Responding to Columbian Chemicals, EPA—both Region 7, which covers Missouri, and headquarters—approved a similar method that annualized the emissions from the highest 7 days of production during the baseline period, discounted by the unit's

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[3] Pls.' Reply Mem. Mot. Summ. J. at 4 n.13, AEP Docket, ECF #332 (May 26, 2005).

[4] Letter from Gregg M. Worley, Chief, EPA Air Permits Section to Mark Robinson, Plant Manager, Georgia-Pacific Woods Products LLC (Mar. 18, 2010), https://www.epa.gov/sites/production/files/2015-07/documents/demand growth.pdf.

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availability. (ADD3009-3015; APP1857-1873; APP3157; APP3173-3187; APP3158-3172).

These standards and methods implement the third step—applying the causation provision—of the multi-step process.

Step 4. After applying the causation provision, the operator next subtracts the unrelated emissions due to demand growth calculated in step 3 from the post-project maximum annual rate identified in step 2, resulting in the unit's "projected actual emissions." 40 C.F.R. §52.21(b)(41). "By definition … 'projected actual emissions' excludes emissions attributable to an independent factor (such as demand growth)." 72 Fed. Reg. 72,607, 72,609 (Dec. 21, 2007).

Step 5. The operator then compares the projected actual emissions from step 4 to the baseline actual emissions from step 1 and, if there is an emissions increase from the baseline period to the projected period, then it determines whether that increase surpasses a significance threshold of 40 tpy for SO_2. 40 C.F.R. §52.21(b)(23)(i). If so, then there is a "significant emissions increase," meaning the project is a "major modification" that requires a PSD permit; if not, then no "significant emissions increase," no "major modification," and no PSD permit. *Id.* §52.21(a)(2)(iv)(c), (b)(2)(i).

B. The District Court Did Not Find Ameren Violated Any Written Requirements of the Federal Regulations.

The District Court did not find Ameren violated any of the express, written requirements of the federal regulations. Rather, the District Court found Ameren liable under new legal standards for causation and an overarching "reasonable power plant operator" standard found nowhere in the regulations, which the court applied based on the subjective opinions of EPA's expert witnesses. *See infra* pp.49-56.

1. Under the Written Requirements of the Federal Regulations, the Rush Island Projects Were Not Major Modifications.

At the liability trial, Ameren presented evidence—through witnesses such as its Environmental Engineer Michael Hutcheson, who prepared an emissions analysis for the Unit 2 Projects, and its emissions expert witness Sandra Ringelstetter, who prepared emissions analyses for the Projects at both units—that under the five steps specified by the federal regulations the Projects were not "major modifications" and therefore did not require PSD permits.

Step 1. For the Projects at each unit, Ameren selected a 24-month baseline period, summed the actual emissions from that period, and divided by two to calculate annualized "baseline actual emissions." (APP2611-2612; APP3199; APP2538-2542; AP3010-3011; APP2580-2581; APP3198).

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<u>Step 2.</u> Ameren forecasted future operations using its "highest projection of business activity" to estimate emissions for the five years following the Projects, and identified the 12-month period with the highest forecasted emissions as the "maximum annual rate." (APP2543-2555; AP3010-3011; APP2611-2612; APP2580-2581; APP3198-3199).

<u>Step 3 – "Demand Growth."</u> Ameren calculated growth in demand for electricity in the system served by Rush Island from the pre-project baseline period to the post-project period using "relevant information" listed in the regulations and the two methods EPA had identified for performing such calculations: using demand forecasts from (1) Ameren's IRPs filed with the Missouri Public Service Commission ("PSC"), and (2) Ameren's annual budgeting forecasts using ProSym.

First, consistent with the PSC's requirements, Ameren periodically prepares and files IRPs, which must include detailed forecasts of future system-wide demand to ensure Ameren will have sufficient generation resources to meet that demand. (APP2349-2350, 2360-2361). In the IRPs covering the pre- and post-Project periods at issue, Ameren forecasted substantial increases in system-wide demand, stemming from economic growth and doubling demand from its largest commercial customer, a large aluminum smelter called Noranda. Ameren's forecasts ranged from 4% to 7% increases over the relevant time spans. (APP2366-2368, 2376-2379, 2401-2406; APP3113, 3115; APP3106, 3108, 3111; APP3099, 3101, 3104; APP3260).

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Second, Ameren annually prepares an official budget, using ProSym to forecast system-wide demand and allocate future generation responsive to that forecasted demand for each unit in Ameren's fleet. (APP2411-2439; APP3094; APP3262-3265). Those forecasts varied between 6% and 7.5% over the relevant time spans. (APP2437-2439; APP3094). Ringelstetter further assessed the ProSym forecasts and determined that none of Ameren's forecasted increases in generation at the Rush Island units were related to the Projects. (APP2202-2203; APP2210-2222, APP2255-2256; APP3065-3072; APP2366-2379; APP2422-2439; APP3262-3265; APP3094; APP2444-2447, 2451-2460; APP3073-3093; APP2475-2480, 2485-2487; APP2577-2579, 2587-2591, 2621-2624; APP3198-3199; APP3269).

Corroborating Ameren's evidence, EPA admitted that system-wide demand would grow by 1.5% year-over-year. (APP2010-2011). That annual rate, compounded over the relevant time spans, equates to over 4.5% demand growth for Unit 1 and over 9% demand growth for Unit 2. (APP3276).

Having calculated demand growth, Ameren next compared the changes in demand to the changes in the Rush Island units' generation over the relevant time spans. For Unit 1, the change in generation was small—a fraction of a percent—whereas the change in demand was 4.5% or greater. For Unit 2, the change in generation was 3 to 5%, whereas the change in demand was 6% or greater.

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	Change in Generation	Change in Demand		
		EPA's Admission	Ameren's IRPs	Ameren's Annual Budgets
Unit 1	0.18%	4.5%	4.1%	N/A
Unit 2	3%-5%	9%	7.3%	6.0%-7.5%

(APP2437-2439; APP3094; APP2577-2579, 2587-2588, 2621-2623, 2627; APP3198-3199; APP3150-3151; APP2365-2373; APP3095-3096; APP3099, 3104; APP1835, 1842-1843, 1846-1853 (¶¶ 48-54; 63-68, 76-87)). For both units, the changes in demand exceeded, and accounted for, the changes in generation.

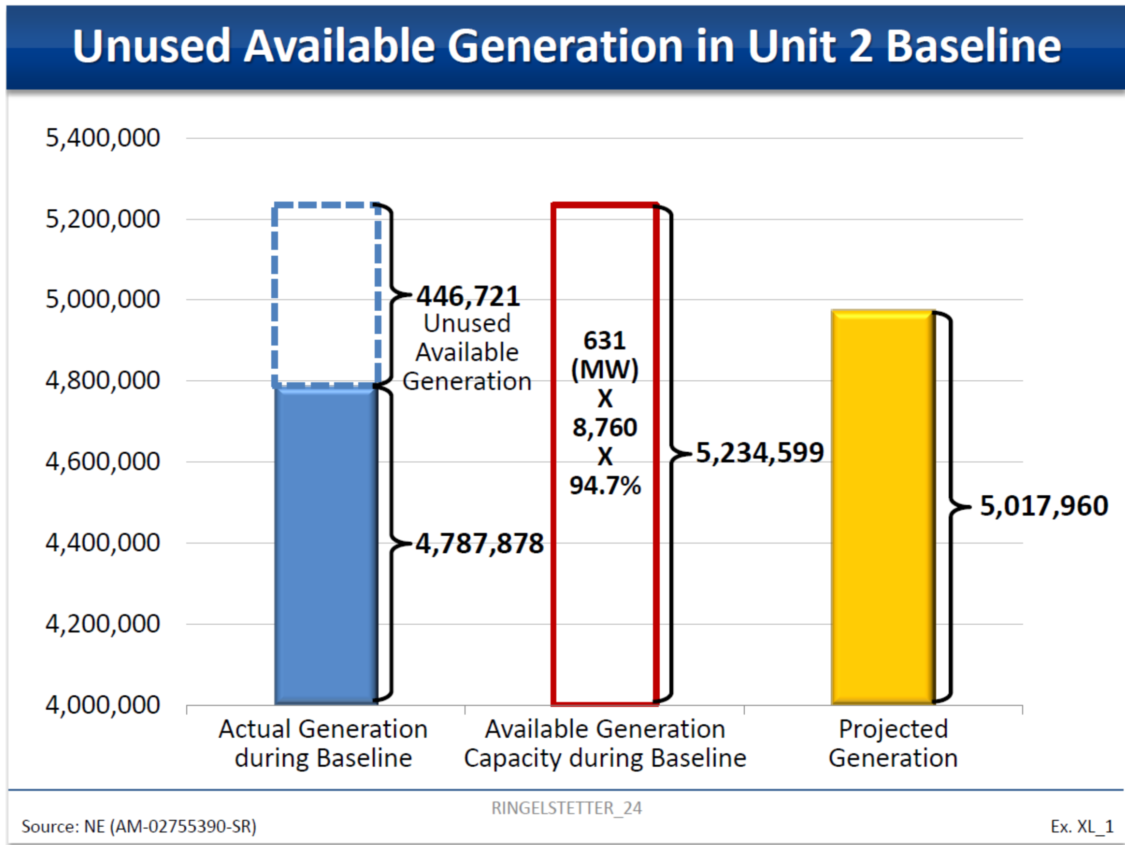
Step 3 – "Could Have Accommodated." Ameren also calculated the emissions that the units "could have accommodated" during their respective baseline periods. Ringelstetter applied the two methods approved by EPA in response to Georgia-Pacific and Columbian Chemicals. (APP2596-2605). Under both methods, the units could accommodate the emissions. Hutcheson used an even more conservative method in his Unit 2 analysis. (APP2538-2560; APP3010-3011). Rather than annualizing the highest month or week of baseline operations, Hutcheson used Unit 2's actual 24-month baseline availability (94.7%), which accounted for all breakdowns that occurred during that period. (APP2558-2559). Hutcheson's method, which Ringelstetter also applied to both units, produced results falling between the two EPA methods. (APP2591-2595; 2618-2619).

