NO. 19-3220

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

v.

AMEREN MISSOURI, Defendant-Appellant

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

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Response Brief of Plaintiff-Appellee Sierra Club

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SUMMARY

The District Court correctly determined that Ameren Missouri ("Ameren") undertook a substantial renovation of its Rush Island coal-fired power plant, and that Ameren expected that renovation to significantly increase the plant's pollution. Ameren did not comply with the pollution-control requirements imposed by the Clean Air Act when plant-owners make such modifications. It thereby violated that Act.

The District Court's liability and remedy decisions should be upheld. Missouri's regulations implementing the Clean Air Act expressly adopt the federal regulations applied by the District Court; under those governing regulations the requisite emissions increase is measured by actual—not potential—emissions. The District Court correctly found that, considering the evidence, Ameren's projects resulted in such an increase in Rush Island's emissions. And the District Court's narrowly tailored remedial order is authorized by the Act.

Sierra Club believes that thirty minutes of oral argument per side would be appropriate, in light of the complexity of the underlying caselaw, the number of issues raised by Ameren, and the lengthy factual record supporting the District Court's decisions.

RULE 26.1 DISCLOSURE STATEMENT

Sierra Club has no parent corporation, and no publicly held company has any ownership interest in Sierra Club.

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STATEMENT OF ISSUES

1. Does Missouri's Clean Air Act implementation plan, which expressly adopts the federal regulations defining a "major modification" under the Act's Prevention of Significant Deterioration Program, 42 U.S.C. § 7475, plainly repudiate that federal regulatory definition in favor of a definition that conflicts with federal requirements? (*New York v. EPA,* 413 F.3d 3 (D.C. Cir. 2005); *Envtl. Defense v. Duke Energy Corp.,* 549 U.S. 561 (2007)).

2. Did the District Court abuse its discretion in determining, based upon its assessment of the testimony and evidence presented at trial, that the emissions increases caused by Ameren's modifications of the Rush Island power plant could not be attributed to "demand growth," because the plant units in question could not "have accommodated" those increases prior to the modifications, and because the increases were not "unrelated to the particular project," 40 C.F.R. § 52.21(b)(41)(ii)(c)? (*United States v. DTE Energy Co.,* 845 F.3d 735 (6th Cir. 2017); *New York v. EPA,* 413 F.3d 3).

3. Does the text of the Clean Air Act, 42 U.S.C. § 7413(b), the United States' waiver of civil penalties, or Article III of the Constitution

preclude the District Court from issuing a narrowly tailored injunction requiring Ameren to remedy the damage caused by its violation of the Clean Air Act, in part by reducing pollution from sources beyond the plant at which the violation occurred? (*Franklin v. Gwinnett Cty. Pub. Sch.,* 503 U.S. 60 (1992); *Tull v. United States,* 481 U.S. 412 (1987); *Wieland v. U.S. Dep't of Health & Human Servs.*, 793 F.3d 949 (8th Cir. 2015); 42 U.S.C. § 7470(1)).

STATEMENT OF THE CASE

A. Legal Framework

The Clean Air Act "establishes a comprehensive regulatory scheme designed to promote public health by enhancing the nation's air quality." *Envtl. Defense v. EPA,* 369 F.3d 193, 196 (2d Cir. 2004). To that end, the Act requires the U.S. Environmental Protection Agency ("EPA") to establish national ambient air quality standards ("NAAQS") at a level requisite to protect public health for a variety of air pollutants, including sulfur dioxide ("SO_2"). "Congress repeatedly emphasized that" these standards "alone were insufficient to protect public health and welfare." *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1446-47 (9th Cir. 1984). For that reason, the Act's Prevention of

Significant Deterioration program imposes a series of pollution-control measures within areas that have attained the Act's national ambient air-quality standards. *See Ala. Power Co. v. Costle,* 636 F.2d 323, 347-52 (D.C. Cir. 1979) (describing history of program).

1. New Source Review

The Prevention of Significant Deterioration program primarily operates through its New Source Review ("NSR") provisions, which require large sources of air pollution, prior to their construction or modification, to meet "certain preconditions" designed to protect air quality. *Sierra Club v. Otter Tail Power Co.,* 615 F.3d 1008, 1011 (8th Cir. 2010); 42 U.S.C. § 7475(a). These preconditions include an assurance that the pollution produced by the source will not "cause or contribute" to a violation of any air quality standard, as well as installation of the "best available control technology" ("BACT") to reduce the source's pollution. 42 U.S.C. §§ 7475(a)(3)-(8) (these requirements are described herein as "PSD").

The Act defines a "major modification" that will trigger a source's PSD obligations in a fashion reflecting Congress' desire, when it enacted the Prevention of Significant Deterioration program in 1977, to

"'grandfather' existing industries," but to ensure "that this [does not] constitute a perpetual immunity" from the program's requirements. *Ala. Power Co.,* 636 F.2d at 400. Consequently, "[i]f these plants increase pollution, they will generally need a permit," unless the "increases are de minimis," or "offset by contemporaneous decreases of pollutants." *Id.* More precisely, EPA's regulatory definition of a "major modification" requiring compliance with PSD includes "two separate components": *first*, a "physical change in or change in the method of operation of a major stationary source," that, *second*, "would result in a significant net emissions increase of any pollutant subject to regulation under the Act." *Envtl. Defense v. Duke Energy Corp.,* 549 U.S. 561, 578-79 (2007).

