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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INTRODUCTION

In this appeal, the Court must determine whether the Permit Rule of Missouri's State Implementation Plan ("SIP") required Ameren to obtain permits before performing projects to replace components at Rush Island's two electric generating units during planned maintenance outages in 2007 and 2010. Ameren has raised legal issues requiring reversal of the rulings below—the District Court misinterpreted Missouri's SIP, shifted the burden of proof and applied incorrect legal standards on causation, and issued unprecedented and improper injunctive relief. EPA and Sierra Club largely look past these legal flaws and instead emphasize factual findings.[1] And when they do engage Ameren's arguments, their responses fall flat.

Missouri's Permit Rule, in its first section titled "Applicability," states that permits are required for "modifications," which the SIP defines as projects that increase a facility's potential emissions. Ameren's projects did *not* increase Rush Island's potential emissions—as EPA conceded—but maintained the units' high levels of performance achieved through a maintenance program implemented in the early 2000s. Because the projects were not "modifications," the Applicability Provision's threshold condition for requiring any of the permits discussed in the

[1] Because the arguments regarding EPA apply equally to Sierra Club, this reply refers simply to "EPA" when discussing both Sierra Club and EPA.

other sections of the rule was not present. As a result, Missouri's Permit Rule did *not* require Ameren to obtain PSD permits for the projects.

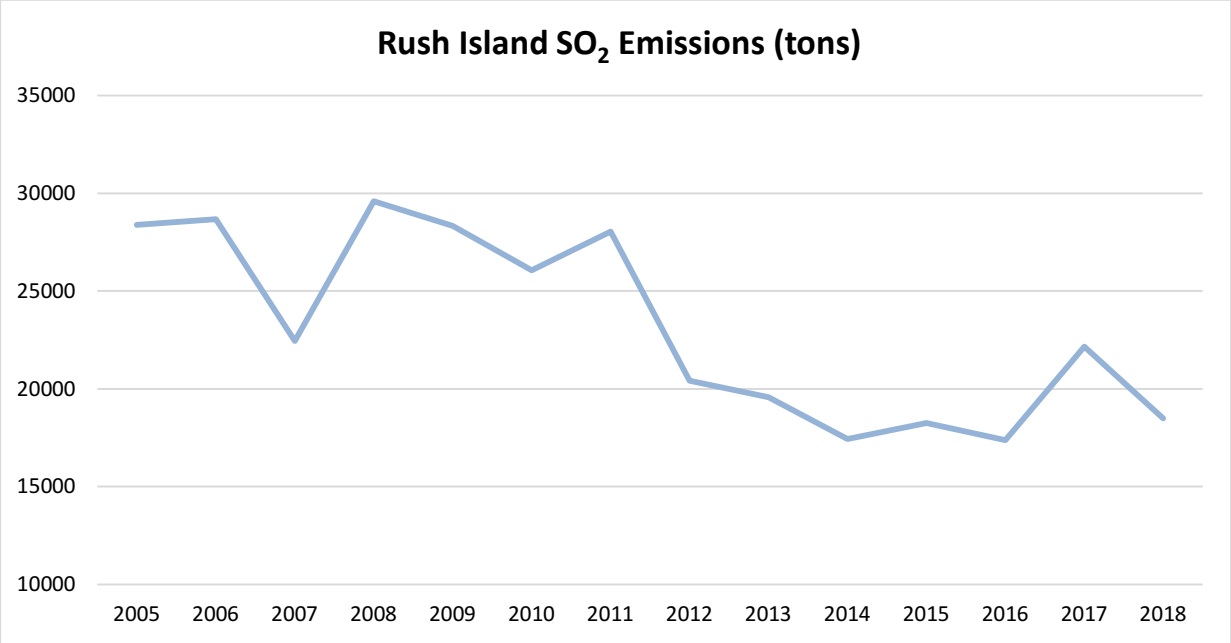
EPA's interpretation of the Permit Rule gives no meaning whatsoever to the Applicability Provision—even though Missouri made it the Permit Rule's very first section, titled that section "Applicability," and specifically defined "modification." Instead, EPA points to applicability under *federal* PSD regulations (to which Missouri looks only *if* the Applicability Provision's threshold "modification" condition is satisfied) and caselaw interpreting *federal* applicability. This case, however, is about *Missouri's* rule.

The federal regulations EPA invokes require showing that a project causes an emissions increase and explicitly make assessing independent causes, including growth in demand, part of that required showing. Here, EPA admitted demand grew during the relevant time periods. So EPA persuaded the District Court to change the rules—by recasting the regulations' causation provision as an "exclusion" in order to shift the burden of proof and by applying new legal standards for assessing demand growth. But EPA cannot rewrite federal regulations to change the causation requirements and shed the burden of proof.

The District Court's unprecedented, billion-dollar injunction order suffers from its own fundamental legal flaws. In attempting to support it, EPA relies on general equitable principles and Clean Water Act cases, but avoids the holdings and

logic of this Court's *Otter Tail* decision and other PSD cases, as well as the Supreme Court's *Kokesh* decision.

Rather than engage on the law, EPA suggests the PSD program necessarily requires all power plants eventually to install scrubbers. It does not. *See U.S. v. DTE Energy Co.*, 711 F.3d 643, 651 (6th Cir. 2013). EPA claims Rush Island's post-project operations released thousands of tons of "excess emissions." That operation was lawful under *Otter Tail* and those emissions were allowed under operating permits. Contrary to EPA's innuendo, Rush Island's SO_2 emissions have significantly declined over the last decade:



(SUPP.APP3303-3306; *see* ADD1308-1309 ¶¶5-6; ADD1398-1399.) And while EPA claims Rush Island's emissions affected air quality, EPA never contended those emissions contributed to any exceedance of National Ambient Air Quality

Standards, which are set by EPA at levels "more than requisite to protect the public health with an adequate margin of safety." (*See* ADD1388 ¶343; ADD1439-1441; 85 Fed. Reg. 24094, 24120 (Apr. 30, 2020); *see generally id.* at 24119-21.)

This Court should reverse and enter judgment in Ameren's favor.

ARGUMENT

I. The Plain Language of the Permit Rule Requires Reversal.

The most basic rule of regulatory interpretation is to give effect to the plain language of the regulation—the *entire* regulation. Ameren's interpretation of the Permit Rule does that. The proper interpretation starts with Section (1) on "Applicability," which determines whether the rule applies to the conduct under review. If the rule is applicable, then its remaining sections are consulted to see what additional requirements apply, including whether the project is a major modification because it increases actual emissions.

EPA ignores this textual argument entirely. It makes no attempt to harmonize Section (1) with the rest of the regulation. Instead, EPA asks the Court to ignore Section (1), arguing that, "for PSD purposes," an operator must bypass the Applicability Provision and proceed directly to Section (8), which covers additional requirements specific to PSD.

There are many problems with EPA's interpretation, but two stand out. First, an interpretation that renders meaningless an entire regulatory provision is strongly

disfavored. Second, if accepted, EPA's argument would upend the cooperative federalism principles that Congress wrote into the Act, giving States broad discretion to structure their permitting programs as they deem appropriate. Missouri made the choice—one EPA approved—to include a threshold "Applicability" provision that turned on increases in potential emissions.

To give effect to the framework Congress created requiring cooperative federalism, to respect the regulatory choices Missouri made under that framework, and to avoid penalizing the regulated community for relying on Missouri's choices, this Court need only apply the Permit Rule as it is written.