Under all three methods, both units "could have accommodated" ("CHA") emissions exceeded post-Project emissions:

CHA Method	Unit 1		Unit 2	
	Post-Project Emissions	**CHA Emissions**	**Post-Project Emissions**	**CHA Emissions**
Georgia-Pacific	15,165 tpy	17,952 tpy	16,527 tpy	17,045 tpy
Columbian Chemicals		21,207 tpy		20,716 tpy
Hutcheson		18,484 tpy		17,516 tpy

(APP2582-2584, 2596-2607, 2612-2620; APP3195-3196; APP3268; APP3270-3271; APP3273-3275).

During the baseline periods, both units had substantial unused available generating capacity, or "headroom," to accommodate increased generation due to demand growth. (APP2179-2181; APP2216; APP2351-2352, APP2356-2357; APP2330-2338, 2340-2342, 2345—2346; APP3193-3194; APP2608-2609; APP3197; APP2088). As shown below, Unit 2's available generating capacity during the baseline (middle bar) exceeded forecasted generation after the Projects (yellow bar), and the capacity the unit had available but did not use during the baseline, before and without performing the Projects (blue dotted box), exceeded the increase in generation from the baseline to the post-Project period (blue bar to yellow bar):



<u>Step 4.</u> In step 3, Ameren calculated, for both units, that the future emissions increases were due to system-wide demand growth, not the Projects, and those emissions could have been accommodated by the units during their respective baseline periods. Ameren, therefore, subtracted those unrelated emissions from the post-project maximum annual rate identified in step 2 to calculate the units' "projected actual emissions."

<u>Step 5.</u> Finally, Ameren compared the projected actual emissions from step 4 to the baseline actual emissions from step 1, which showed no emissions increase from the baseline period to the projected period, meaning there was no "significant

emissions increase" or "major modification," and therefore under federal regulations no PSD permits were required for the Projects.

Step	Unit 1	Unit 2
1. Baseline actual emissions	14,874 tpy	14,288 tpy
2. Post-project maximum annual rate	15,165 tpy	16,527 tpy
3. Unrelated and could have been accommodated[5]	291 tpy	2,239 tpy
4. Projected actual emissions	14,874 tpy	14,288 tpy
5. Comparison of projected to baseline	0	0
Result	**No increase**	**No increase**

2. The District Court Relied on EPA's Expert Witnesses Who Did Not Follow the Federal Regulations' Requirements.

EPA's liability case consisted almost entirely of expert witness testimony. EPA's witnesses did not testify that Ameren's conclusions were objectively *un*reasonable. Rather, as shown below, EPA's experts testified about how *they* would assess emissions impacts from the Projects using their own subjective methods, none of which the regulations require, and offered criticisms of Ameren's emissions analyses, not because they deviated from the regulations, but because EPA's experts simply had a different view. All of EPA's experts were private consultants; none had ever worked for EPA, the Missouri Department of Natural

[5] This shows only the amount of unrelated emissions that exceed the baseline actual emissions; otherwise the result would be a negative number.

Resources ("MDNR"), or any other permitting agency. (APP1246-1247, 1250; APP1256-1274).

Robert Koppe, EPA's engineering expert, estimated availability and capability impacts from pre-Project boiler tube leaks and air preheater pluggage that he assumed would be eliminated post-Project, which—because he also assumed everything else would stay the same—he then calculated as "regained" availability and capability attributable to the Projects. (ADD1222-1223; APP2095). Koppe simply used his judgment to estimate post-Project performance, admitting that Ameren could reasonably arrive at different estimates because his method is subjective and not required by the regulations. (APP2092-2097; APP1242-1243, 1245). Koppe did not consider market demand in any part of his analysis, and admitted his method was incapable of considering it. (APP2104-2105).

Ranajit Sahu, EPA's emissions expert, took Koppe's "regained" availability and capability estimates and, using a method of his own design, estimated emissions he attributed to the Projects. Like Koppe, Sahu admitted his method is not required by the regulations, and that numerous methods can reasonably be used to determine emissions and causation. (APP2132-2138, 2143-2144, 2153; APP1246-1247, 1251; APP1392; APP1717, APP1727).

Sahu did not follow the steps defined by the regulations: he did not forecast the units' post-Project operations or highest business activity as required by

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§52.21(b)(41)(i)-(ii) (step 2); he did not identify the 12-month period of highest post-Project emissions as required by §52.21(b)(41)(i) (step 2); he made no attempt to assess market demand, or otherwise quantify the portion of emissions that were unrelated to the Projects, as required by §52.21(b)(41)(ii)(c) (step 3) (APP2145-2150); and he did not calculate the amount of emissions the units could have accommodated during their respective baseline periods, as required by §52.21(b)(41)(ii)(c) (step 3). Because Sahu performed none of these preceding steps, he could not exclude unrelated emissions from the post-Project maximum annual rate, and so he did not determine projected actual emissions as defined and required by §52.21(b)(41)(ii)(c) (step 4). Having failed to calculate projected actual emissions, he could not compare them to baseline actual emissions as required by §52.21(a)(2)(iv)(a)-(c) (step 5).

Sahu's method diverged from the regulations because he started with the baseline actual emissions and assumed emissions would increase from there, estimating the assumed emissions increases based on Koppe's assumed availability and capability increases. (ADD1223-1224, APP2139-2140). Because Sahu disregards market demand, his method *always* produces an emissions increase. (APP2145-2146, APP2157-2161).

Ezra Hausman, EPA's economics expert, used his own method to perform what he deemed a causation analysis (APP1254-1255), comparing one forecast of future operations assuming a certain level of availability to another forecast of

future operations assuming a different level of availability, and ascribing the difference to the Projects. (APP2118-2119). His future-to-future comparison also diverged from the regulations, which require comparing a specific pre-Project period to a specific post-Project period, not comparing two future periods. 40 C.F.R. §52.21(a)(2)(iv)(c). Hausman admitted he had never used his method to assess emissions, and that he created it for use in this litigation. (APP1254-1255). He admitted that Ameren could use other methods to assess causation, and that it would not be unreasonable for it to do so. (*Id).*

V. The Proceedings in the District Court

EPA never alleged that the Rush Island Projects constituted "modifications" or "construction" as defined by Missouri's SIP. (APP1138-1165; ADD1010-1011, nn.4-5). It alleged instead that Ameren violated the SIP and federal regulations by commencing construction on the Projects without having obtained PSD permits (APP1155-1157), and violated Title V of the Act because Rush Island's operating permit omitted Best Available Control Technology ("BACT") emissions limits that would have been developed in PSD permitting. (APP1157-1161). EPA originally sought civil penalties and various forms of injunctive relief. (APP1138, 1161-1162). The District Court bifurcated the case into liability and remedy phases.

Before the liability trial, EPA voluntarily waived all claims for penal relief and successfully moved to strike Ameren's jury demand. (APP1284-1295). After a 12-day bench trial, the District Court held that the Projects were major

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modifications and Ameren violated the SIP and federal regulations by commencing construction without obtaining permits. (ADD1271-1272).

At the outset of the remedy phase, Plaintiff-Appellee Sierra Club intervened.[6] (APP1874-1875). During the remedy phase, EPA abandoned injunctive relief it had pled in its complaint and announced it would seek two injunctions: one seeking "compliance" by requiring installation of scrubbers at Rush Island, and the other seeking "remediation" by requiring installation of scrubbers or other control equipment at Labadie. (ADD1299-1300). EPA had never alleged any violation at Labadie and, prior to the remedy phase, had never sought any remedy there either. After a 6-day bench trial, the District Court ordered both injunctions, requiring Ameren (1) to apply for a PSD permit and to install scrubbers at Rush Island within three years; and (2) to install dry sorbent injection ("DSI") equipment or comparable equipment at Labadie and operate it "until Ameren has achieved emissions reductions totaling the same amount as the excess emissions from Rush Island." (ADD1453-1456). Estimates of the overall cost of the Rush Island injunction ranged from $2 billion to $2.5 billion; the Labadie injunction was estimated to cost an additional $1.6 billion. (AP2632-2637, 2638-2652, APP3283).

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[6] Because Sierra Club sought no new relief, this brief refers simply to "EPA."

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SUMMARY OF THE ARGUMENT

EPA filed this lawsuit as part of its nationwide "enforcement initiative" aimed at shutting down coal-fired power plants. *See U.S. v. EME Homer City Generation, L.P.*, 727 F.3d 274, 281 (3d Cir. 2013). These suits, which contain "virtually identical allegations," have "become the largest, most contentious industry-wide enforcement initiative in EPA history …." *Id.* EPA's "unprecedented action" bypasses statutory amendment and notice-and-comment rulemaking and, instead, asks federal courts to impose more costly and stringent emission limitations on coal-fired power plants than EPA had been able to secure through normal rulemaking and permitting processes. *Id.* at 281-82.

"Congress designed the Clean Air Act to protect the nation's air quality and to protect the 'reasonable expectations of facility operators' and the 'significant investment of regulatory resources made by state permitting agencies.'" *Id.* at 289 (quoting *Otter Tail*, 615 F.3d at 1022). This case presents three ways in which the enforcement arm of EPA upended the regulatory balance struck by Missouri and the reasonable expectations of Ameren.

First, under the plain language of Missouri's SIP, permits are required only for increases in potential emissions. EPA agreed that the SIP's language, which EPA approved, is unambiguous. However, because it was undisputed that the Projects would not, and did not, increase potential emissions, EPA argued for an interpretation that nullified the SIP Permit Rule's Applicability Provision and

substituted the federal regulations' applicability standard—an interpretation to which the District Court deferred. If the SIP is applied as written, judgment for Ameren is required.