2. An "Emissions Increase" Triggering PSD

EPA's regulatory definition of a "major modification" clarifies its second component—the "emissions increase" resulting from the project—in two salient respects.

First, such an increase is measured by an "actual-to-projected-actual" test. 40 C.F.R. § 52.21(a)(2). In other words, an emissions increase occurs when, as a result of the project, the plant's "projected *actual*

post-change emissions" exceeds (by a non-de-minimis level) the plant's "*actual* emissions before the change"—a test that "focuses on net emissions increases measured in tons per year." *New York v. EPA,* 413 F.3d 3, 15-18 (D.C. Cir. 2005) (emphases added) (explaining background).[1] In adopting that actual-to-projected-actual standard, EPA expressly rejected a "potential-to-potential" measurement—a test that would instead "focus[] on the hourly rate of emissions" at the modified plant, ignoring the number of hours the plant actually operated in any given year. *Id.* at 17-18.

The practical result of that choice is that how often a plant operates—and, especially, how often it is capable of operating—matters: if "aging produces more frequent breakdowns" at an older power plant, "reduc[ing] a plant's hours of operations and hence its output," those reduced hours will be reflected in the plant's actual, annual emissions. *United States v. Cinergy Corp.,* 458 F.3d 705, 709-10 (7th Cir. 2006) (*Cinergy I*). Consequently, if the owner decides to "renovate the plant,"

[1] If a plant's actual pollution increases in fact, as a result of modifications to the plant, that too demonstrates an emissions increase. *See United States v. DTE Energy Co.,* 711 F.3d 643, 651-52 (6th Cir. 2013) ("EPA can bring an enforcement action whenever emissions increase, so long as the increase is traceable to the construction.").

to eliminate those breakdowns and "increase the plant's hours of operation," the increased pollution resulting from those additional hours of expected operation must be accounted for as an "emissions increase," for purposes of PSD. *Id.* (noting that this standard avoids giving "the company an artificial incentive" to renovate "rather than to replace" outdated facilities). The emissions-increase calculation is, under EPA's regulations, made by comparing the facility's annual emissions over a representative two-year period prior to the project (the "baseline" actual emissions), with its maximum annual emissions within the five-year period following the project (the "projected actual" emissions). 40 C.F.R. §§ 52.21(a)(2)(iv)(c), (b)(41) & (b)(48). If a physical change "result[s]" in an "emissions increase," so measured, the plant-owner must comply with PSD, and will be liable if it fails to do so. *Id.* § 52.21(b)(2)(i).

Second, in projecting the actual annual emissions following the project, a company may exclude emissions increases that do not result from the modification, such as those caused by "demand growth." 40 C.F.R. § 52.21(b)(41)(ii)(c). Thus, if a plant lacks demand for its product and operates less often as a result, and later increases its hours of

operations solely because demand rises, the associated emissions increase may be discounted when calculating whether a significant emissions increase has occurred. But because "in a market economy, all changes in utilization—and hence, emissions—might be characterized as a response to market demand," *New York,* 413 F.3d at 31-32 (citation omitted), EPA's regulations impose two conditions to ensure that this exception does not swallow the rule. First, an emissions increase is caused by demand-growth, rather than the unit's modification, only if the "existing unit could have accommodated" the emissions increase during the "consecutive 24-month period used to establish" the unit's pre-project actual emissions (*i.e.,* the baseline period). 42 C.F.R. § 52.21(b)(41)(ii)(c). Second, the emissions increase must be "unrelated to the particular project." *Id.* Together, those conditions fulfill the Act's core requirement that companies include emissions increases in their projections, where there is "a causal link between the proposed change and any post-change increase in emissions." *New York,* 413 F.3d at 32 (citation omitted).

3. Missouri's State Implementation Plan

As with many of the Act's requirements, States implement PSD requirements "by developing 'State implementation plans'" ("SIPs"). *Util. Air Reg. Grp. v. EPA,* 573 U.S. 302, 308 (2014); 42 U.S.C. § 7410(a)(2)(C). Once EPA adopted the definition of a "major modification" triggering PSD (described above) into the federal PSD regulations, Missouri expressly incorporated that definition, along with the remainder of EPA's PSD regulations, into its SIP. Mo. Code Regs. Ann., tit. 10, § 6.060(8)(A) ("All of the subsections of 40 CFR 52.21 other than [certain ancillary subsections] are incorporated by reference."); ADD1091. Those SIP provisions became federally enforceable when EPA formally approved them into Missouri's SIP, 42 U.S.C. § 7410(k)(3). EPA issued that approval in 2006, emphasizing that by incorporating the federal PSD program, it had "supersede[d] any conflicting provisions" in Missouri's rule. 71 Fed. Reg. 36,486, 36,489 (June 27, 2006).