A. Ameren's Interpretation Harmonizes All Provisions.

Ameren's interpretation of the Permit Rule is simple. One starts at the beginning—Section (1)—and first determines whether the rule is "Applicable" under subsection (1)(C), the Applicability Provision. (Am.Op.Br.10-12.)[2] The Applicability Provision tells the reader how to navigate the Permit Rule. Applicability is triggered if the project at issue is a "modification," because it increases an installation's potential emissions. 10 C.S.R. §§10-6.060(1)(C), 10-

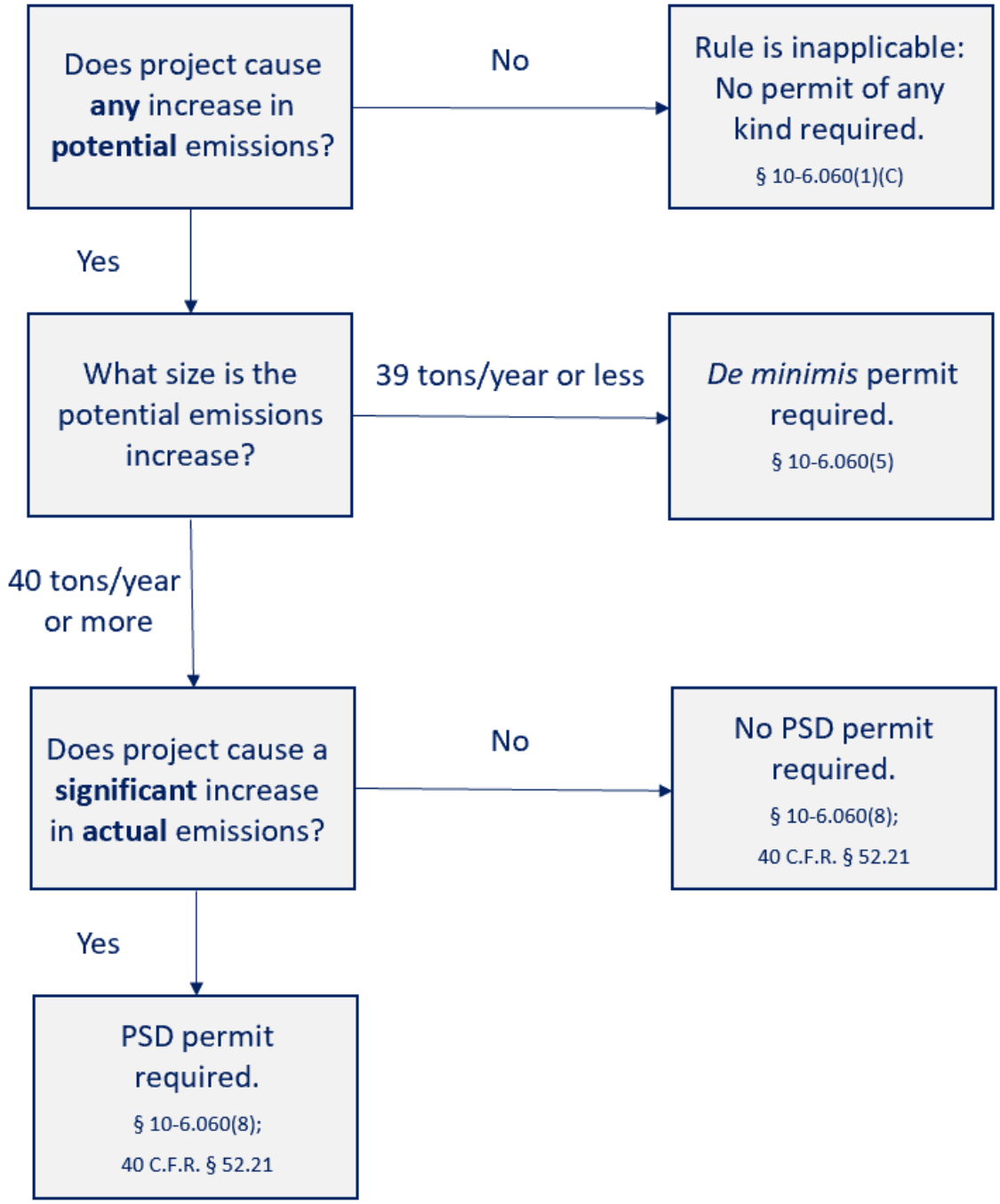
[2] Ameren's opening brief is cited Am.Op.Br.[PageNumber]. EPA's and Sierra Club's briefs are cited EPA.Br.[PageNumber] and SC.Br.[PageNumber].

6.020(2)(M)(10). If the rule is inapplicable, the analysis is complete, and no permit is required.[3]

If Section (1) determines the Permit Rule is applicable, then one moves on to the other sections to determine which *kind* of permit is necessary. The next issue is the size of the increase in potential emissions. Even small increases in potential emissions require a Section (5) "*de minimis*" permit. 10 C.S.R. §§10-6.020(3)(A), 10-6.060(5). After that, actual emissions are considered: if a modification occurs in an attainment area, and causes a significant increase in actual emissions, a Section (8) PSD permit is required.

Missouri's Permit Rule thus creates the following multi-step approach to determining applicability.

[3] MDNR's Permit Manual (SC.Br.32 n.3) confirms that the Permit Rule uses a two-step applicability test. First, the project's impact on potential emissions (shown as "$PTE_{Project}$") is assessed. (*See* p.5) If the $PTE_{Project}$ increases above *de minimis* levels and the operator does not wish to take a permit or "net out" of review, it proceeds to the second step to assess PSD. (*See* p.6.)



Ameren's interpretation gives effect to all the rule's provisions—the Applicability Provision, the definition of "modification," and Section (8)'s

definition of "major modification," which looks to increases in actual emissions under 40 C.F.R. §52.21. (Am.Op.Br.36-38.) The same project can increase both potential emissions (and be a modification) and actual emissions (and be a major modification). EPA does not deny this.

The Permit Rule is unambiguous, and no party argues otherwise. Nor does EPA seek deference or defend the District Court's reliance on deference. "The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (plurality).

There is no dispute that the Projects were not modifications. If the SIP is applied as written, no permits were required as a matter of law.

B. EPA's Interpretation of the Text Is Untenable.

EPA interprets the Permit Rule to require assessing PSD by starting the analysis at Section (8)—which EPA says "stands alone." That is the disagreement between the parties: Ameren starts with Section (1) and then assesses whether additional requirements apply, and EPA starts and ends with Section (8). There are several problems with EPA's interpretation.

First and foremost, EPA does not construe Section (1), which contains the Applicability Provision, and is the foundation of Ameren's argument. EPA fails to address it. An interpretation that renders part of a regulation superfluous is strongly disfavored, and nullifying an applicability provision is "entirely unacceptable." *Nat.*

Res. Def. Council, Inc. v. E.P.A., 822 F.2d 104, 113 (D.C. Cir. 1987). Missouri commonly uses applicability provisions to delineate a regulation's scope so that a regulated party understands its obligations. (Am.Op.Br.37.) EPA approved Missouri's choice to make this Applicability Provision part of the Permit Rule. "The Clean Air Act does not authorize the imposition of sanctions for conduct that complies with a State Implementation Plan that the EPA has approved." *U.S. v. Cinergy,* 623 F.3d 455, 458 (7th Cir. 2010).

EPA also fails to address Missouri's deletion of the words "major modification" from the Applicability Provision. (Am.Op.Br.41.) When Missouri made that change in 1996, EPA recognized that the Applicability Provision—not Section (8)—imposed the critical permitting requirement: "Under the applicability provisions of 10 C.S.R. 10-6.060(1)(C), no owner or operator shall commence construction or modification of any installation [unless it] first obtains a permit." 61 Fed. Reg. 7,714, 7,715 (Feb. 29, 1996). EPA also specifically found that the Applicability Provision was "at least as stringent as Federal law[.]" *Id*.