Second, EPA persuaded the District Court not only to substitute federal regulations for the SIP, but also to read into those federal regulations legal requirements they do not contain. As a result, the District Court improperly shifted the burden of proof on causation from EPA to Ameren, and, after Ameren applied EPA-approved standards to prove any emissions increase was caused by demand growth, the court changed the legal standards in ways that were at odds with the regulations, contradicted EPA's prior positions, and required impossible proof. Moreover, the District Court superimposed a separate reasonableness standard on the regulations, which allowed EPA's expert witnesses to supplant the written regulations with their own subjective judgments of what was reasonable. EPA then used the reasonableness standard to rewrite the regulations' requirements through its experts' testimony, and argued Ameren should have obtained permits based on the experts' opinions. Because it was based on the wrong legal standards, the District Court's liability finding must be reversed.

Third, EPA sought, and the District Court ordered, two injunctions infected by fundamental legal flaws. The injunction at Labadie—a plant against which EPA did not allege wrongdoing and the liability finding did not apply—circumvented jurisdictional prerequisites for enforcement actions. Moreover, the Labadie

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injunction is premised on an "excess emissions" theory that this Court rejected in *Otter Tail*, and constitutes a penalty, which EPA had waived. In addition, with respect to both the Labadie and Rush Island injunctions, the District Court lacked jurisdiction under Article III and statutory authority under the Act.

Each of these legal flaws individually requires reversal of the judgment. In combination, they reflect an enforcement regime that overrides the Clean Air Act's cooperative federalism framework, circumvents notice-and-comment rulemaking, and uses litigation to obtain regulatory results that the statute and regulations never required and stakeholders never anticipated.

ARGUMENT

Standard of Review

Ameren's issues on appeal regarding the District Court's failure to apply the Missouri SIP (Section I), the District Court's failure to apply the proper causation standards (Sections II A, B, C), the legal flaws in the injunctions ordered by the District Court (Sections III and IV), and EPA's Title V claims (Section V) all involve issues of law subject to *de novo* review. *Lincoln Provision, Inc. v. Puretz*, 775 F.3d 1011, 1014 (8th Cir. 2015) (questions of law and mixed question of law and fact reviewed *de novo*). The District Court's admission of and reliance on undisclosed expert opinions (Section II.D) is reviewed for abuse of discretion. *Ryan v. Bd. of Police Comm'rs of City of St. Louis*, 96 F.3d 1076, 1081 (8th Cir. 1996).

I. The Rush Island Projects Did Not Require Permits Under Missouri's SIP.

Missouri designed its SIP to trigger construction permitting based on increases in a unit's potential to emit. Because it is undisputed that the Rush Island Projects would not and did not increase the units' potential emissions (ADD1010 n.4), they did not trigger the SIP Permit Rule's Applicability Provision and therefore did not require permits. Ameren moved for summary judgment on that basis. Having repeatedly approved Missouri's SIP, EPA could not and did not "directly challenge Ameren's 'straightforward reading' of the SIP language" and

instead only argued that "the SIP cannot mean what it says." (ADD1015). EPA urged the District Court to adopt an interpretation that nullified the Applicability Provision. In denying Ameren's motion and ultimately finding that Ameren had violated the Act, the District Court adopted EPA's interpretation. (ADD1013-1014).

Missouri struck its chosen regulatory balance in unambiguous language. Missouri's policy choices must be respected and the SIP's plain language must be applied as written. Even if EPA's enforcement arm believes the Rush Island Projects *should* trigger permitting, the EPA-approved SIP says they *do not*. After-the-fact arguments in enforcement litigation cannot override SIP language that Missouri chose and EPA repeatedly approved and admitted is "straightforward." The District Court erred in its interpretation and deference to EPA's litigation argument. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Judgment should be entered in Ameren's favor.

A. The Plain Language of the Permit Rule's Applicability Provision Does Not Require Permits for the Projects.

The plain language of the Permit Rule's Applicability Provision requires permits for projects constituting "construction or modification," terms the SIP specifically defines. §10-6.060(1)(C). EPA conceded the Rush Island Projects did not qualify as "construction." (ADD1011 n.5). Moreover, the SIP defines a "modification" as a project that "would cause an increase in potential emissions,"

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which the SIP in turn defines as an increase in a unit's "maximum annual-rated capacity" to emit "assuming continuous year-round operation." Mo. Code Regs. Ann., tit. 10, §§10-6.020(2)(M)(10), 10-6.020(2)(P)(19). If a project would *not* increase a unit's potential emissions, it is *not* a modification and does *not* trigger permitting under the Applicability Provision.

"EPA d[id] not challenge" this "straightforward reading" (ADD1015) and conceded the SIP is unambiguous. (APP1117). Where regulatory language is plain and unambiguous, "[t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415 (plurality); *see also Perez v. Loren Cook Co*., 803 F.3d 935, 939-40 (8th Cir. 2015) (*en banc*) (emphasizing "fidelity to the text of the regulation itself"). Yet, having recognized Missouri's SIP says that only increases in potential emissions require permits, and having conceded "that the [P]rojects were not expected to and did not increase the units' potential emissions," (ADD1010 n.4) EPA urged the District Court to adopt an interpretation "that the SIP cannot mean what it says." (ADD1015).

This is not the first PSD enforcement action in which EPA has argued that a state's "SIP cannot mean what it says." The Seventh Circuit addressed, and rejected, the very same argument on the very same issue in *U.S. v. Cinergy*, 623 F.3d 455 (7th Cir. 2010). *Cinergy* involved EPA's enforcement action against an Indiana utility for performing projects at coal-fired power plants without obtaining

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permits. There, as here, Indiana's SIP triggered permitting based on *potential* emissions increases. *Id.* at 458. Cinergy moved for summary judgment because the projects would not increase potential emissions, and the District Court denied the motion, accepting EPA's argument that the SIP could not mean what it said. *Id.* at 458. The Seventh Circuit found that argument "untenable" given both the SIP's plain language and EPA's approval of that language. The Seventh Circuit held that "[t]he Clean Air Act does not authorize the imposition of sanctions for conduct that complies with a State Implementation Plan that the EPA has approved." *Id.* The same reasoning applies with equal force here.

Under the Missouri SIP's plain language, the Projects did not require permits.

B. The District Court's Interpretation Renders the Applicability Provision, and Other Provisions, Meaningless.

Recognizing Missouri's SIP, applied as written, does not require permits for the Rush Island Projects, EPA argued—and the District Court deferred to the argument—that the Permit Rules' Applicability Provision, Subsection (1), was "general" and therefore "trumped" by a later part of the Rule, Subsection (8). (ADD1011-1013). That interpretation misapplies principles of construction.

First, it renders the Applicability Provision meaningless, violating the "cardinal principle" that "no clause, sentence, or word shall be [rendered] superfluous, void, or insignificant," *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001);

see Sierra Club v. E.P.A., 536 F.3d 673, 680 (D.C. Cir. 2008) (applying principle to regulations). This prohibition applies most forcefully to applicability provisions: "To read out of [the text] a clause setting forth a specific condition or trigger to the provision's applicability is, we should have thought, an entirely unacceptable method of construing statutes." *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 822 F.2d 104, 113 (D.C. Cir. 1987). "Applicability" provisions perform important gatekeeping functions and are common in Missouri's SIP and other regulations. *See, e.g.*, Mo. Code Regs. Ann., tit. 10, §10-6.065(1) (SIP's operating permit applicability provision); *id.*, tit. 12, §10-2.050(2) (Applicability of Elective Division of Income rule). The SIP's Permit Rule delineates four types of permits that might fit a particular project, described in Subsections (5) through (8). By design, the Applicability Provision, Subsection (1), determines whether any later portion of the rule, including Subsection (8) regarding PSD, applies at all.

Second, the District Court's interpretation renders superfluous other parts of Subsection (1) of the Permit Rule, not just the Applicability Provision. Subsection (1)(A) provides key definitions and Subsection (1)(B) defines which emissions sources are covered. Both speak in terms of "potential to emit," and Subsection (1)(B) limits the Permit Rule to installations that emit more than the "de minimis level." These provisions limit the Permit Rule's scope. Reading them out of the Rule would produce absurd results by covering every emissions source.

Third, the District Court misapplied the specific-trumps-the-general principle, which "presumes that the clauses stand irreconcilably in conflict" and does not apply "where both the specific and general provisions may be given reasonable effect" and so "both are to be retained." *Ohio Power Co. v. F.E.R.C.*, 744 F.2d 162, 168 n.7 (D.C. Cir. 1984). Here, no conflict exists between Subsections (1) and (8) of the Permit Rule. The threshold question is whether a project would increase potential emissions (Subsection (1)). If so, then the next question is whether the project would also increase actual emissions (Subsection (8)). A project that increases the unit's potential to emit, intuitively, might also increase its actual emissions. The provisions interact harmoniously, and PSD permitting triggers if both conditions are met.

C. The District Court's Interpretation Is a Collateral Attack on the EPA-Approved Missouri SIP.

The District Court's interpretation amounts to a collateral attack on the regulatory balance Missouri chose to strike in its SIP—choices Congress authorized Missouri to make for itself and EPA found compliant with the Act when it repeatedly approved the SIP. Under the Act, "States and local governments," not the federal government, have "primary responsibility" for controlling air pollution. 42 U.S.C. §§7401(a)(3), 7407(a); *Save Our Health Org. v. Recomp. of Minnesota, Inc.*, 37 F.3d 1334, 1335-36 (8th Cir. 1994). Congress designed the Act to be implemented through "cooperative federalism" whereby EPA sets NAAQS and

states develop SIPs to meet them. 42 U.S.C. §7410(a)(1); *N. Dakota v. E.P.A.*, 730 F.3d 750, 757 (8th Cir. 2013).