B. Factual Background & Decision Below

1. Ameren's Rush Island Plant

This case involves Ameren's Rush Island power plant, which comprises two coal-fired boilers (labeled Units 1 and 2). ADD1089. In

rough sketch, each unit burns raw coal, using the resulting heat to boil water into steam, which is in turn used to rotate turbines and generate electricity. ADD1093-94. Both Rush Island units are "baseload units, meaning they generally operate every hour that they are available to run." ADD 1090. Because Rush Island is among the plants temporarily grandfathered under the Clean Air Act's PSD program, the plant lacks any sulfur dioxide controls. It consequently emits approximately 18,000 tons of sulfur dioxide per year—an enormous amount of pollution. ADD1090. Comparable plants, employing standard pollution-reduction technologies (known as "scrubbers"), emit just "several hundred" tons per year of sulfur dioxide. ADD1090.

Units 1 and 2 began service in 1976 and 1977. The components making up the boilers have an expected life of 30 to 40 years. ADD1089, ADD1098. By the "mid-2000's," therefore, "age-related deterioration" had substantially compromised both Units' capabilities. ADD1101. Those problems were exacerbated by Ameren's decision to switch Rush Island's fuel from the bituminous coal for which it was originally designed to sub-bituminous coal from Wyoming's Powder River Basin (a decision Ameren made to save fuel costs, and to avoid installing

scrubbers that would otherwise have been required under the Act's separate Acid Rain requirements), ADD1099-1100. The tubes containing the water and steam used by the boiler had begun leaking, ADD1103; falling slag, at times in chunks "as large as an automobile," caused frequent damage along the lower slopes of the boilers, ADD1103-4; and ash build-ups had plugged various components within both boilers, preventing air and water from circulating as necessary for the boilers' function. ADD1105-11 (noting Ameren's conclusion that "the end of" major components' "lives were approaching").

Those multiple problems, according to Ameren's contemporaneous reports, substantially diminished both Rush Island units' ability to consistently operate. Between February 2005 and January 2007 (the period selected by Ameren as the baseline representative of Unit 1's operations prior to its modification of that unit), Ameren was forced to "completely shut down" Unit 1 for over 245 hours due to problems within various key components of the boiler (the "economizer, reheater, lower slopes, and preheaters"), and "lost the equivalent of another 89.7 full" hours of operation to "deratings"—periods when the plant was incapable of operating at full capacity. ADD1119. Between April 2005

and March 2007 (Ameren's baseline period for Unit 2), Ameren was forced to "completely shut down" Rush Island's second unit for over 145 hours per year, and "lost the equivalent of another approximately 100" hours to deratings, as a result of the failure of Unit 2's corresponding components (the "economizer, reheater, and air preheaters"). ADD1120. Those lost hours included, in the case of both units, continuous derates over months-long periods, *e.g.* spanning "the entire months of June, July, August, September, and October 2006," *id.*—losses that Ameren attributed not to lack of demand for the plant's output, but to the failure of the boilers' key components, *id.*

2. Ameren's Component-Replacement Projects

In 2007 and 2010, Ameren embarked on separate modifications of both units, replacing key components of each boiler—the "reheaters, economizers, and air preheaters"—which were "more than 30 years old, nearing the end of their expected lives," and had "never before been replaced" at either unit. ADD1124, ADD1137-39. In their scope, those projects were "unprecedented" for Rush Island, requiring "approvals of executives at the highest level of the company, including Ameren's CEO." ADD1126, ADD1138-9 (noting that "Ameren itself did not

characterize the replacement of major components … as 'routine,'" but instead "described the work as 'major boiler modifications'"). *See also* ADD1136-37 (describing projects). At "$34 to $38 million," the replacement projects were the "costliest capital projects ever done at the Rush Island Plant," and "among the most expensive boiler projects" that Ameren had ever "undertaken at *any* of its plants." ADD1141 (emphasis added). *But see* Corrected Brief of Appellant Ameren Missouri ("Brief") 8 (characterizing projects as "commonplace").

3. The Sulfur Dioxide Increases Resulting from the Replacement Projects

Under EPA's regulations any increase in sulfur dioxide emissions greater than 40 tons is significant, and triggers a company's PSD obligations. 40 C.F.R. § 52.21(b)(23)(i). The question, for purposes of determining whether the 2007 and 2010 projects were "major modification[s]" under PSD, is whether those projects should have been expected to, or did in fact, cause an increase in the Rush Island plant's hours of operations sufficient to produce such a significant increase in the plant's sulfur dioxide pollution. 40 C.F.R. § 52.21(b)(2)(i); ADD1218 (noting that under EPA's regulations, if a "proposed change will increase reliability … or improve other operational characteristics of the

unit, increases in utilization that are projected to follow can and should be attributable to the change" (quoting 61 Fed. Reg. 38,250, 38,268 (July 23, 1996)). Because Rush Island lacks sulfur dioxide controls, even a modest increase in the units' hours of operation results in large increases in the plant's pollution; just "21 hours of operation" of the Rush Island units is enough to produce more than 40 tons of sulfur dioxide (that is, a significant increase requiring PSD compliance). ADD1086.