The Applicability Provision has not changed since 1996. Even in this litigation—at least until Ameren moved for summary judgment—EPA recognized that the Applicability Provision—not Section (8)—determined permit applicability for the Projects at issue here. Opposing Ameren's earlier motion to dismiss, EPA stated: "the Missouri SIP identifies *precisely* the kind of permit that is required … a

construction permit [under] 10 C.S.R. 10-6.060(1)(C)." (SUPP.APP1900 (emphasis added).)

This Court "prefers the construction that enables [it] to give effect, if possible, to every clause and word of" the law. *Sanzone v. Mercy Health*, 954 F.3d 1031, 1044 (8th Cir. 2020), *as corrected* (Apr. 9, 2020) (internal quotations omitted). Ameren gives effect to the entire Permit Rule, harmonizing all provisions. EPA nullifies entire sections and the Rule's purpose.

The purpose of the Permit Rule is to "establish requirements to be met prior to … modification"—*not* major modification. 10 C.S.R. §10-6.060 (preamble). While EPA argues against potential emissions-focused permitting, Missouri chose such an approach, making its Permit Rule applicable even to *de minimis* increases in potential emissions. §10-6.060(5). Yet under EPA's reading—which begins at Section (8)—no permit is necessary for an increase in potential emissions. EPA cannot overrule Missouri's choices through a litigation argument. *Advanta USA, Inc. v. Chao*, 350 F.3d 726, 729 (8th Cir. 2003) (rejecting agency's interpretation that was contrary to preamble).

EPA ignores language in other sections of the Permit Rule that confirms Ameren's interpretation. In Section (1)(B), for example, the Rule states it only applies to installations that have the potential to emit more than *de minimis* levels. §10-6.060(1)(B). But it goes on:

> This rule shall also apply to changes at installations that emit less than the *de minimis* levels where the construction or modification itself would be subject to section (6), (7), (8) or (9) of this rule.

Id. This means that if a *de minimis* installation performs a Section (1) modification that is also a Section (8) major modification, the Permit Rule applies, even though it otherwise would not. Section 1(C) contains similar passages (referring to permit waivers) that also point the reader to Sections (7)-(9).

The *location* of these passages—in Section (1)—is important. If EPA were right that subsection (8) "stands alone," then these passages in Section (1) would not be necessary, because an operator with a possible PSD project would never look to Section (1). There would be no need for Section (1) to point to Section (8). These passages confirm Missouri wanted operators to start with Section (1).

Similarly, Section (1)(D) of the Permit Rule exempts from permitting certain modifications, delineated under a separate Permit Exemptions Rule, §10-6.061, but that rule specifies that it does not apply to "modifications" that are also major modifications under Section (8) of the Permit Rule. 10 C.S.R. §10-6.061(1)(B). If Section (8) "stood alone," there would be no need for §10-6.061(1)(B).

Regulations must be interpreted holistically. *Northshore Min. Co. v. Sec'y of Labor*, 709 F.3d 706, 709-10 (8th Cir. 2013). EPA focuses solely on Section (8)'s incorporation of part of the federal PSD regulations. (EPA.Br.23-29.) But incorporating *part* of the federal regulations into *part* of Missouri's Permit Rule does

not nullify the rest of the Permit Rule—certainly not the provision that determines "Applicability."

EPA says the "specific" actual emissions test should trump the "general" potential emissions test, but that canon applies only when provisions conflict. *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002). Ameren's interpretation shows Sections (1) and (8) coexist harmoniously. EPA establishes no conflict.

Section (8)'s incorporation of some of the federal PSD regulations does not affect any other section of the Permit Rule. Generally, the "scope of a subpart is limited to that subpart." *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1105–06 (11th Cir. 2015); *see* Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 156 (2012). EPA offers no evidence Missouri intended Section (8)'s incorporation to nullify Section (1); to the contrary, Missouri "intentionally retained" existing provisions in "the interest of regulatory certainty." (Am.Op.Br.42.) Missouri is a "SIP-approved" State that developed its own regulations structured differently from federal PSD regulations, yet EPA's interpretation treats Missouri as if it were instead a State "delegated" authority by EPA to implement the federal PSD regulations directly, without change. (Am.Op.Br.10.) Missouri has shown elsewhere that, when it wants an incorporated federal regulation to serve *as the rule*, it does so unambiguously in the applicability

provision. Missouri's New Source Performance Standards ("NSPS") rule's applicability provision consists of a single sentence incorporating the federal NSPS rule. *See* 10 C.S.R. §10-6.070(1). This contrasts starkly with Missouri's Permit Rule.

EPA's various arguments ultimately reduce to one: in a PSD case, the Applicability Provision can be ignored. But EPA offers no valid reason why its interpretation should prevail over the plain language of the Permit Rule and the purpose of an applicability provision.

C. EPA Ignores Cooperative Federalism Principles.

Another fundamental flaw pervades all of EPA's arguments on the SIP issue: they ignore the Clean Air Act's cooperative federalism framework, and Congress's grant of regulatory authority to the States. (Am.Op.Br.9-10, 38-40.) EPA seeks to override Congress's design.

The Act empowered the States to *make their own rules*, giving States "broad discretion" to design their own implementation plans. *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1011-12 (8th Cir. 2010). Missouri exercised that "broad discretion" to write its own SIP, customized to address its own local needs and conditions, with a comprehensive permitting program, which broadly covers many types of permits, not just PSD permits. Missouri designed its Permit Rule with a potential emissions "modification" threshold that differs from current federal

regulations. But cooperative federalism means that Missouri's SIP need *not* mirror federal regulations any more than it need mirror other states' SIPs. The purpose of cooperative federalism is to allow and encourage such variation. And EPA has "no authority to question the wisdom of a State's choices." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). Missouri's SIP need only satisfy the statutory requirements, and it undeniably does.

EPA ignores these principles, dismissing Missouri's Applicability Provision and definition of "modification" as "general" provisions. That label is both artificial and irrelevant. These provisions are not extraneous; they are part of the SIP. Just as Missouri operators must follow all SIP provisions, they also are entitled to rely on all SIP provisions to define their obligations.

D. Missouri's SIP Complies with the Clean Air Act.

EPA claims it has "repeatedly rejected" a potential emissions test and PSD has always turned on actual emissions. (EPA.Br.34.) Not so. EPA just recently proposed a rule— the Affordable Clean Energy ("ACE") Rule, still under review— that would make federal PSD regulations turn on "maximum achievable hourly emissions," much like Missouri's Permit Rule turns on "maximum design capacity" in the definition of "potential emissions." *Compare* 83 Fed. Reg. 44,746, 44,777-82

(Aug. 31, 2018) *with* 10 C.S.R. §10-6.020(2)(P)(19). EPA's proposed ACE Rule follows two similar earlier proposals EPA made in 2005 and 2007.[4]

EPA's argument against a potential emissions approach here relies exclusively on inapposite cases involving the federal version of the regulations. (EPA.Br.29-34.) But, as discussed above, States' plans need not mirror federal regulations. Recognizing this, in addition to Indiana (Am.Op.Br.35-36), EPA has approved potential emissions tests in three other SIPs. Pennsylvania's SIP in effect from 1997 through 2011, for example, used "a potential-to-potential test to determine NSR applicability" and was approved by EPA. 77 Fed. Reg. 2,937, 2,940 (Jan. 20, 2012).[5]

If a potential emissions test violated the Act, then EPA could not have approved the SIPs of Missouri and these other four states. Yet it did.

Ignoring its own proposals and approvals, EPA relies heavily on *Environmental Defense v. Duke Energy Corporation*, 549 U.S. 561 (2007) ("*Duke*"). There, the Supreme Court was asked whether the 1980 version of the federal regulations contained a threshold potential emissions test requiring that "before a

[4] 70 Fed. Reg. 61,081, 61,088-91 (Oct. 20, 2005) (same); 72 Fed. Reg. 26,202, 26,205-08, 26,213-20 (May 8, 2007) (same).