Because each state has its own unique mix of emission sources, types of pollutants, stakeholder concerns, and resources, "Congress recognized that [each] state was in the best position to determine how best to achieve the national goals in light of local needs and conditions." *U.S. v. Ford Motor Co.*, 736 F. Supp. 1539, 1542 (W.D. Mo. 1990). Accordingly, "[s]tates have broad discretion in designing their SIPs." *Otter Tail*, 615 F.3d at 1011-12. Section 110(a)(2) of the Act requires that SIPs include "adequate provisions" to prohibit any source from interfering with the NAAQS." 42 U.S.C. §7410(a)(2)(D)(i). To approve a SIP, EPA must determine that the SIP is as stringent as federal regulations in 40 C.F.R. §51.166.

So long as a SIP satisfies these requirements, a state is "at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). "Section 110 left to the states 'the power to [initially] determine *which sources* would be burdened by regulation and to *what extent*.'" *Michigan v. E.P.A.*, 213 F.3d 663, 686 (D.C. Cir. 2000) (quoting *Union Elec. Co. v. E.P.A.*, 427 U.S. 246, 269 (1976)).

Given states' broad discretion, EPA's role in the SIP process is to review proposed SIPs to ensure they satisfy the statutory requirements under Section 110(a)(2), and the stringency requirements under federal regulations, 40 C.F.R. §51.166. If a SIP does not comply with the requirements, then EPA cannot approve

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it. 42 U.S.C. §7410(k)(3)-(k)(5). EPA has numerous other tools available to it in the rulemaking process, 42 U.S.C. §7410(k), and can issue its own federal implementation plan if a state "submits an incomplete SIP, or submits a SIP that does not meet the statutory requirements.…" *N. Dakota*, 730 F.3d at 757.

But if a SIP meets the statutory and regulatory requirements, then EPA has "no authority to question the wisdom of a State's choices." *Train*, 421 U.S. at 79. EPA "does not tell the states how to achieve SIP compliance." *Michigan*, 213 F.3d at 687; *Commonwealth of Va. v. E.P.A.*, 108 F.3d 1397, 1408 (D.C. Cir. 1997). If a SIP "meets the statutory criteria," then, EPA "must approve it." *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981); *see Indiana v. E.P.A.*, 796 F.3d 803, 806 (7th Cir. 2015); 42 U.S.C. §§7410(k)(2)-(3).

If EPA approves a SIP, that represents EPA's determination that the SIP complies with the Act and regulations. *Id.* EPA approved Missouri's SIP, including the Applicability Provision, on three separate occasions prior to the Rush Island Projects. *See* 61 Fed. Reg. at 7,714; 71 Fed. Reg. at 36,488; 71 Fed. Reg. at 38,999. EPA found Missouri's SIP was "at least as stringent as Federal law at 40 C.F.R. 51.166(i)(1)." 61 Fed. Reg. at 7,715.

EPA conceded that the SIP's language is unambiguous. It knew what it was approving. Under the Act's "cooperative federalism" framework, the EPA-approved Missouri SIP is the law. Its provisions may not be collaterally attacked through an after-the-fact interpretation in enforcement litigation.

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D. The SIP Rulemaking History Confirms Ameren's Reading.

The rulemaking history of Missouri's SIP further confirms Ameren's reading of the Permit Rule's plain language. Prior to 1995, the Permit Rule's Applicability Provision stated that permits were necessary for both "modifications" (increases in potential emissions) and "major modifications" (increases in actual emissions). Mo. Code Regs. Ann., tit. 10, §10-6.060 (1993). In 1995, Missouri deleted the words "major modification" from the Applicability Provision, narrowing applicability to trigger *solely* on increases in potential emissions. 20 Mo. Reg. 344 (Jan. 17, 1995). EPA approved that amendment in 1996. 61 Fed. Reg. at 7,714. Missouri's deletion of "major modification" from the Applicability Provision must be given meaning, just as "[w]hen a statutory provision is deleted in a subsequent reenactment, the omitted term cannot be read into the later statute." *Hazardous Waste Treatment Council v. E.P.A.*, 861 F.2d 270, 276 (D.C. Cir. 1988); *see also Stone v. INS*, 514 U.S. 386, 397 (1995) (courts must assume legislature intended for "its amendment to have a real and substantial effect"); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) ("Where the words of a later statute differ from those of a previous one … Congress must have intended them to have a different meaning."); *cf. Snow v. Ault*, 238 F.3d 1033, 1036 (8th Cir. 2001) ("where Congress includes particular language in one section of a statute but omits it in another section…it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

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In 2005, Missouri reaffirmed its decision by declining EPA's request to change Missouri's SIP to mirror federal regulations. Commenting on Missouri's proposed revisions to its SIP, EPA asked Missouri to "add a sentence stating that the provisions of 40 C.F.R. §52.21 override any conflicting provisions or definitions in the existing [Permit Rule]." (APP1275, 1278-1279). Missouri declined EPA's request, stating that "[c]ertain definitions and other provisions that are not identical to those in the federal regulations were *intentionally retained* in the interest of regulatory certainty." 29 Mo. Reg. 1756, 1756 (Nov. 1, 2004) (emphasis added). EPA approved Missouri's proposed SIP revisions, notwithstanding Missouri having declined EPA's request. 71 Fed. Reg. at 36,488. Had EPA disregarded Missouri's intent while still approving the SIP, it would have abused its discretion and committed "agency action beyond the Congressional mandate." *Florida Power & Light*, 650 F.2d at 587, 589. EPA cannot now disregard Missouri's intent through the backdoor of litigation.

E. Ameren Cannot Fairly Be Held Liable Under an After-the-Fact Interpretation Announced in Litigation.

Finding Ameren liable under an after-the-fact interpretation announced in litigation years after the Projects deprived Ameren of fair notice and due process. Based on the same fact pattern present here, in *Cinergy* the Seventh Circuit explained:

> So what was Cinergy "on notice" of? It was on notice that a straightforward reading of [Indiana's SIP] permitted the

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> company without fear of sanctions to make modifications without a permit as long as they would not increase a plant's potential generating capacity, even if they would increase its annual output[.] … What Cinergy was not on notice of was that the EPA would treat [prior] approval of [the SIP] as rejection of it.

623 F.3d at 458-59.

Ameren, like Cinergy, was not on notice that EPA would treat three prior approvals of the Missouri SIP as rejection of it or that the District Court would impose liability based on a permit applicability standard *other than* the potential emissions standard Missouri wrote in the Permit Rule's Applicability Provision. As the Supreme Court has said, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

F. Deference to EPA's Counsel Is Unwarranted.

The District Court improperly deferred to EPA's interpretation of Missouri's SIP, citing *Auer v. Robbins*, an error shown by the Supreme Court's recent *Kisor* decision, which reaffirmed that if a regulation is unambiguous, "there is no plausible reason for deference." 139 S. Ct. at 2415; *Otter Tail*, 615 F.3d at 1018 n.7.

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Deference is particularly unwarranted here also because the interpretation does not reflect EPA's "authoritative, expertise-based, fair, or considered judgment," but rather its "convenient litigating position," which "creates unfair surprise to" Ameren. *Kisor*, 139 S. Ct. at 2414, 2417-18; *see Perez*, 803 F.3d at 939.

This Court has held that deference is due only "when an agency has developed its interpretation contemporaneously with the regulation, when the agency has consistently applied the regulation over time, and when the agency's interpretation is the result of thorough and reasoned consideration." *Id.* None of those parameters applies here. On the contrary, EPA never developed its interpretation of Missouri's SIP until its opposition to Ameren's summary judgment motion. EPA never previously applied the interpretation, much less consistently applied it over time, and EPA's interpretation did not result from any consideration prior to litigation. "Conspicuous inaction" like this never warrants deference. *Id.*

G. EPA's Preamble Statement Had No Legal Effect.

The District Court found "most persuasive" a statement in the Federal Register preamble for EPA's 2006 approval of Missouri's SIP: "This revision also incorporates by reference the other provisions of 40 C.F.R. §52.21 as in effect on July 1, 2003, which supersedes any conflicting provisions in the Missouri rule." 71 Fed. Reg. 36,486, 36,486-89 (June 27, 2006). The District Court misinterpreted

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that sentence to mean *any* differences between federal regulations and the SIP would favor the federal regulations. The preamble shows, however, that that sentence referred *not* to the Permit Rule's Applicability Provision but to two specific "conflicting provisions" regarding "public participation requirements in § 52.21(q)" and provisions in Appendices E, G, and F. *Id.* at 36,487-89.

Moreover, a preamble statement simply cannot override the SIP revision process. EPA cannot correct a SIP through a preamble statement; it must use the tools available to it. 42 U.S.C. §7410(k). A preamble statement can no more change a SIP than a presidential signing statement can change a law enacted by Congress. Missouri expressly *rejected* EPA's request to make federal regulations supersede conflicting SIP provisions, and EPA nonetheless approved the SIP; it cannot undo that approval now.

The judgment in favor of EPA should be reversed and judgment should be entered in favor of Ameren.

II. Applying Proper Liability Standards, Ameren Is Independently Entitled to Judgment as a Matter of Law.

For the reasons discussed in Section I, the SIP's Applicability Provision entitled Ameren to judgment. But even if federal regulations governed applicability, Ameren was held liable under the wrong legal standards, independently requiring reversal. The District Court improperly (A) shifted EPA's burden of proof on causation to Ameren; (B) applied new interpretations of the

federal regulations' causation provision; and (C) superimposed a separate "reasonable power plant operator" standard the regulations do not require. Separately, the District Court admitted and relied upon undisclosed expert opinions on causation of actual (as distinct from projected) emissions increases.

A. EPA Bore the Burden to Prove Causation.

It is axiomatic that plaintiffs bear the burden to prove all elements of their claims. Proof of causation is a statutory requirement. 42 U.S.C. § 7411(a)(4); *New York v. E.P.A.*, 413 F.3d 3, 32-33 (D.C. Cir. 2005). At EPA's urging, the District Court improperly shifted the burden of proving causation to Ameren. (ADD1038-1039).