The District Court found not only that Ameren should have anticipated such a significant emissions increase—it found that Ameren at the time *did in fact* expect the projects to produce that increase. ADD1155-8 (noting that "[c]ompany documents and witnesses confirm that Ameren actually... expected that as a result of the 2007 [project at Unit 1] … availability losses attributable to the replaced components would be completely eliminated."), ADD1162-63. In making that determination, the District Court relied on the same model used by Ameren itself to "track the causes of outages … assess the status of plant equipment and predict future availability," ADD1144 (describing "General Availability Data System," or GADS data), and the model

Ameren used to "forecast its unit operations" for, *inter alia,* "fuel budgeting and rate case justifications before the Missouri Public Service Commission," ADD1181 (describing "Prosym" production cost model).[2] And the District Court relied on Ameren's own financial justification for the projects, which were based on Ameren's projection that the 2010 modifications at Unit 2 would, for example, provide "the equivalent of 15 *days*" of additional generation each year at that Unit. ADD1134 (emphasis added).

All three of those evidentiary sources confirmed that Ameren did expect, and should have expected, that the two projects would each increase the plants' hours of operations by hundreds of hours per year. ADD1220-38. Indeed, Ameren approved the unprecedented financial cost of the projects precisely because it expected them to produce that increase in annual production, ADD1131 (describing "Project Approval Package" stating expectation that component replacement would "reduce the number of forced outages due to these components 'to zero'")—an increase sufficient to increase the plant's sulfur dioxide

[2] As Ameren's own testifying experts conceded, these models have "been 'well-known in the industry' since … 1999," as are the methods used by the United States to project emissions. ADD1154.

emissions "an order of magnitude" beyond the PSD program's 40-ton threshold, ADD1224. And in the case of Unit 2, Ameren anticipated not just an increase in the number of hours the plant would operate (an "availability improvement") but an increase in the plant's overall generation capacity—in other words, an increase in the plant's hourly output and hourly pollution. ADD1133 (noting Ameren's anticipation of a "capacity … improvement" of "30 [megawatts of generation] in the summer and 20 [megawatts] in the winter").

The projects did, when complete, produce a significant increase in emissions from the Rush Island Units, in keeping with Ameren's above-described expectations. Following the 2007 project at Unit 1, the Unit "set an all-time record for days on line," as a result of the improved performance of the newly installed boiler components. ADD1158-59 (noting that "Ameren Vice President … specifically called out the replacement of [the boiler components] in 2007 as having 'paid off' when he reported Unit 1's record availability to Ameren's CEO"). Ameren's operating data showed "an increase of 360 hours" per year, between the baseline and the "highest post-project period of emissions," an increase that reflected "the effect of eliminating the 246 outage hours per year

during the baseline period that were caused by problems associated with the" replaced boiler components. ADD1159-60. And Ameren's emissions monitors showed that Unit 1 operated not only over far "more hours" during the relevant post-project period, but also "emitted more pollution *per hour"* following the project, as the improved components allowed Ameren to combust greater quantities of coal in the unit (with correspondingly greater pollution). ADD1160 (emphasis added).

Likewise, following the 2010 upgrade of Rush Island's second unit, "[j]ust as Ameren expected, Unit 2 experienced a substantial increase in availability," with the unit's hours of operations increasing by "175 hours per year," including "the effect of eliminating 146 outage hours per year," by virtue of the replaced boiler components. ADD1165-66. And again as Ameren had forecast, ADD1131-32, not only did "Unit 2 operate[] more hours" per year, but it also "emitted more pollution per hour during the relevant post-project period as compared to the baseline period." ADD1166.

For all of those reasons, the District Court concluded the 2007 and 2010 boiler-improvement projects at Rush Island were "major modifications" within the meaning of the Clean Air Act's PSD

requirements, and that Ameren had violated the Act by failing to comply—most notably, by failing to install the "best available control technology" at the plant to reduce its sulfur dioxide emissions, 42 U.S.C. § 7475(a)(4). ADD1271-72.

4. The Pollution Resulting from Ameren's Violations of the Act.

Congress enacted the Prevention of Significant Deterioration program "to protect public health and welfare" from the "actual or potential adverse effect" of "air pollution," 42 U.S.C. § 7470(1). In keeping with that textual purpose, the District Court, during the remedy phase of its trial, sought to assess the air pollution that had resulted from Ameren's violation of the Act's PSD provisions, and its adverse effects on public health.