[5] *See also* 68 Fed. Reg. 2,722, 2,724 (Jan. 21, 2003) (Connecticut SIP "uses the potential-to-potential test"); 69 Fed. Reg. 31,056, 31,061 (June 2, 2004) (same; Clark County, Nevada).

project can become a 'major modification' under the PSD regulations, it must meet the definition of 'modification' under the NSPS regulations." *Id.* at 581 n.8. The NSPS regulations, another Clean Air Act program, use a maximum hourly test—*i.e.*, a potential emissions test. The Supreme Court held that, as promulgated, the 1980 regulations did not impose a potential emissions test. *Id.* at 577-78.

The *Duke* Court did not consider the question presented here: whether the Act *allows* applicability determined by assessing potential emissions first and actual emissions second. EPA has answered that question through its own actions—by proposing rules and approving SIPs with that very sequence. EPA recently stated in its rule proposal that even though the *Duke* Court "had no occasion to address whether the Clean Air Act allows, rather than directs, EPA to define 'modification' the same way [as a maximum-capacity test] in both the NSPS and NSR programs, *EPA believes that the answer is clearly yes*." 83 Fed. Reg. at 44,749 (emphasis added).[6]

[6] The preamble to the ACE Rule proposal discusses the "set to subset" issue, disposing of EPA's litigation argument here. *Compare* 83 Fed. Reg. at 44,749 *with* EPA.Br.31. *Duke* also is inapposite because it compared the 1980 version of the federal PSD and NSPS regulations, whereas the comparison here is between the 2006 versions of Missouri's SIP and the federal PSD regulations. Missouri's Permit Rule governs "installations" that emit more than 40 tons of SO_2 per year. §10-6.060(1)(B). The federal regulations govern "major stationary sources" that emit more than 100 tons of SO_2 per year. 40 C.F.R. §52.21(b)(1)(i). Missouri's SIP defines "modification"; the federal PSD regulations do not.

EPA cannot reconcile its argument in this appeal, namely that the Act "unambiguously" defines "modification" to mean "increases in actual emissions," (EPA.Br.29-30 (citing *New York v. EPA*, 413 F.3d 3, 40 (2002)), with its interpretation in the recent rule proposal. Nor can EPA reconcile its interpretations of the Act in the *Duke* litigation with its arguments in this case. EPA told the Fourth Circuit in *Duke* that "Congress has not spoken to the precise meaning of the term 'modification' for PSD purposes"—the opposite of what it tells this Court.[7] EPA told the Supreme Court that the quoted passage from *New York*—on which it hangs its argument here—was "erroneous[]," and that the Act allowed EPA to define "modification" as referring to increases in *either* potential or actual emissions.[8]

This Court has properly rejected EPA's attempts to take litigation positions that contradict its regulatory positions. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 864-65 (8th Cir. 2013). The Court should hold EPA to the regulatory positions it has taken in the Federal Register and before the Supreme Court and the Fourth Circuit, positions consistent with the letter and objectives of the Act.

While *Duke* did not consider the question at issue here—whether a *SIP* may use a potential emissions test for applicability—in the only case that has addressed

[7] 2004 U.S.4thCir.Briefs LEXIS 137, *46-47.

[8] 2006 U.S.S.Ct.Briefs LEXIS 494,*86 n.18.

that question, the Seventh Circuit answered affirmatively. *Cinergy,* 623 F.3d at 458. EPA tries to distinguish *Cinergy*, arguing Indiana's SIP was promulgated before a ruling that the major modification test must focus on actual emissions. (EPA.Br.32.) But Missouri's Permit Rule *does* use actual emissions to assess major modifications; it just first requires a modification that increases potential emissions.

E. EPA's Interpretation Would Constitute Unfair Surprise.

Allowing EPA's new interpretation of Missouri's Permit Rule would constitute unfair surprise because, until 2015, EPA interpreted the rule the same as Ameren. (Am.Op.Br.9-10.) In *Cinergy*, the Seventh Circuit rejected EPA's attempt to rewrite Indiana's SIP through litigation. (Am.Op.Br.42-43.) And EPA's argument that Ameren had notice after *New York* (EPA.Br.35 n.4) is incorrect: *New York* pertained to the federal rules, which by definition cannot provide notice regarding Missouri's SIP.

II. The District Court Applied Improper Liability Standards.

The District Court misinterpreted Missouri's SIP and improperly evaluated applicability under the federal PSD regulations at 40 C.F.R. §52.21. And then, in applying those regulations, EPA persuaded the District Court to shift the burden of proof and apply improper liability standards.

A. EPA Bore the Burden to Apply the Causation Provision.

To establish liability, the Clean Air Act required a showing that the Projects caused an emissions increase. EPA concedes that it bore the burden to prove

causation. The federal regulations carry out the statutory causation requirement through the "causation provision," 40 C.F.R. §52.21(b)(41)(ii)(c). (Am.Op.Br.46-47.) In EPA's words, "what the rule provides is to exclude, subtract from the projection of future emissions … demand growth[.]" (ADD3004; APP1893.) This step is mandatory—one "*shall* exclude" such emissions. 40 C.F.R. §52.21(b)(41)(ii)(c) (emphasis added); *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016).

EPA does not deny that it failed to perform this step. (*See* Am.Op.Br.25-28.) EPA instead recasts the causation provision, as an "exclusion" on which Ameren bore the burden. EPA is wrong. The required "procedure for calculating" emissions under the regulations, 40 C.F.R. §52.21(a)(2)(iv)(b), cannot be completed *without* accounting for and subtracting unrelated emissions, including those due to demand growth. One of the calculation's integral, *mandatory* steps, promulgated to carry out a statutory requirement, is not an optional "exclusion." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (interpretation should harmonize the statute and regulation).

To be sure, the causation provision states that one "shall exclude" unrelated emissions such as those due to demand growth. But use of the verb "exclude" does not transform the causation provision into a regulatory exclusion. True regulatory exclusions categorically exclude certain conduct or actors from the regulation's

coverage. The federal regulations specify numerous exemptions—the causation provision is not among them. 40 C.F.R. §52.21(i). EPA cites cases addressing categorical exclusions under other statutes, but none purported to convert a core requirement into an exclusion.

EPA, not Ameren, bore the burden to apply the causation provision.

B. The District Court Applied Improper Causation Standards.

The federal PSD regulations require a specific procedure for determining causation—forecasting all emissions, then subtracting unrelated emissions. (Am.Op.Br.14-18.) As to *which* emissions are unrelated, EPA told electric utilities in 1992 that, given the unique nature of their industry, emissions from *system-wide* demand growth are unrelated emissions under the causation provision. (Am.Op.Br.15-16.) EPA reaffirmed in 2002 that utilities could continue applying the causation provisions as they had since 1992. 67 Fed. Reg. 80,186, 80,203 (Dec. 31, 2002). EPA testified in 2006 that this remains the correct standard. (Am.Op.Br.16.) EPA does not dispute any of this. (EPA.Br.41-43.)[9]

EPA never altered or revoked the system-wide demand standard it first announced for electric utilities in the Federal Register in 1992 and reaffirmed over

[9] EPA claims the system-wide demand standard allows operators to "ignore" PSD regulations and tries to pass it off as "Ameren's argument" (EPA.Br.43), but EPA does not dispute Ameren's citations showing this is EPA's standard. (Am.Op.Br.14-17.)

the years since. Yet the District Court accepted EPA's litigation argument discarding the standard in this case. That rejection of a longstanding standard requires reversal of the liability ruling.