The federal regulation's plain language specifically requires that causation be addressed by forecasting the 12-month maximum annual rate following the project (step 2), and subtracting unrelated emissions from that figure to calculate projected actual emissions (steps 3 and 4). 40 C.F.R. §52.21(b)(41)(i)-(ii). "*By definition*…'projected actual emissions' *excludes* emissions attributable to an independent factor (such as demand growth)." 72 Fed. Reg. at 72,609 (emphases added).

EPA's experts disregarded those required steps and in so doing disregarded the required causation showing. Sahu did not forecast future unit emissions or the post-Project maximum annual rate, and did not calculate emissions due to demand growth. He used his own method, assuming away alternate independent causes like

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demand growth, rather than following the causation analysis mandated by the regulations. As a result, he could not, and did not, calculate and compare "projected actual emissions" to "baseline actual emissions" (step 5). *See supra* pp.25-28.

B. The District Court Applied New Legal Standards for Causation.

Before Ameren performed the Projects and before trial in this litigation, EPA repeatedly stated that growth in system-wide demand for electricity is unrelated to a project and such growth can be "easily calculated" from forecasts presented in IRPs and annual budget modeling. EPA also approved methods of calculating the emissions a unit "could have accommodated" by annualizing the highest period of pre-project operations and comparing it to annualized post-project operations. Ameren presented precisely that evidence at trial. *See supra* pp.14-25. Rather than rebut the evidence, in post-trial briefing EPA pivoted, arguing Ameren had to meet a different legal standard: demand growth for a specific unit's generation. (APP1370). This was the exact opposite of EPA's prior statements: "[D]emand growth refers to what the utility expects to be required to produce in the way of energy system wide, *not for a single unit*, but system wide." (APP1893).

Further, EPA persuaded the District Court to adopt three additional new interpretations, requiring Ameren to prove (1) hour-by-hour demand growth for each of the 17,520 hours in the baseline period and the 8,760 hours in the post-project period; (2) which portion of its emissions projections consisted of "marginal increases in demand on the 'shoulder' hours"; and (3) an increase in "utilization

factor." (ADD1248-1251, 1258-1259). The federal regulations nowhere require such proof. The District Court applied EPA's litigation positions as controlling law, without assessing whether deference was warranted, and found Ameren liable for failing to meet those standards. *See Kisor*, 139 S. Ct. at 2417; *Christopher*, 567 U.S. at 155; *Perez*, 803 F.3d at 939.

The court's adoption of EPA's new causation interpretation mattered. For example, requiring proof of unit-specific demand makes no sense in modern electricity markets where system demand is no different than unit demand. Since 2005, the Midcontinent Independent System Operator ("MISO") has dispatched Rush Island. MISO "controls which generation facilities operate at any given time," not "individual generators." *N. Dakota v. Heydinger*, 825 F.3d 912, 915 (8th Cir. 2016). MISO's demand *is* Rush Island's demand. Because "electricity cannot be stored," MISO directs "[s]uppliers [to] generate—every day, hour, and minute—the exact amount of power necessary to meet demand...." *F.E.R.C. v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). No consumer orders electricity from a specific unit. Instead, hundreds of units supply electricity to "an interconnected 'grid' of near-nationwide scope." *Id.* Demand is made on the grid *as a whole*; supply is provided to the grid *as a whole*. Because MISO is a price-clearing market, and the Rush Island units are relatively inexpensive, they respond to MISO's price signals and are "load-following" units. (APP2321-2325; APP2381-2385).

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The District Court held Ameren not just to new standards, but to nonsensical and impossible standards. If EPA wanted these legal standards, it had to promulgate them through notice-and-comment rulemaking. EPA may not avoid "the notice and predictability purposes of rulemaking" through litigation positions. *Christopher*, 567 U.S. at 158 (2012). The liability finding based on these incorrect legal standards must be reversed.

C. The District Court Improperly Superimposed a Separate Unwritten "Reasonable Power Plant Operator" Standard.

If federal regulations, and not Missouri's SIP, govern applicability, then they specify a multi-step process for determining whether permitting applies. *See supra* pp.14-18. Although the regulations nowhere overlay a "reasonableness" standard on that process, the District Court ruled that the test for liability was "whether a reasonable power plant operator or owner ["RPPO"] would have expected the projects to cause a significant emissions increase." (ADD1055, 1262 n.24). The District Court found Ameren liable under that standard.

The RPPO standard allowed EPA to sidestep deference principles articulated in *Kisor* and *Perez*. EPA created, through expert's *subjective* opinions and attorney argument, new legal standards just for this trial. Moreover, the RPPO standard did not exclude the possibility that Ameren's conclusions were reasonable.

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1. EPA Never Promulgated an RPPO Standard.

Ameren moved for summary judgment on grounds that the federal regulations do not impose an RPPO standard and, if that standard applies, EPA produced no standard-of-care evidence defining the specific boundaries of reasonableness. (APP1182-1225). The District Court erroneously denied Ameren's motion. (ADD1056). Absent standard-of-care evidence, the written requirements of the regulations should have governed liability, not an unwritten RPPO standard and not expert witnesses' subjective views offered under the guise of that standard. Absent specific, objective boundaries defining what is and what is not reasonable, compliance with the regulations' written requirements should be deemed reasonable.

"Requiring regulated entities to do more" than comply with the regulations' language and the agency's representations "would undermine their ability to comply, even in good-faith, with the applicable regulatory scheme." *Utah Physicians for a Healthy Env't v. Kennecott Utah Copper, LLC*, 191 F. Supp. 3d 1287, 1301 n.85 (D. Utah 2016). EPA agrees with that principle outside of this litigation: When an "operator performs a pre-project [PSD] applicability analysis in accordance with the calculation procedures in the regulations," it "has met the pre-project source obligations of the regulations, unless there is clear error (*e.g.*, the source applies the wrong significance threshold). The EPA does not intend to

substitute its judgment for that of the owner or operator by 'second guessing' the owner or operator's emissions projections."[7]

The written regulations do not contain a separate RPPO overlay. Even when EPA implemented "major new changes to [PSD] applicability" in the 2002 Reform Rules, it never proposed such a standard. 67 Fed. Reg. at 80,198. If EPA wished to impose such a standard, it had to promulgate new regulations providing notice, opportunity for comment, and judicial review through the rulemaking process. It would have had to give operators parameters for distinguishing reasonable from unreasonable approaches.

By superimposing an RPPO standard, the District Court allowed EPA's experts to second-guess Ameren's conclusions even though Ameren followed the regulations' written requirements. The District Court compounded that error by allowing EPA to present its experts' opinions without any standard-of-care evidence against which reasonableness could be measured. Denial of Ameren's summary judgment motion on that issue warrants reversal and remand of the liability finding. *See Rosemann v. Sigillito*, 785 F.3d 1175, 1181 (8th Cir. 2015); *S&A Farms, Inc. v. Farms.com Inc.*, 678 F.3d 949, 954-55 (8th Cir. 2012); *S.E.C.*

[7] Memorandum from EPA Administrator on "New Source Review Preconstruction Permitting Requirements" at 8 (Dec. 7, 2017), https://www.epa.gov/sites/production/files/2017-12/documents/policy_memo.12.7.17.pdf.

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v. Shanahan, 646 F.3d 536, 545-46 (8th Cir. 2011). The end result was a liability trial in which EPA's experts, rather than an established rule or standard, set the bar for assessing liability. To be sure, EPA's witnesses did not say "Ameren broke the law," but when the ultimate question is "reasonableness," permitting experts to testify as to what is or is not "reasonable" creates the same problem. The experts created and applied their own rules. *Cf. Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) (addressing analogous claim that "modification" of helicopter violated FAA regulations and ruling expert opinion on "whether federal law was contravened…was inadmissible"). The District Court ultimately adopted the entirety of EPA's experts' testimony by incorporating all 457 of EPA's proposed findings of fact and conclusions of law.

2. The RPPO Standard Circumvented Any Deference Analysis.

The RPPO standard allowed EPA to sidestep stringent deference principles that should have applied to the interpretations and applications of the regulations—such as its experts' methods and new causation standards—that EPA urged and the District Court adopted. *See Kisor*, 139 S. Ct. at 2414, 2417-18; *see also Perez*, 803 F.3d at 939. EPA simply presented these methods and standards through expert testimony and attorney argument, under the cover of the RPPO standard, without even requesting, much less justifying, deference.

3. As Applied, the RPPO Standard Improperly Validated Subjective Expert Opinion.

EPA's case, and the findings the District Court adopted, turned entirely on EPA's expert's personal judgment—how *they* would assess causation; how *they* would forecast emissions; what information *they* found relevant and how it *could* be considered. And while EPA's experts criticized Ameren's analyses, they did so based only on their *subjective* views, as illustrated by the example below. EPA's experts did not opine that Ameren deviated from the regulations' written requirements or other *objective* standards. What EPA's experts believed Ameren could have done, rather than what regulatory or industry standards required it to do, is purely subjective. Experts' beliefs about how to comply with the law are irrelevant, particularly in a highly regulated industry. Experts' subjective views and methods cannot form the basis for liability—yet they did here.