The Court did so by determining the consequences of Ameren's failure to comply with PSD's core demand: installation of the best available control technology, 42 U.S.C. § 7475(a)(4). ADD1324-61. The District Court concluded that Ameren's failure to install scrubbers—the pollution-reduction technologies prescribed by "[e]very BACT determination for SO_2 emissions from pulverized coal-fired power plants during the past twenty years," ADD1332—had "resulted in 162,000 tons

of excess SO_2 emissions through the end of 2016," and that "excess emissions continue at a rate of about 16,000 tons per year" from the as-yet uncontrolled Rush Island plant. ADD1355, ADD1361. Although it was in attainment of EPA's national air quality standards for sulfur dioxide when the Rush Island component-replacement projects occurred, the area is currently in non-attainment of EPA's updated sulfur dioxide standard. ADD1091. In other words, regional sulfur dioxide pollution now exceeds the Act's public-health standards. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA,* 686 F.3d 803, 810 (D.C. Cir. 2012).

5. The District Court's Remedy Order

The District Court further analyzed one aspect of the health-harms posed by that excess pollution: fine particulate matter ($PM_{2.5}$), formed when sulfur dioxide is released into the atmosphere. ADD1361-62 (describing, *inter alia,* formation of fine particulates from sulfur dioxide). Because of their small size, fine particulates "have a better chance of getting past the body's natural defenses … into deeper lung structures … where they can do greater damage for more sustained periods of time." ADD1362. Fine-particulate pollution is, accordingly,

especially dangerous to human health—indeed, sometimes fatal—causing "high blood pressure, hardened arteries, strokes, [and] asthma attacks." ADD1364. There is, moreover, "no evidence of a safe level of exposure" to $PM_{2.5}$ "below which no adverse health effects occur," ADD1366; reduced $PM_{2.5}$ exposure produces improved health, according to a "linear concentration-response function," so that "any incremental decrease in exposure produces a positive impact on public health." ADD1366-76.

After characterizing the geographic areas affected by $PM_{2.5}$ produced by Rush Island's excess emissions, ADD1378-80 (discussing "CAMx" photochemical modeling) (*see Michigan v. EPA,* 213 F.3d 663, 673 (D.C. Cir. 2000) (approving EPA's use of CAMx model)), and testimony regarding the health-effects of that pollution, ADD1384-91, the District Court concluded that Rush Island's unlawful emissions resulted in as many as 879 "expected premature mortality events" between 2007 and 2016. It further found that after 2016 Rush Island's excess pollution was producing "an average of 62 or 86 premature mortality events" each year (depending on the precise model used), within the affected areas. ADD1385.

The District Court ordered Ameren to belatedly comply with the Clean Air Act, by subjecting the Rush Island plant to PSD, and installing the pollution-controls that should have been put in place when Ameren undertook its 2007 and 2010 major modifications. ADD1415. But the District Court recognized that, by the time Ameren completes this tardy compliance with the law, it "will have emitted nearly 275,000 tons of excess pollution" affecting areas across "the Eastern United States," ADD1415, and producing ongoing harm to people living in those areas. ADD1387 (noting ongoing annual premature deaths caused by Ameren's pollution). While an injunction requiring Ameren to bring Rush Island "into compliance with the PSD program" would "end[] the [further] release of excess" pollution, it would not, of itself, "redress the harm from the last ten years" of Ameren's unlawful activity. ADD1444. Consequently, as part of its remedy the District Court carefully crafted an injunction that would require Ameren to remedy the specific harm caused by its violations, by reducing sulfur dioxide emissions affecting "the same communities—and to the same degree—as Rush Island's pollution on a ton-per-ton basis." ADD1415.

To ensure that these reductions would provide compensatory relief to those injured by Rush Island's unlawful emissions, the District Court specified their source: Ameren's nearby Labadie power plant. The District Court found "a tight geographic nexus between the harms Rush Island caused and the benefits gained through reducing Labadie's emissions," and that "reduc[ing] emissions at Labadie commensurate with the excess emissions from Rush Island" would "put the public in the place it would have been absent Ameren's Clean Air Act violation." ADD1447. For those reasons (and after considering the additional equitable factors), the District Court ordered Ameren to provide those remedial reductions from the Labadie plant.

After considering "multiple options" as to how those reductions might be achieved, ADD1392, the District Court based its injunction on the use of a relatively inexpensive pollution-reduction technology ("dry sorbent injection," or "DSI")). ADD 1447. The District Court selected that technology because, *inter alia,* it entails minimal capital expense. *Id.* By avoiding more capital-intensive options, the District Court ensured that Ameren could "operate [the required controls] for as many years as necessary to remediate Rush Island's excess emissions," then

"terminate" further reductions, without "suffering significant lost capital assets." ADD1448. The Court made that choice to "provid[e] the relief necessary to remedy the harm from Rush Island without penalizing Ameren" in any fashion. ADD1448-49.

ARGUMENT

I. Missouri's SIP Does Not Repudiate the Federal Definition of a Major Modification.

Ameren argues, first, that when EPA approved Missouri's SIP into the federal Clean Air Act's implementing regulations, EPA repudiated the federal regulatory definition of a major modification—which measures an emissions increase by the plant's actual emissions, 40 C.F.R. § 52.21(a)(2)(iv). Brief 34. According to Ameren, the "unambiguous" text of Missouri's approved SIP instead requires a comparison of potential emissions—that is, of the plant's "maximum annual-rated capacity" to emit, "assuming continuous year-round operation," even if the plant was, like Rush Island, demonstrably incapable of operating continuously or year-round. Brief 35 (citation omitted)).