Moreover, the District Court changed the rules by imposing a new "peak hours" causation standard.[10] EPA never promulgated such a standard—it was created for this case. (*Cf.* EPA.Br.41-43.) "An enforcement action must [] rely on a legislative rule, which (to be valid) must go through notice and comment." *Kisor*, 139 S. Ct. at 2420 (plurality). The "peak hours" standard did not. It *is not the law*, and therefore cannot determine liability. EPA's enforcement counsel cannot unfairly surprise operators with new legal standards after the conduct at issue has occurred. *Children's Health Care v. Centers for Medicare & Medicaid Servs.*, 900 F.3d 1022, 1026 (8th Cir. 2018) (agency cannot "announce a new policy out of whole cloth.").

Applying these new, improper standards changed the course of the liability trial, as the District Court disregarded EPA's admissions and unrebutted evidence of

[10] The District Court imposed several new causation standards, all of which constituted unfair surprise. (Am.Op.Br.47-48.) EPA's Response adds another new test for which it provides no legal support: measuring demand by "utilization factor" (EPA.Br.11). EPA's response only attempts to justify the "peak hours" standard; we limit our reply accordingly.

demand growth, and adopted proposed findings and conclusions favorable to EPA.[11] EPA conceded that system-wide demand grew more than generation and that Rush Island had sufficient baseline capacity to accommodate the demand growth. (Am.Op.Br.21-22.) MISO controls generation, meaning system-wide growth requires more generation from Rush Island. (Am.Op.Br.48.) Under existing standards, this undisputed evidence required judgment for Ameren.

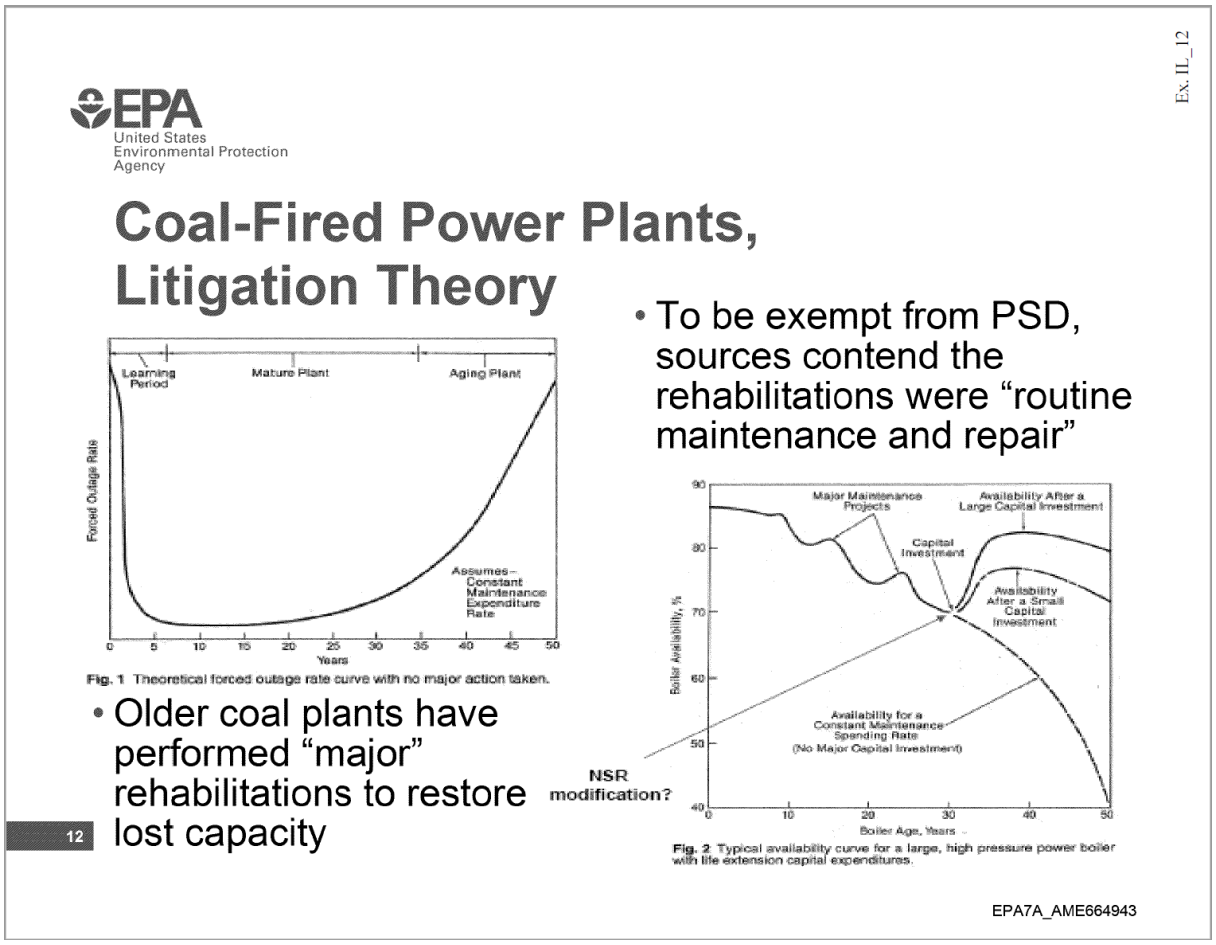
In short, EPA's case did not fit the facts under existing law, so it persuaded the District Court to change the law. Because these legal errors skewed the facts, it is necessary to place those errors in context by addressing EPA's characterizations of the facts.

First, EPA chose not to offer evidence under the causation provision. None of EPA's experts assessed either demand growth or the units' baseline capacity to accommodate additional generation and associated emissions—the two parts of the causation provision. (Am.Op.Br.46-47.) EPA does not dispute this.

Second, EPA's decades-long power plant enforcement initiative relied on a litigation theory that targeted plants with low pre-project availability (in the 70%

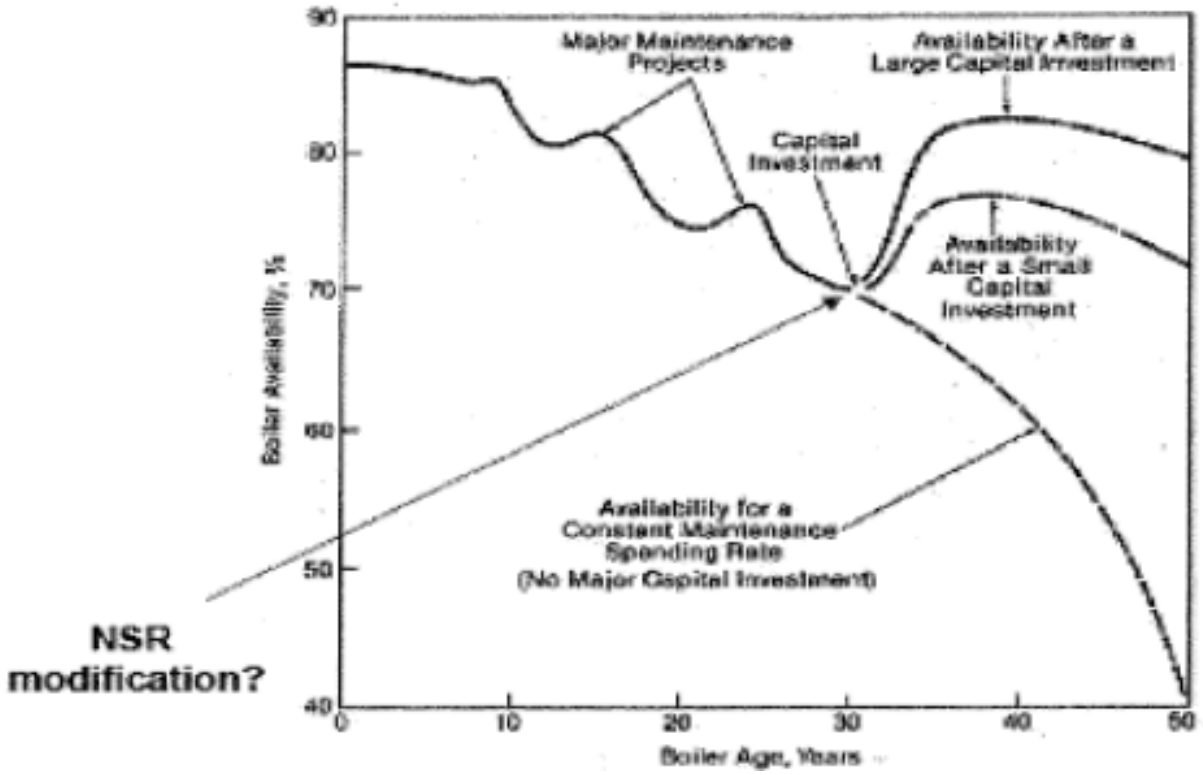
[11] The liability findings and conclusions mirror those proposed by EPA, which, by adopting incorrect legal standards, largely ignored Ameren's evidence and arguments.

range) that perform "large capital investments," which increase availability to the 80% or higher range.