4. The RPPO Standard Did Not Exclude the Possibility that Ameren's Conclusions Were Reasonable.

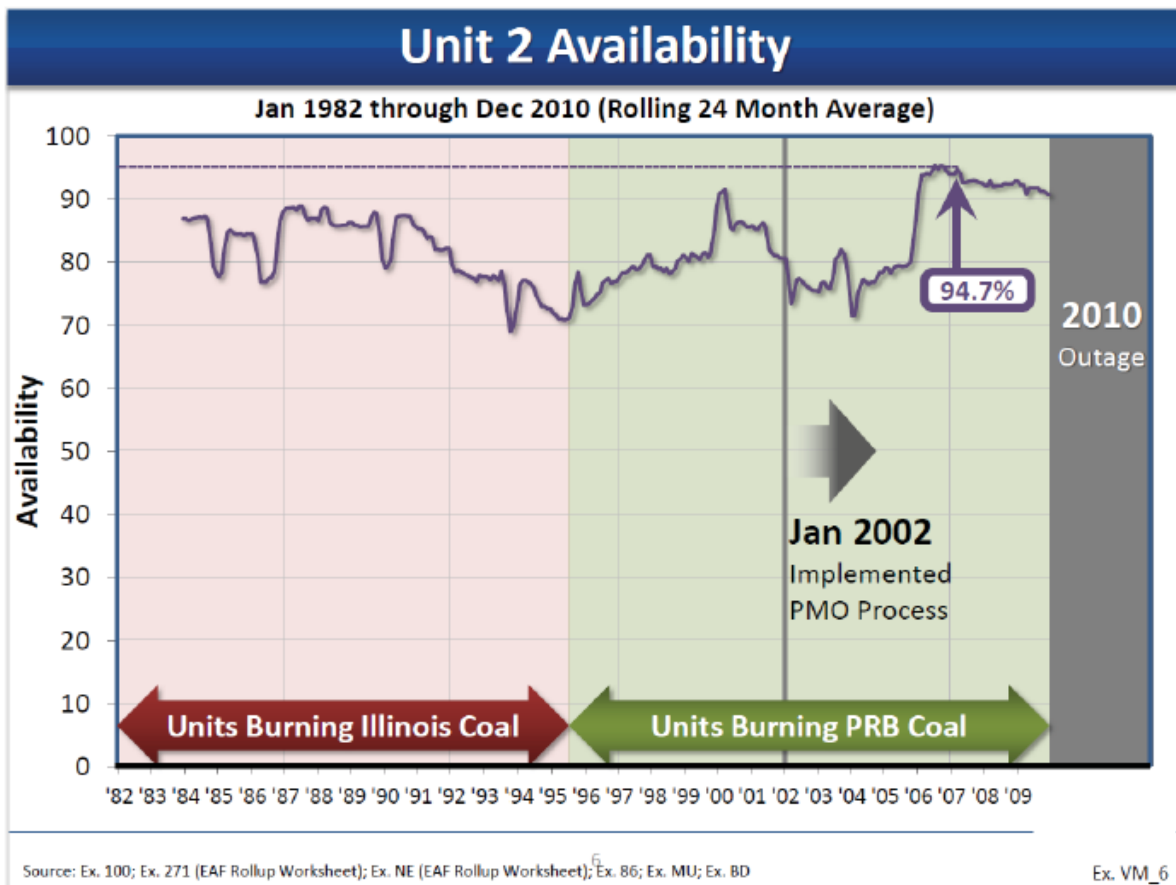
In another PSD enforcement action, the district court in *Pennsylvania, Dep't of Envtl. Prot. v. Allegheny Energy, Inc.* observed: "Even assuming, arguendo, the internal validity of [the expert's] methodology, the Court has a more fundamental concern regarding Plaintiffs' approach, namely, that *it does not answer the correct question*." No. 02-885, 2008 WL 4960090, at *6 (W.D. Pa. Nov. 18, 2008) (emphasis added) (vacated on other grounds). The court emphasized, as is also true here, that the plaintiff experts' methodology "was not the only acceptable

methodology for making emissions projections." *Id.* Thus, even if it demonstrates that the utility "*might* have projected a significant net increase, [the] opinion is insufficient to establish that *all* reasonable methodologies *must* have projected a significant net increase such that Defendants' failure to obtain a permit at the time was unreasonable." *Id.*

Reasonable minds can differ. The question "would a reasonable power plant operator expect the Projects to cause an emissions increase?" is susceptible to more than one answer. EPA advanced a case that one way of looking at the issue—its experts' way—led to one conclusion. Using the RPPO standard, the District Court found Ameren liable based on EPA's experts' conclusion, but that standard did not exclude the possibility that Ameren's conclusions were reasonable.

5. An Illustrative Example: Koppe's Availability Opinion

EPA based its case on whether an RPPO would expect the Projects to cause the units' availability to increase compared to the baseline periods. Ameren believed they would not, because the Units were already at record-high levels immediately before the Projects. (APP2210-2222; APP3066, 3070; APP3065). For example, Unit 2's availability hovered between 70% and 90% for decades, but, as shown below, after Ameren implemented its proactive maintenance program in 2002, availability improved to levels as high as 97%—*before* the Projects. *See supra* pp.6-8.



(APP3279, 3280, 3282 (Unit 2); *see also* APP3277, 3278, 3281 (Unit 1)).

Ameren reasonably did not believe Unit 2's availability could get better than the record-high level of 94.7% over the 24-month baseline period because the unit has thousands of components that can break down or degrade at any time. (AP2220-2222; AP2202-2203).

Koppe, EPA's expert, agreed that other component breakdowns after the Projects would increase. (APP2091). Nevertheless, he testified that Ameren should have expected availability to increase after the Projects. (APP2091-2095).

Koppe admitted his method was subjective and other engineers could reach different, but still reasonable, judgments. (APP2093, 2096, 2102-2103).

In the absence of a rule's or standard of care's guardrails, the RPPO standard permitted Koppe to pick any path, allowed EPA to argue Koppe's way was "reasonable," and resulted in the District Court finding Ameren liable merely for taking a different path. "An unassisted court cannot be expected to evaluate the reasonableness of a professional judgment that involves so much sophistication." *Reliance Insurance v. The Louisiana Land & Exploration Co.*, 110 F.3d 253, 258 (5th Cir. 1997). This shows how the RPPO standard created a legally flawed liability trial, requiring reversal.

D. The District Court Abused Its Discretion by Letting EPA Present Undisclosed Expert Opinions on Actual Post-Project Emissions.

For the first time at trial, EPA claimed it sought to prove, not just that Ameren should have expected the Projects would cause emissions increases, but also that emissions increases actually occurred after and because of the Projects. During discovery, EPA's expert witnesses did not disclose, under Rule 26(a)(2), any opinions regarding the cause of any actual post-Project emissions increases. Instead, they focused entirely on what Ameren should have expected. (APP1300-1367).

When EPA sought to elicit trial testimony from its experts regarding actual post-Project emissions, Ameren objected. *Id.* EPA could not identify any disclosed

opinions. (APP2033-2054). Koppe admitted he did not reach any causation opinion. (APP2108-2110). Sahu was asked multiple times, but could not identify any opinions he disclosed before trial. (APP2152-2154). But the District Court nonetheless admitted, and ultimately relied upon, the undisclosed expert opinions. (ADD1267-1269). This constituted an abuse of discretion. *See Sogelease Corp. v. McGehee Pub. Co.*, 876 F.2d 53, 54 (8th Cir. 1989). Even in a bench trial, this error was not harmless—Ameren was entitled to the protections Rule 26 affords all civil litigants.

Because the District Court applied the wrong standards governing liability, the judgment should be reversed.

III. The Unprecedented Injunction Ordered at Labadie Is Legally Flawed.

This enforcement action is, and always has been, about Rush Island, not any other power plant. EPA sued over the Rush Island Projects and prosecuted claims throughout the liability phase pertaining only to Rush Island. The District Court's liability finding applied only to Rush Island. And, through three amended complaints, the remedies EPA sought—injunctive relief and civil penalties—related only to Rush Island. Even when EPA elected to abandon civil penalties before the liability trial to avoid a jury, the District Court recounted its remaining forms of relief as injunctive relief to effect compliance and remediation at Rush Island. (APP1286-1287).

Once in the remedy phase, however, EPA expanded its claims, asserting for the first time that it sought injunctive relief, not just at Rush Island, but also at a different power plant over 50 miles away—Labadie—that has nothing to do with this case. In addition to seeking scrubbers at Rush Island, EPA announced it would also seek equally expensive scrubbers, or, at a minimum, DSI or comparable equipment, at Labadie's four units. EPA rationalized seeking additional control equipment at Labadie on a theory that reducing future SO_2 emissions from Labadie would offset past SO_2 emitted from Rush Island after the Projects—which EPA dubbed Rush Island's "excess emissions." Although neither the Act nor the regulations authorize such relief, and although no court had ever ordered installation of controls at a non-violating plant, the District Court embraced EPA's "excess emissions" theory and entered an injunction requiring Ameren to install DSI or comparable equipment at Labadie, in addition to an injunction requiring scrubbers at Rush Island.

The Labadie injunction has several legal flaws. First, it awards unprecedented relief that circumvents statutory prerequisites for PSD enforcement actions. Second, the sole justification for the Labadie injunction, EPA's "excess emissions" theory, was rejected by this Court in *Otter Tail*. Third, the Labadie injunction constitutes a penalty, which EPA waived.

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A. The Labadie Injunction Circumvents Statutory Prerequisites for PSD Enforcement Actions.

Before filing this lawsuit, EPA requested and reviewed records of projects Ameren performed at its other power plants, including Labadie. (*See* APP3207-3244) (Ameren response to EPA information request regarding all plants and Notice of Violation EPA ultimately pursued only against Rush Island)). Following that review, EPA sued over only the Rush Island Projects. If EPA believed it could prove a violation at Labadie, it would have sued over Labadie.

Under the Act, specific prerequisites must be satisfied before a remedy can be had in a PSD enforcement action. These prerequisites are jurisdictional: EPA must issue a Notice of Violation identifying specific projects at a specific source, file suit, and prove those specific violations. 42 U.S.C. §7413(a), (b); *U.S. v. Duke Energy Corp.*, 5 F. Supp. 3d 771, 779 (M.D.N.C. 2014); *U.S. v. Pan Am. Grain Mfg. Co.*, 29 F. Supp. 2d 53, 56 (D.P.R. 1998); *U.S. v. AM Gen. Corp.*, 808 F. Supp. 1353, 1362 (N.D. Ind. 1992).