Missouri's SIP cannot be fairly read to require Ameren's reality-blinking approach. The SIP expressly adopts the federal PSD

regulations, including the federal definition of "major modification." "All of the subsections of 40 CFR 52.21 other than (a) Plan disapproval, (q) Public participation, (s) Environmental impact statements and (u) Delegation of authority are incorporated by reference," as "promulgated as of July 1, 2003." Mo. Code Regs. Ann., tit. 10, § 6.060(8)(A) (2007) ("Section 6.060(8)") (ADD2020). Those incorporated regulations unambiguously define an emissions increase as "any physical change in or change in the method of operation of a major stationary source that would result in … a significant emissions increase," 40 C.F.R. § 52.21(b)(2)(i), measured (for existing units) by "the sum of the difference between the projected *actual* emissions ... and the baseline *actual* emissions," 40 C.F.R. § 52.21(a)(2)(iv)(c) (emphases added). *See New York,* 413 F.3d at 18-19 (upholding regulations' definition of modification based upon "net emissions increases measured in tons per year," rather than "hourly emissions"). When EPA approved that provision into Missouri's SIP, it made plain that by incorporating the federal regulation, the SIP "adopt[ed] an actual-to-projected-actual methodology for determining whether a major modification has

occurred." 71 Fed. Reg. 19,467, 19,468 (Apr. 14, 2006) (proposed rule); 71 Fed. Reg. at 36,487 (final rule).

Ameren argues that, despite its stated "adopt[ion]" of the "actual-to-projected-actual" test, EPA instead approved Missouri's *rejection* of that actual-emissions test. Brief 34. Ameren argues that EPA did so by retaining, elsewhere in the SIP, a definition of "modification" that encompasses "[a]ny physical change, or change in method of operation of, a source operation or attendant air pollution control equipment which would cause an increase in potential emissions of any air pollutant emitted by the source operation." Mo. Code Regs. Ann., tit. 10, § 6.020(2)(M)(10) ("Section 6.020(2)(M)(10)"). *See* Brief 34-36. Ameren's reading is untenable.

First, the plain text of Missouri's implementation plan demonstrates that this one potential-based definition is not universally applicable to all portions of the SIP. The very next provision distinguishes "modifications" for purposes of "Title I" of the Clean Air Act, Mo. Code Regs. Ann., tit. 10, § 6.020(2)(M)(11) (separately defining "[m]odification, Title I"), establishing that such modifications are distinct and governed by "10 C.S.R. 60.060 section (7) or (8)" (the latter

of which addresses PSD by explicitly incorporating the federal rules). Mo. Code Regs. Ann., tit. 10, §§ 6.020(2)(A)(27)(A)-(B) ("Title I" requirements include PSD), 6.020(2)(T)(3) (defining "Title I modification"), 6.060(8). That separate definition establishes that Section 6.020(2)(M)(10) is not universally applicable, and does not apply to Missouri's PSD program. This result is confirmed by the SIP's independent definition of a "major modification"—not as a subset of the "modifications" described by Section 6.020(2)(M)(10), but as an independent term encompassing "[a]ny physical change … that would result in a significant net emissions increase of any pollutant," in parallel with the federal regulatory definitions. Mo. Code Regs. Ann., tit. 10, § 6.020(2)(M)(3) ("Section 6.020(2)(M)(3)").

Ameren contends that because Mo. Code Regs. Ann., tit. 10, § 6.060(1)(C) ("Section 6.060(1)(C)") prohibits "modification[s]," its preferred definition of "modification" must be inserted into the PSD requirements incorporated by Section 6.060(8), so that only projects that increase *both* potential emissions *and* actual emissions trigger New Source Review. Brief 38. But the PSD provisions adopted into the SIP by Section 6.060(8) contain their own, separate prohibition of "major

modification[s]," defined with reference to "actual"—not potential—emissions. 40 C.F.R. §§ 52.21(a)(2)(iii)-(iv). The PSD program's prohibition in 40 C.F.R. § 52.21(a)(2) does not suggest that it depends upon, or incorporates the requirements of, the prohibition in Section 6.060(1)(C); it is, by its terms, entirely free-standing.

Nor is there other textual basis to import Ameren's "potential emissions" definition of "modification" into the Missouri SIP's PSD requirements. The definition of "major modification" in 40 C.F.R. § 52.21(b)(2)(i) (and in Section 6.020(2)(M)(3)) does not cross-reference or otherwise invoke the definition of "modification" contained in Section 6.020(2)(M)(10)—rather, each refers to "*any physical change* … that would result in" an emissions increase, defined with reference to actual emissions. 40 C.F.R. § 52.21(b)(2) (emphasis added). Those words—"any physical change"—cannot be read to require a PSD permit only for those physical changes that are also 'modifications as defined by Section 6.020(2)(M)(10).' *See Envtl. Defense,* 549 U.S. at 581 n.8 (rejecting argument that "before a project can become a 'major modification,'" it must meet "definition of 'modification'" occurring elsewhere in

regulations, because the PSD regulations "require a 'major modification' to be a 'physical change in or change in the method of operation'").