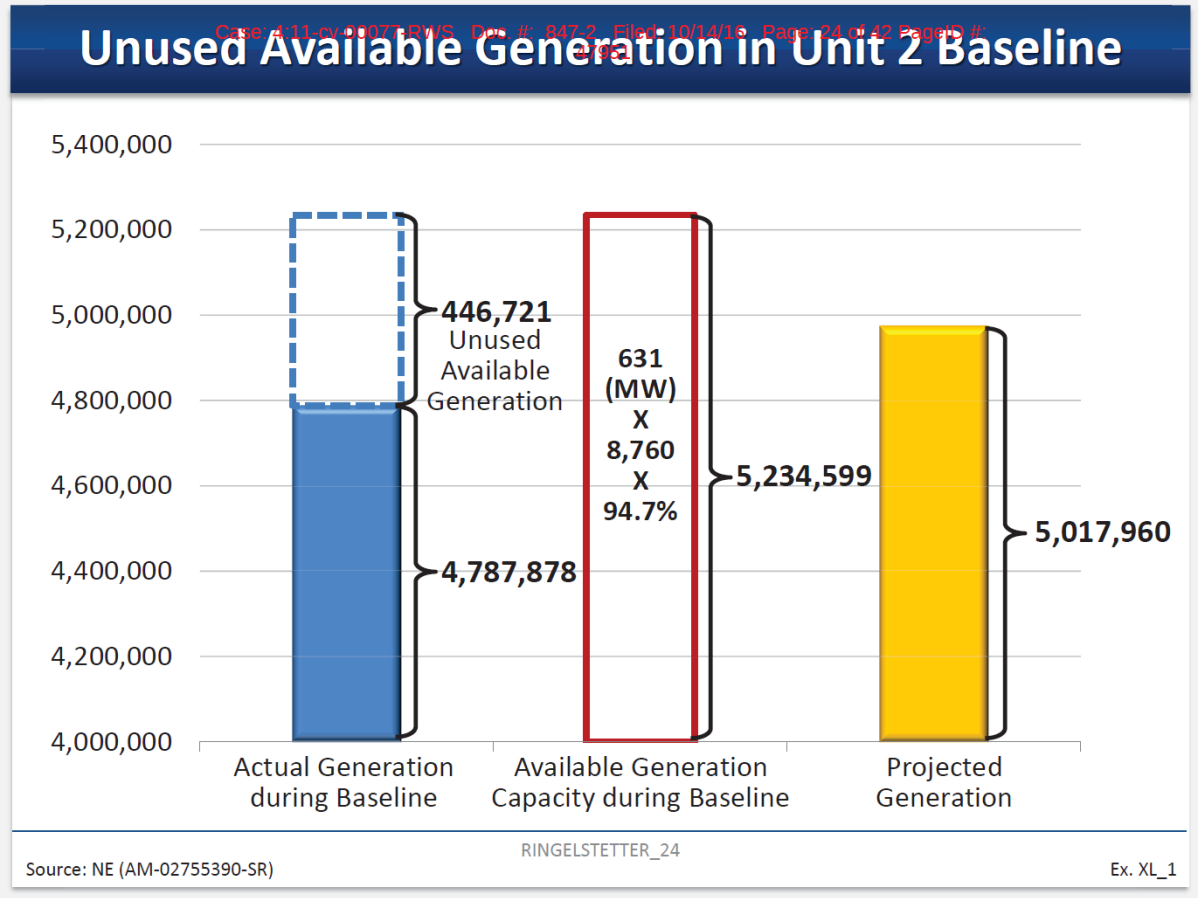
(SUPP.APP3301-3302)

EPA's theory posited that such projects "enabled" more generation by increasing the units' capacity to generate (by making them available more often).



That theory does not fit Rush Island. Both units achieved record levels of availability of 94-95% *before* the Projects, meaning all of the units' malfunctions and breakdowns, taken together, caused downtime of only 5% to 6%. (Am.Op.Br.6.) Rush Island, with availability in the mid-90% range, would not even appear on EPA's Litigation Theory graph, which tops out at 90%.

This record availability also meant the Rush Island units had considerable unused capacity during the baseline. (Am.Op.Br.6-7, 22-23, 54-55.) Unit 2's unused capacity, illustrated below, equated to over 30 days'-worth of additional generation the unit could have produced if called upon.



EPA's assertion that the units were "maxed out" is just unsupported argument. EPA does not dispute the *data* showing the units had far more unused available capacity than necessary to accommodate forecasted generation. Likewise, EPA waves away its concession that demand grew by 4.5% at Unit 1 and 9% at Unit 2, describing demand as "relatively constant." (*Compare* EPA.Br.11 *with* Am.Op.Br.20-22.) But EPA does not deny forecasted generation increases were smaller. (Am.Op.Br.21-22.) Together, these undisputed facts satisfied both parts of the causation provision.

Unable to rebut these facts, EPA had to change what causation meant under the law. Thus, at summary judgment oral argument, EPA introduced a "restaurant" theory of causation, arguing that just as adding seats at a restaurant might "enable" a restaurant to serve more diners, adding more capacity at a unit might "enable" more generation during "peak hours." (SUPP.APP2653-2659.) Conversely, EPA argued it was legally irrelevant that the units had capacity in "off-peak hours," akin to when restaurants have "open tables between rushes." (EPA.Br.42 n.5.)

EPA says "the text requires" this "peak hours" standard, (EPA.Br.42), but cites only the District Court's summary judgment opinion, which in turn relied only on EPA's summary judgment oral argument. (EPA.Br.42 n.5.) The citation is circular. The regulations have a provision for determining causation—this is not it.

The "peak hours" standard is contrary to the regulations' plain language, which requires accounting for all emissions, not just those during "peak hours." "PSD is concerned with changes in *total annual emissions*, expressed in tons per year." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 915 (7th Cir. 1990) (emphasis added); *see* 40 C.F.R. §§52.21(a)(ii)(4)(c), (b)(2)(i), (b)(41), (b)(48) (all discussing annual rates, expressed in tons per year). (Am.Op.Br.14-18.) In terms of capacity, the causation provision looks to the baseline's entire "consecutive 24-

month period" not "peak hours." 40 C.F.R. §52.21(b)(41)(ii)(c).[12] Nor did EPA ever suggest—before this case—that "baseload" plants cannot exclude demand growth.

The District Court's errors snowballed, creating significant prejudice. Shifting the causation burden to Ameren meant EPA never had to show the Projects actually affected the units' generation during "peak hours." EPA cites no trial evidence. (EPA.Br.42 n.5.) Applying an unwritten "reasonableness" standard (discussed below) meant EPA was not required to seek deference—the "peak hours" standard simply became the law. And by avoiding rulemaking, EPA was not required to define the standard. EPA never even identified which hours are "peak hours." While the baseline period is two years, EPA never said which year's "peak hours" should be compared to the future period. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (warning of "vague and open-ended regulations" agencies can "later interpret as they see fit").