EPA did not satisfy these prerequisites with respect to Labadie, and yet the District Court entered an injunction there anyway. This circumvents the Act's enforcement regime, rendering jurisdictional prerequisites meaningless. The Act does not allow injunctive relief at a non-violating plant like Labadie and no court has ordered a non-violating plant to install expensive control equipment. Even the courts that have considered such an injunction have *rejected* it. *See U.S. v. Cinergy*

Corp., 618 F. Supp. 2d 942, 967 (S.D. Ind. 2009) (EPA could not obtain remedy at units where no violation occurred based on violations that occurred at other units), *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010); *U.S. v. Westvaco Corp.*, No. 00-2602, 2015 WL 10323214, at *12 (D. Md., Feb. 26, 2015) (EPA could not get injunctive relief at "totally innocent boiler").

B. The Labadie Injunction Contradicts *Otter Tail*, Which Rejected EPA's "Excess Emissions" Theory.

The Labadie injunction orders Ameren to install DSI or comparable equipment costing hundreds of millions of dollars at Labadie. The District Court justified the injunction on the theory that requiring "emissions reductions" at Labadie would offset "the excess emissions from Rush Island." (ADD1453). According to the District Court, this "remediates the public harm Ameren has caused and reverses the unjust gain Ameren has enjoyed from its violation of the Clean Air Act at Rush Island." *Id.* The emissions the District Court deemed "excess emissions" and an "unjust gain," however, resulted from Ameren's post-Project operation of Rush Island, which this Court held in *Otter Tail* does not violate the law. The sole premise for the Labadie injunction, therefore, was a *non*-violation. This means the District Court not only entered an unprecedented injunction at Labadie, a plant that *did not violate the law*, but also based that injunction on post-Project operation at Rush Island that *did not violate the law*.

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This Court held in *Otter Tail* that "operation of a facility without a permit is not articulated as a basis for a violation" of the Act or regulations and "there is no ongoing duty to obtain PSD permits." 615 F.3d at 1015, 1017. It is "the unanimous view of the other courts of appeals" that the Act and regulations do not "prohibit operating a facility without BACT or a PSD permit." *Homer City*, 727 F.3d at 284 (citing *Otter Tail*, 615 F.3d at 1015; *U.S. v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013); *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1323 (11th Cir. 2007) ("*NPCA*")); *see also Nucor Steel-Arkansas v. Big River Steel, LLC*, 825 F.3d 444, 450 (8th Cir. 2016) (same). "The Third, Seventh, Eighth, Tenth, and Eleventh Circuits each have held that a violation … occurs only at some point during the construction period, and not … subsequent *operation* of the modified facility." *U.S. v. Luminant Generation Co.*, 905 F.3d 874, 882 (5th Cir. 2018), *reh'g en banc granted*, 929 F.3d 316 (5th Cir. 2019) (citing same cases, plus *Sierra Club v. Oklahoma Gas & Elec. Co.*, 816 F.3d 666, 674 (10th Cir. 2016)).

Otter Tail involved the same fact pattern presented here. An electric utility (Otter Tail) performed projects at a coal-fired power plant (Big Stone) without obtaining permits, and subsequently operated the plant without installing BACT, thereby emitting SO_2 that, hypothetically, the plant would not have emitted if the utility had obtained permits and installed BACT. Under that fact pattern, this Court held that, "while [the utility] may have violated [the federal regulations] by failing

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to apply for PSD permits in the first place, it does not continue to do so by failing to comply with a hypothetical set of operational parameters that would have been developed through the permitting process." 615 F.3d at 1016. This Court rejected EPA's amicus argument that "[e]ach day Otter Tail operates its facility … and emits pollutants *in excess of* a BACT-derived emissions limitation, it commits an overt act that inflicts new and accumulated injury and therefore continues its violation."[8] Disagreeing with EPA, this Court explained:

> Even though the preconstruction permitting process may establish obligations which continue to govern a facility's operation after construction, that does not necessarily mean that such parameters are enforceable independent of the permitting process.
>
> … [W]e conclude that the plain language of the statute and the regulations … prohibited only modification of the … plant without a PSD permit or BACT, not its operation.

Id. at 1017-18 (citation omitted).

In this case, the District Court based the Labadie injunction on the very same hypothetical exercise—calculating "excess emissions"—that this Court rejected in *Otter Tail*. The District Court calculated the difference between a hypothetical amount of SO_2 the Rush Island units "would have emitted" "[b]ased on what BACT would have been" at the time of the Projects, and the actual amount of SO_2 the units

[8] Brief for EPA as Amici Curiae Supporting Appellant at 18, *Otter Tail*, No. 09-2862 (8th Cir)., Entry ID 3611777 (Dec. 3, 2009) (emphasis added).

emitted from post-Project operation without BACT. (ADD1134-1135 ¶106). The District Court labeled those "excess emissions" an "unjust gain Ameren has enjoyed from its violation … at Rush Island," which the Labadie injunction would "reverse." (ADD1453).

This logic turns *Otter Tail* on its head. Post-Project operation of Rush Island without permits or BACT, held *not* a violation in *Otter Tail*, becomes a violation under the District Court's logic. "[F]ailing to comply with a hypothetical set of operational parameters [*i.e.*, BACT] that would have been developed through the permitting process," held *not* a violation in *Otter Tail*, becomes a violation under the District Court's logic. *See Otter Tail*, 615 F.3d at 1016. Because it contradicts *Otter Tail*, the "excess emissions" theory underpinning the Labadie injunction is a false legal foundation, particularly for relief involving a plant not found to have done anything wrong.

Sound policy further supports rejecting the "excess emissions" theory. First, endorsing the "excess emissions" theory would reward EPA for sitting on its hands, without ever seeking a temporary restraining order or preliminary injunction, while purportedly illegal "excess emissions" piled up during this decade-long litigation, incentivizing EPA to take no immediate action so it can argue later that accumulated "excess emissions" it never sought to stop justify an onerous permanent injunction.

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Second, allowing the Labadie injunction based on "excess emissions" would render meaningless EPA's abandonment of civil penalties. That was a significant decision aimed at a tactical goal: nullifying Ameren's jury demand in advance of the liability trial. Because EPA simply swapped civil penalties for the "excess emissions"-based Labadie injunction, EPA did not give anything up at all, a result realized through the Labadie injunction. That result not only props up a legally invalid injunction, but also allows EPA to avoid the consequences of its decision to abandon civil penalties. This Court should not render meaningless EPA's abandonment of that remedy.

C. The Labadie Injunction Constitutes Penal Relief EPA Waived.

EPA's abandonment of penal relief has additional significance: because the Labadie injunction constitutes a penalty, EPA waived it.

In *Kokesh v. S.E.C.*, the Supreme Court held that whether a remedy constitutes a penalty turns on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual" and on whether it "is sought for the purpose of punishment, and to deter others from offending in like manner—as opposed to compensating a victim for his loss." 137 S. Ct. 1635, 1642 (2017) (internal quotations omitted). The Supreme Court defined disgorgement, one example of a penalty, as "a form of restitution measured by the defendant's wrongful gain." *Id.* at 1640 (internal quotations and brackets omitted).

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Here, the District Court specifically stated that the Labadie injunction seeks to "remediate[] the public harm Ameren has caused," not harm to any particular individual, and seeks to "reverse[] the unjust gain Ameren has enjoyed" and "reduce[] any economic advantage Ameren gained." (ADD1446, 1453). Applying *Kokesh*'s principles to the District Court's words shows the Labadie injunction constitutes a penalty.

Other courts have found injunctive remedies sought by EPA in PSD cases constitute penalties. In *U.S. v. Midwest Generation, LLC*, EPA asked for "an injunction requiring [the utility] to purchase and retire sulfur-dioxide allowances to mitigate past illegal sulfur-dioxide emissions resulting from its past PSD violations." 781 F. Supp. 2d 677, 685 (N.D. Ill. 2011). The district court rejected that injunction because "it would be a penalty," "not … an injunction to remedy the failure to obtain a permit." *Id.*; *see also Cinergy*, 618 F. Supp. 23 at 967 (rejecting injunction at non-violating plant as "punitive in nature"). Likewise, the Fifth Circuit's Judge Elrod observed that district courts must assess whether an injunction to "clean up the pollution" from a violating plant would constitute a "penalt[y] in disguise" under *Kokesh*. *Luminant*, 905 F.3d at 890-91 (Elrod, J., concurring in part and dissenting in part); *see also id.* at 888-89 (majority opinion) (noting whether injunction constitutes a penalty "has not been addressed in this appeal"). As this Court has recognized, an "injunction's 'equitable' label does not

exempt it from being [a] 'penalty.'" *S.E.C. v. Collyard*, 861 F.3d 760, 763 (8th Cir. 2017).

The Court should reverse the judgment ordering injunctive relief involving Labadie.

IV. The District Court Lacked Jurisdiction Under Article III and Statutory Authority Under the Act to Enter Both Injunctions.

In addition to the flaws affecting the Labadie injunction, both the Labadie *and* Rush Island injunctions fail because EPA ultimately elected to pursue remedies for which the District Court lacked jurisdiction under Article III and statutory authority under the Act.

A. The District Court Lacked Jurisdiction Under Article III.

Over the nine-year course of this litigation, EPA made choices regarding which remedies to pursue and which to forego for the violation it alleged. Before the liability trial, EPA waived all penal relief in order to avoid a jury. At the remedy trial, EPA abandoned all other relief except for two injunctions, both of which EPA based on "excess emissions" from Rush Island's post-Project operation—conduct that does not violate the Act or regulations under *Otter Tail*. *See supra* pp.60-64. A remedy may not be had for conduct the law does not proscribe.

Because the injunctions EPA sought—based on Rush Island's *operation*—did not redress the violations the District Court found—commencing *construction*

without obtaining permits—the District Court lacked Article III jurisdiction to order either injunction, and the remedy order should be reversed.