The federal PSD rules contain their own "[a]pplicability procedures" (as do other portions of the SIP), 40 C.F.R. § 52.21(a)(2), refuting any suggestion that the title "Applicability," in Mo. Code Regs. Ann., tit. 10, § 6.060(1), requires incorporating its terms into the SIPs PSD requirements. Brief 37. And Ameren's interpretation—that an increase in potential emissions serves as a "threshold" requirement for PSD—renders much of the remainder of 40 C.F.R. § 52.21 nonsensical. There is, for example, no reason to exclude increased hours of operation resulting from "demand growth" if the regulations contain a threshold requirement that renders hours of operation entirely irrelevant. 40 C.F.R. § 52.21(b)(41)(ii)(c). *See Envtl. Defense,* 549 U.S. at 577-78 ("[T]he regulatory language simply cannot be squared with a regime under which [potential emissions are] dispositive.").

The natural reading of the SIP is that the federal PSD prohibition incorporated at Section 6.060(8) is separate and independent from the prohibition in Section 6.060(1)(C)—not that the latter effectively over-writes the former. *See United Food & Commercial Workers Union Local*

751 v. Brown Grp., Inc., 517 U.S. 544, 550 (1996) (noting interpretive canon that "the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight"). *See Kisor v. Wilkie,* 139 S. Ct. 2400, 2416 (2019) (noting that such interpretive canons apply to construction of regulations as well as statutes). Other elements of the regulations confirm that those prohibitions are distinct, with the federal definition of "major modification" incorporated at Section 6.060(8) serving as the trigger for federal PSD requirements, and the definition of "modification" at Section 6.020(2)(M)(10) serving as the trigger for other air program requirements. *E.g.,* Mo. Code Regs. Ann., tit. 10, § 6.060(2)(B) (separately enumerating "modifications," and "major modifications subject to 10 CSR 10-6.060(8) or subject to 40 CFR 52.21").

Reading the SIP straightforwardly—to provide distinct definitions of 'modification,' relating to different sets of obligations—does not render any portion of the text "superfluous." Brief 37. Missouri's SIP, as is typical under the Clean Air Act, contains a variety of regulatory requirements triggered by "modifications," each of which defines the

pertinent "modification" differently. Non-attainment area permits are required for certain "major modifications" (separately defined). Mo. Code Regs. Ann., tit. 10, § 6.060(7)(A). The Act's New Source Performance Standards apply to yet a different sort of "modification"—those producing an increase in hourly rather than actual emissions. Mo. Code Regs. Ann., tit. 10, § 6.070 (incorporating 40 C.F.R. § 60); *New York,* 413 F.3d at 20 (noting that under Act, different definitions of "modifications" co-exist, and trigger different requirements). *See also* Mo. Code Regs. Ann., tit. 10, § 6.165 (governing "modification[s]" that "cause[] an increase in potential odor emissions"). The structure of the SIP thus demonstrates that no single definition of "modification" is universally applicable; the SIP contains multiple definitions of "modification," connected to independent programs and prohibitions.

That structure is equally consistent with the structure of the Clean Air Act. *See Envtl. Defense,* 549 U.S. at 574 (holding that same term may be defined differently, under different provisions of the Clean Air Act "with distinct statutory objects calling for different implementation strategies"). A modification meeting Ameren's definition (Section 6.020(2)(M)(10)) may require a permit pursuant to section

6.060(1)(A)(C). But that does not mean that other modifications, meeting the SIP's definitions of a "major modification" (in the PSD provisions of Sections 6.060(8) and 6.020(2)(M)(3)), do not trigger different permitting requirements.

Ameren cites *United States v. Cinergy,* 623 F.3d 455 (7th Cir. 2010) (*Cinergy II*). But in *Cinergy II,* EPA had not approved implementation-plan provisions that adopted the federal requirements. *Id.* at 457-58 (noting that Indiana had "amended [its SIP] to conform the definition of 'modification' to the actual-emissions standard," but had failed to "submit [the] amended plan" for approval to EPA, when modification occurred). Here, in contrast, Missouri specifically amended its SIP to "adopt an actual-to-projected-actual methodology for determining whether a major modification has occurred," for purposes of PSD, and EPA formally approved those provisions. 71 Fed. Reg. at 36,487. *Cinergy II* provides no support for the proposition that Missouri's SIP should nonetheless be understood to reject a methodology contained in rules it expressly incorporates.