In one fell swoop, EPA discarded the existing causation provision it could not satisfy; imposed new standards it never had to define; absolved itself of the burden of satisfying those standards; avoided facts it could not overcome; and persuaded the

[12] The "peak hours" standard assumes newly-created capacity would be used, but existing capacity would not. This confiscates existing capacity, contrary to EPA's long-standing interpretation that a source may "emit up to its current maximum capacity without triggering" PSD. 71 Fed. Reg. 54,235, 54,237 (Sept. 14, 2006).

District Court to find Ameren had not satisfied the new standards. In short, EPA crafted causation standards to ensure success under its litigation theory. Its theory was that the Projects would add more capacity, so it created standards that—as a matter of law—rendered meaningless Rush Island's *existing* capacity. Any demand growth, EPA was then free to argue, was irrelevant.

These legal errors require reversal and, because no factual disputes warrant a remand, entry of judgment in Ameren's favor.

C. The "Reasonable Power Plant Operator" Standard Was Improper.

The federal regulations specify a particular "procedure for calculating" emissions. The regulations do not require any analysis of what an operator "should have expected" in the past, and nowhere impose a "reasonableness" standard. The District Court superimposed those standards without any supporting authority, and EPA cites none on appeal. Moreover, the District Court did not use the "reasonable power plant operator" ("RPPO") standard to evaluate Ameren's conduct against the *PSD regulations,* but instead against *EPA's experts' proprietary methods*—methods EPA had never promulgated and the regulations did not require, as EPA admitted. This created intractable fair notice problems. (Am.Op.Br.49-56.)

This standard does not lead to a definitive answer. As EPA's experts conceded, there can be more than one reasonable conclusion, so an RPPO standard cannot eliminate the possibility that Ameren's conclusion, though different from

EPA's experts', is also reasonable. (Am.Op.Br.25-28, 53-54.) In short, the RPPO standard is not the law, Ameren's conduct cannot be judged under it, and the District Court committed reversible error applying it.

EPA offers no response to these points, except to assert it would be "impossible" to assess PSD without an RPPO standard. (EPA.Br.46.) This just begs the question how EPA could have promulgated regulations it believes are impossible to apply. If that is true, then EPA should engage in future rulemaking. But it cannot be the standard here.

D. EPA Never Disclosed Expert Opinions on Actual Emissions Causation.

Prior to trial, EPA's experts never disclosed opinions that emissions actually occurring *after* the Projects were *caused by* them. (Am.Op.Br.56-57.) EPA says its experts testified the increases "actually materialized." (EPA.Br.37.) But that is meaningless to the causation issue: the experts made their "projections" *after* the emissions occurred, already knowing what they were. This is only an observation that emissions *were* higher; it does not explain why.

EPA also suggests the District Court determined causation without relying on EPA's expert testimony. (EPA.Br.38.) But EPA cites only increases in availability or capability—not *emissions*. Outside of this case, EPA recognizes that availability naturally varies by 4% or more from year to year. 72 Fed. Reg. 26,202, 26,209 (May

8, 2007). And adding incremental capacity does not establish causation under the regulations, which give a source credit for baseline capacity.

These undisclosed opinions were the only evidence on which the District Court based its actual emissions causation finding.

III. The Unprecedented Labadie Injunction Is Legally Flawed.

The injunction mandating installation of expensive SO_2 control equipment at Labadie—a *non-violating* plant—is the first of its kind in the country. (Am.Op.Br.57-66.) EPA asks this Court to make new law and bad policy, encouraging enforcement targeted against one source only to pursue remedies against other sources that comply with the law. The Act does not sanction such misdirected enforcement. Nor does PSD case law, which EPA's response either ignores or minimizes. EPA's argument that this is "remediation" fails under this Court's decisions finding post-project operation lawful. Congress did not prohibit post-project operation; so such operation need not and cannot be remediated. An injunction purporting to do so is a penalty.

EPA attempts to avoid the core problems with the Labadie injunction, including this Court's *Otter Tail* decision, which rejected EPA's "excess emissions" theory underpinning the injunction. 615 F.3d at 1017-18. EPA refuses to accept this Court's interpretation of the relevant statutory provisions, an interpretation shared by all Courts of Appeals that have addressed the issue.

Quoting *Otter Tail*, EPA maintains that "PSD permits … regulate operation." (EPA.Br.55-56.) But its selective quotation (underlined) omits this Court's rejection of EPA's argument:

> Sierra Club and EPA … argue that the [Act] and PSD regulations should be interpreted as establishing operational duties ….
>
> While it is true that PSD permits establish emission limits and thus regulate operation, *that does not compel the conclusion Sierra Club [and EPA] reach[]*. 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.

615 F.3d at 1017 (emphases added).

This Court held that the Act prohibits "only modification of the [plant] without a PSD permit or BACT, not its operation." *Id.* "Excess emissions"—which EPA now also calls "ongoing effects" (EPA.Br.55)—come from post-modification operation, which *Otter Tail* holds is lawful. The Labadie injunction, therefore, stands on a false foundation. EPA characterizes it as "remedial," but neither law nor equity allows "remediation" of lawful conduct. EPA's reliance on courts' equitable authority overlooks the "clear and valid legislative command," identified in *Otter Tail*, that post-project operation is lawful. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

EPA tries to limit *Otter Tail* to circumstances involving accrual of the statute of limitations. (EPA.Br.55-56.) In *Otter Tail*, though, this Court did not hold that post-project operation constitutes a *non-continuing* violation, but rather that it *is not a violation at all*. EPA had urged the Court to apply the continuing violation theory articulated in *Izaak Walton League of America, Inc. v. Kimbell*, 558 F.3d 751 (8th Cir. 2009).[13] The Court declined, choosing instead to interpret the scope of the statute. EPA also ignores this Court's confirmation of *Otter Tail*'s holding in *Nucor Steel*, which did not involve the statute of limitations. *Nucor Steel-Arkansas v. Big River Steel, LLC*, 825 F.3d 444, 450 (8th Cir. 2016).

Second, EPA also tries to sidestep the Supreme Court's *Kokesh* decision, which stated the test for distinguishing penalties from other relief: if the wrong is to the public and the remedy is sought to redress wrongful gain, then the remedy is a penalty. *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1642 (2017). Both elements are met here. (Am.Op.Br.64-66.) EPA does not address this test, much less contest Ameren's application of it. Under *Kokesh*, the Labadie injunction is a penalty.

Attempting to circumvent *Kokesh*, EPA urges a different test—whether the injunction "bears an equitable relationship to the degree and kind of wrong it is intended to remedy." (EPA.Br.49.) But that is the wrong question. EPA addresses

[13] Brief for EPA as Amici Curiae Supporting Appellant at 16-17, *Otter Tail*, No. 09-2862 (8th Cir.), Entry ID 3611777 (Dec. 3, 2009).

the *scope* of an injunction—whether it is appropriately tailored—instead of the *nature* of the injunction—whether it constitutes a penalty. A narrow injunction can nonetheless be penal.

EPA tries to distinguish *Kokesh* by arguing it was not an environmental case. (EPA.Br.53-54.) Nothing in *Kokesh* indicates the Court intended to limit it so, and other jurists have looked to *Kokesh* in PSD cases. *See U.S. v. Luminant Generation Co., L.L.C.,* 905 F.3d 874, 890-91 (5th Cir. 2018) (Elrod, J., concurring in part and dissenting in part) (PSD case, analyzing injunction under *Kokesh*).[14] Courts have frequently found that injunctions in environmental cases constitute penalties. (Am.Op.Br.64-66 (citing cases)). Indeed, no court in any PSD case has ever ordered mandatory injunctive relief at a non-violating plant. The Labadie injunction would be the first. (Am.Op.Br.59-60 (citing cases).)[15]

Third, because the PSD caselaw goes against its position, EPA relies largely on Clean Water Act ("CWA") cases. But the distinct facts of those cases spotlight

[14] After the Fifth Circuit granted *en banc* review, rather than risk adoption of Judge Elrod's reasoning, EPA and Sierra Club took the extraordinary step of voluntarily dismissing their appeal. EPA suggests this is reason to disregard Judge Elrod's opinion (EPA.Br.54 n.9); instead, it is reason to credit her analysis.