1. The Injunctions Were Justified on Alleged Harm from Rush Island's Lawful Post-Project Operation.

In the liability phase, EPA sought to prove, and the District Court found, that the Rush Island Projects were major modifications requiring permits before Ameren could commence construction. (ADD1216). In the remedy phase, however, EPA's theory of the case changed. EPA did not seek to prove any injury from the violation it proved. Instead, EPA sought to obtain relief based on the harm from Rush Island's operation without a PSD permit—the operation this Court found does not violate the PSD program. The District Court adopted EPA's theory and based its *eBay* analysis of both injunctions solely on Rush Island's "excess emissions." (*See* ADD1434-1438 (Rush Island); ADD1444-1447 (Labadie)).

The premise for the injunctions is false. This Court rejected EPA's "excess emissions" theory in *Otter Tail*. *See supra* pp.60-64. Operations do not cause an injury that the PSD program recognizes. In *Midwest Generation*, the Seventh Circuit cited *Otter Tail* and recognized the distinction between construction and operation under the Act: "Section 7475(a)(4) [of the Act] specifies what must be built, not how the source operates after construction. If the owners ripped out or deactivated the [BACT controls] after finishing construction, *that would not violate § 7475*—though it might well violate some other [law]." 720 F.3d at 647 (emphasis

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added). The Third Circuit agrees. *Homer City*, 727 F.3d at 287 (citing *Midwest Generation*).

By EPA litigating a *construction*-based violation in the liability phase, and then pivoting to request *operations*-based injunctions in the remedy phase, EPA made an end run around *Otter Tail*. This Court has held "there is no ongoing duty to obtain PSD permits" or "to apply BACT independent of the permitting process," 625 F.3d at 1017, but those were precisely the remedies EPA sought and the District Court ordered.

2. EPA Elected to Pursue Remedies that Mooted Article III Jurisdiction.

EPA must establish Article III jurisdiction "for each form of relief that is sought." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008). It must show: (1) a legally cognizable injury in fact; (2) a causal connection between the injury and the complained-of conduct; and (3) relief that redresses the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). These requirements "persist throughout all stages of litigation," *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013), and "cannot be waived," *Sierra Club v. Robertson*, 28 F.3d 753, 757 n.4 (8th Cir. 1994). The Supreme Court "has consistently applied its rigorous standing principles to environmental and conservation laws …." *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000) (Loken, J., concurring in part and dissenting in part).

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Article III jurisdiction existed when EPA filed this lawsuit, but EPA was pursuing different remedies then, including civil penalties. EPA's later choices to abandon those remedies ultimately mooted that jurisdiction because: (1) the injury the injunctions seek to redress—"excess emissions"—is not judicially cognizable; (2) the violation is mismatched with the remedy so traceability and redressability are lacking; and (3) redressability is separately lacking because past wrongs cannot be redressed by prospective injunctive relief.

No Legally Cognizable Injury. A legally cognizable injury is "caused by the violation of legal right." *Lewis v. Casey*, 518 U.S. 343, 353 n.4 (1996). As this Court has held, Congress did not prohibit operation without a PSD permit or BACT. There can be no legally cognizable injury from lawful conduct. In *U.S. v. Oklahoma Gas & Electric*, a PSD enforcement action, the district court dismissed EPA's claims for lacking Article III jurisdiction because the injunction EPA sought did not remedy any violation of the Act or regulations. No. 13-690, 2015 WL 224911, at *12 (W.D. Okla. Jan. 15, 2015). "The availability of relief of the nature requested by EPA is a matter to be addressed by Congress, not [a] Court." *Id.*

No Traceability or Redressability. "The remedy must of course be limited to the inadequacy that produced the injury in fact." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). Here, the mismatch between violation and remedy means traceability and redressability are lacking. The claimed injury is not the result of the complained-of conduct. Conversely, an injunction to remedy alleged

injuries from operation does not redress harms from construction. The Act maintains separate construction permit and operating permit programs. A violation of one does not give rise to a remedy from the other.

The Constitution requires that the remedies redress the violation. If a plaintiff could sue in federal court by establishing a violation of federal law, but then seek remedies unconnected to that violation, limits on federal jurisdiction would be meaningless. The Supreme Court has repeatedly enforced those limits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998) (a plaintiff cannot "bootstrap" itself into federal court); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *as revised* (May 24, 2016) (violation of federal statute not enough, standing alone, to satisfy Article III).

No Prospective Injunction for a Past Wrong. It is black-letter law that "[a]n injunction is inherently prospective and cannot redress past injuries." *Frost v. Sioux City, Iowa*, 920 F.3d 1158, 1161 (8th Cir. 2019); *Hillesheim v. Holiday Stationstores, Inc.*, 903 F.3d 786, 792 (8th Cir. 2018). Redressability is lacking for that independent reason.

A PSD permit authorizes construction; it is "solely a prerequisite for the approval of the modification, not a condition of … lawful operation." *NPCA*, 502 F.3d at 1324. That means any violation by Ameren was complete when it commenced construction without a permit. Ameren cannot retroactively "come into compliance" for a one-time past construction permitting violation. The PSD

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program is a *pre*-construction permitting program; there is no post-construction obligation to obtain a permit. *Nucor Steel*, 825 F.3d at 450 (PSD imposes "one-time permitting requirements"); *Otter Tail*, 615 F.3d at 1014-16; *Luminant*, 905 F.3d at 889 ("there is no ongoing or future unlawful conduct to enjoin") (Elrod, J., concurring in part and dissenting in part).

"Once the construction or modification is complete, the window in which to apply for and obtain a preconstruction permit is gone." *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003); *Otter Tail*, 615 F.3d at 1014-1015 (citing *Niagara Mohawk*). Where a plaintiff "alleges only past infractions of [a statute], and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury." *Steel Co.*, 523 U.S. at 109.

3. EPA Elected to Forego Remedies for Which the District Court Had Article III Jurisdiction.

EPA had several available remedies for the permitting violations the District Court found, such as penal relief, including civil penalties (42 U.S.C. §7413); an injunction to prevent construction (42 U.S.C. §7477); an injunction to obtain information about future planned projects (*U.S. v. Xcel Energy, Inc.*, 759 F. Supp. 2d 1106, 1113 (D. Minn. 2010)); and declaratory relief (28 U.S.C. §2201). EPA also initially sought, but ultimately abandoned, other injunctive relief. (APP1284). EPA chose to forego all of these remedies. EPA's waiver of available remedies does not, and cannot, justify or permit seeking impermissible remedies.

If EPA wanted to limit Rush Island's *operation*, the Title V operating permit process was the exclusive, statutorily-designated avenue for doing so. 42 U.S.C. §7661; *Otter Tail*, 615 F.3d at 1020; *Nucor*, 825 F.3d at 450; *Homer City,* 727 F.3d at 296–300; *NPCA*, 502 F.3d at 1326.

B. The District Court Lacked Statutory Authority Under the Act.

While the Act authorizes civil penalties for past violations and injunctions for ongoing or future violations, it does not authorize injunctions for wholly past violations. Only past violations are at issue here. (APP1134).

"The sole function of an action for injunction is to forestall future violations." *U.S. v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *see U.S. v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 563 (8th Cir. 1998); *Webb v. Missouri Pac. R.R.*, 98 F.3d 1067, 1068 (8th Cir. 1996). The Act's remedies provisions authorize "forward-looking" injunctions for ongoing and future violations, whereas "[c]ivil penalties are the only type of relief…that can be imposed for past violations.…[C]ivil penalties—as opposed to injunctive relief—are necessarily retrospective." *Homer City*, 727 F.3d at 292, 295 & n.20 (construing 42 U.S.C. §§7413(b) & 7477).

Because the District Court lacked statutory authority to enter either injunction, the remedy order should be reversed.

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V. The District Court Lacked Jurisdiction for EPA's Title V Claims.

EPA derivatively alleged that Rush Island's operating permit violates Title V of the Act because it omits BACT emissions limits that would have been incorporated through PSD permitting. This Court has repeatedly rejected such claims, as have the Third, Seventh, and Ninth Circuits. *Otter Tail*, 615 F.3d at 1020; *Nucor Steel*, 825 F.3d at 452-53; *Homer City*, 727 F.3d at 296-97 (collecting cases). "Title V channels…an administrative review process that is reviewable exclusively by the courts of appeals, not collaterally in civil … enforcement actions in the district courts." *Id.*

Rush Island's Title V operating permit was issued on May 18, 2000. (APP1241). Ameren applied to renew the permit on November 18, 2004. MDNR sent Ameren's draft permit to EPA for review. (APP1238 ¶38); 42 U.S.C §7661d(b)(1); 40 C.F.R. §70.8(c). EPA registered no objection. EPA's Title V claims "could have been pressed during the permitting process," but not in this enforcement action because the District Court lacked jurisdiction. *Otter Tail*, 615 F.3d at 1020; *Nucor Steel*, 825 F.3d at 452-53. Ameren moved for summary judgment, but the District Court denied the motion. (ADD1071).

Moreover, Title V operating permits impose no independent obligations, *id.* at 447, and the claims are entirely derivative of the PSD claims. (APP2004-2005). Because the PSD claims fail, so too do the Title V claims.

CONCLUSION

This Court should reverse the District Court's judgment and enter judgment in Ameren's favor because no permits were required under Missouri's SIP.

Alternatively, if federal applicability standards govern, then the liability finding should be reversed and judgment entered in Ameren's favor because the District Court applied the wrong burden of proof and legal standards and Ameren is entitled to judgment under the correct standards. At the very least, this Court should remand for a new liability trial under correct legal standards.

If the liability finding stands, then this Court should reverse the legally-flawed remedy order.

Finally, the Court should reverse the judgement on EPA's Title V claims.

Dated: February 14, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as extended by the Court's January 10, 2020 Order, because this brief contains 15,485 words, as calculated by Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface in Microsoft Word in Times New Roman 14-point font.

3. The digital version of this brief and the accompanying addendum have been scanned for viruses and are virus-free to the best of my knowledge.

Dated: February 14, 2020

/s/ Mir Y. Ali
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 14, 2020, I caused the foregoing Corrected Brief of Appellant to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 14, 2020

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