[15] EPA cites *Louisiana Generating, L.L.C. v. Illinois Union Ins. Co.*, 831 F.3d 618 (5th Cir. 2016), which involved an insurance coverage dispute over the scope of the policy's definition of "remediation." It did not consider whether an injunction was penal or equitable in nature, and the court in *Luminant* did not deem it relevant.

why the Labadie injunction is not remedial. In each CWA case, the discharge of waste *was* the violation; here, the discharge of post-project emissions is lawful. In the CWA cases, the violations remained ongoing; here, the alleged permitting violations are wholly past. In the CWA cases, the site remediated was the same site where the violation occurred; here, the injunction restrains a different, non-violating plant.

Given these legal flaws, EPA resorts to a scare tactic, claiming that applying *Otter Tail* to invalidate the Labadie injunction would somehow transform the PSD program into "a paper tiger." (EPA.Br.55.) Consider what EPA is really saying: if it cannot use hypothetical "excess emissions" to justify an injunction mandating installation of expensive control equipment at a *non-violating* plant where *no liability* exists, then the PSD program is "a paper tiger." That assertion is absurd on its face.

IV. The District Court Lacked Article III Jurisdiction and Statutory Authority for the Injunctions.

A. The Injunctions Do Not Satisfy Article III.

The fundamental flaw with the ordered injunctions is that there is a mismatch between the violation alleged and the remedies imposed. The violation at issue—construction without a permit—ended long ago and cannot be remedied by forward-looking injunctions. The injunctions instead restrain Rush Island's post-project operations—but those operations are lawful. EPA does not deny it had other valid

remedies, but abandoned them. It cannot obtain impermissible remedies by forgoing valid ones.

EPA bears the burden, but has not carried it. EPA incorrectly asserts that "because the Act authorizes the relief [EPA] sought, there is no Article III issue." (EPA.Br.56.) But statutory standing "has nothing to do with" Article III jurisdiction, and this Court is "careful not to conflate the two." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). EPA does not even mention the Article III elements, and argues only statutory standing. (EPA.Br.56-61.)

The Injunctions Were Justified Solely on Lawful Operations. EPA does not dispute that under the "balance of harms" factor, the District Court justified both injunctions solely on the "excess emissions" from Rush Island's operations. (Am.Op.Br.31-32, 58-64; EPA.Br.50-51.) EPA's response now also concedes Rush Island has not violated any emissions limit. (EPA.Br.61.) These concessions are significant, because they mean both injunctions were justified on—and seek to restrain—lawful conduct, not the construction permit violation alleged. (Am.Op.Br.59-64.) EPA says this is not a "mismatch" (EPA.Br.60-61), but offers neither authority nor evidence supporting that assertion.

The injunctions fail the "injury-in-fact" element, because lawful operations do not cause an injury the Act recognizes. And EPA produced no evidence of injury from the violation it *did* allege—commencing construction without a permit. As this

Court has recognized, a "procedural violation, divorced from any concrete harm" does not satisfy Article III. *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 957-58 (8th Cir. 2019) (citing *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016)).

Injunction to Obtain a Permit at Rush Island. Redressability is also lacking for the injunction requiring Ameren to apply for a permit. EPA does not dispute that permitting is a specific point-in-time requirement, because the permit is "solely a prerequisite" for construction. (Am.Op.Br.70-71; EPA.Br.55-56.) Missouri does not contemplate post-project permitting, and there is no "freestanding duty to obtain a permit." *Otter Tail*, 615 F.3d at 1016. (Am.Op.Br.71.) Because a permit must be obtained "*before* commencing construction," *id.*, the inescapable corollary is that the opportunity to comply with that obligation ends once unpermitted construction begins. An injunction directing Ameren to seek a permit to build something *it long ago finished building* is illogical and futile. *Accord Neighborhood Transportation Network Inc. v. Pena*, 42 F.3d 1169, 1171-72 (8th Cir. 1994).

No Traceability. EPA's brief implies permitting always results in scrubbers. (EPA.Br.56.) That is incorrect—operators may comply in several different ways. EPA and MDNR "often" allow existing sources to "take permit limits on future emissions" to lawfully "avoid major [PSD permitting]." 61 Fed. Reg. 38,250, 38,254, 38,319 (July 23, 1996); *Wisconsin Elec.*, 893 F.2d at 916 (same); MDNR's

Permit Manual at p.5 (operators may take a "voluntary *de minimis* limit"). Operators can lawfully avoid installing BACT controls in other ways, like switching to lower-sulfur fuel. (SUPP.APP2662-2677.) EPA implies many existing coal plants have installed scrubbers to comply with PSD permits, but at trial could not identify a *single one* that did so. (SUPP.APP2670-2672.)

Until the permitting agency—here, MDNR—determines them, permit requirements are "hypothetical," as this Court has recognized. *Otter Tail*, 615 F.3d at 1017. Where the outcome depends on another party's determination, traceability is lacking. *Miller*, 68 F.3d at 935 (no traceability where non-party state of Minnesota made determination).

B. The District Court Lacked Statutory Authority.

The Act authorizes specific remedies—civil penalties for past violations and injunctive relief for ongoing or future violations. EPA may not obtain injunctive relief for the wholly-past permitting violations here. (Am.Op.Br.72.)

EPA points to language authorizing "a civil action for a permanent or temporary injunction, or … a civil penalty …, or both, … [w]henever [a] person *has violated*, or is in violation of" the Act, arguing the past tense "has violated" somehow means an injunction can reach back in time to remedy a wholly past violation. (EPA.Br.57.) But the statutory language does not say that—it merely contemplates both remedies *might* be appropriate if there are both past and ongoing or impending

violations. *See United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 292 n.20, 295 (3d Cir. 2013). Injunctive relief, however, "is inherently prospective and cannot redress past injuries." *Frost v. Sioux City, Iowa*, 920 F.3d 1158, 1161 (8th Cir. 2019). (Am.Op.Br.70-72 (citing cases).) EPA's argument flouts that fundamental principle, and should be rejected.

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

Uniform authority shows the District Court lacked jurisdiction over EPA's Title V claims. (Am.Op.Br.73 (citing cases).) So EPA has pivoted from its prior position, now claiming Ameren violated an express permit term regarding "major modifications." (*Compare* EPA.Br.61 *with* APP1157-1161; SUPP.APP1905-1906; & SUPP.APP1910-1911.) EPA's pivot narrows its Title V claims to overlap completely with its PSD claims—now there is no difference between these claims, and they fail for the same reasons.

Moreover, EPA's narrowed position misreads the Title V permit. The permit does not prohibit major modifications. Rather, it simply states that Missouri's Permit Rule applies to Rush Island and directs readers to "[c]onsult the appropriate sections in" Missouri's SIP "for the full text" of the rule's "applicable requirements." (SUPP.APP1922.) Title V permits generally do not impose new requirements, *Otter Tail*, 615 F.3d at 1012, and Rush Island's did not do so here.

CONCLUSION

The judgment of the District Court should be reversed, and judgment entered in Ameren's favor.

Dated: May 21, 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 May 7, 2020 Order, because this brief contains 7,703 words, 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 pt. 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: May 21, 2020

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

I hereby certify that on May 21, 2020, I caused the foregoing Reply Brief of Appellant and the accompanying Supplemental Addendum 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: May 21, 2020

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