Ameren proffers two further elements from the "rulemaking history." First, it points out that Missouri deleted the words "major modification"

from the prohibition in Section 6.060(1)(C), Brief 41. But that only confirms that Section 6.060(1)(C) does not govern "major modifications," for purposes of PSD; the SIP retains both a definition of "major modification," and specific PSD requirements triggered when such a modification occurs. Mo. Code Regs. Ann., tit. 10, §§ 6.020(2)(M)(3) & 6.060(8).

Second, Ameren cites an EPA memorandum supporting EPA's approval of Missouri's SIP. Brief 42 (citing APP1275, 1278-79). That document states that the approved SIP includes the "actual-to-future actual-methodology" for PSD. APP1276-77. Ameren notes that the memorandum also describes an EPA request for "a sentence stating that the provisions of 40 C.F.R. § 52.21 override any conflicting provisions." Brief 42 (citing APP1275, APP1278-79).

But neither that request, nor Missouri's response, suggests that anyone understood the SIP to reject the actual-emissions methodology at the heart of the EPA PSD regulations Missouri was adopting. APP1276-77. Missouri acknowledged that "[c]ertain definitions and other provisions that are not identical to the federal regulations were intentionally retained," but that the State had not yet "determin[ed] if

[the requested provision addressing conflicting provisions] is necessary," and so was refraining from taking action in the interests of "regulatory certainty." APP1278-79. That statement does not claim any extant conflict with EPA's PSD program; it suggests, rather, that the State did not view its non-"identical" provisions as undermining the federal regulations, so that EPA's requested sentence was not "necessary."[3]

And in any event, EPA removed any doubt when it approved Missouri's SIP into the federal regulatory program. EPA's approval made clear that by "incorporat[ing] by reference elements of EPA's NSR reform rule," the SIP established that those federal provisions

[3] And even if Missouri's SIP does contain "conflicting" definitions, Brief 42 (citation omitted)—it could not, as a result, "unambiguous[ly]" support Ameren's interpretation, Brief 34. *See Grinnell Mut. Reinsurance Co. v. Schwieger,* 685 F.3d 697, 701 (8th Cir 2012) ("[L]anguage is ambiguous … if provisions irreconcilably conflict.") The record offers nothing suggesting that Missouri understands its SIP to reject EPA's actual-emissions standard. Indeed, Missouri's explanation of its PSD program suggests otherwise. https://dnr.mo.gov/env/apcp/docs/cp-permitappcapchart.pdf (using potential to emit only to assess whether a source is "major," and clearly stating that PSD applicability is determining according to the rules incorporated at Section 6.060(8)). And regardless it is EPA—not Missouri—that possesses authority to resolve any ambiguities within the SIP, which is "*federal* law." *Safe Air for Everyone v. EPA,* 488 F.3d 1088, 1097 (9th Cir. 2007).

"*supersede[] any conflicting provisions in the Missouri rule*." 71 Fed. Reg. at 36,489 (emphasis added).

II. The District Court Did Not Err in Its Analysis of Causation.

The District Court found, as a factual matter, that Ameren did *in fact* anticipate that its component-replacement projects would increase the annual hours of operation at the Rush Island plant, and should have expected the plant's emissions to increase. ADD1237. That is sufficient to establish Ameren's liability under the Act's PSD requirements. *See United States v. Ala. Power Co.,* 730 F.3d 1278, 1282 (11th Cir. 2013) ("To satisfy its burden under the Act, the government had to show that at the time of the projects Alabama Power expected, or should have expected, that its modifications would result in a 'significant net emissions increase' of sulfur dioxide."); *United States v. DTE Energy Co.,* 845 F.3d 735, 738-39 (6th Cir. 2017). Ameren's attack on that holding relies primarily on three mischaracterizations of its substance.

First, Ameren asserts that the District Court "disregarded the required causation showing." Brief 46. The District Court, however, carefully and thoroughly assessed the evidence, and concluded (as the

regulations require): (a) the "maximum annual rate, in tons per year," at which the Rush Island units were "projected to emit" sulfur dioxide "in any one of the 5 years … following the" project. 40 C.F.R. § 52.21(b)(41); (b) exceeded the annual baseline emissions, 40 C.F.R. § 52.21(b)(48), by (c) a quantity sufficient to trigger PSD. ADD1143-1238. And it found that the United States had demonstrated that this increase had "result[ed]" from Ameren's replacement projects, 40 C.F.R. § 52.21(b)(2)(i). ADD1044 (requiring United States to carry burden), ADD1141-43 (summarizing conclusion). The evidence supporting that conclusion included two separate methods calculating "the tons of emissions *associated just with [the] project-related improvements,*" and the "isolated … amount of generation and pollution *related to the project."* ADD1237 (emphases added). The court's analysis of the emissions increase resulting from Ameren's component-replacement projects thus expressly addressed causation.

The District Court did not thereby mis-allocate the burden of proof. The regulations require "the owner" of the major stationary source to undertake the necessary calculation, "before beginning actual construction." 40 C.F.R. § 52.21(b)(41)(ii). *See New York,* 413 F.3d at 33

("[T]he regulation establishes two criteria *a source must meet* before excluding emissions from its projection," *i.e.* that the source "'could have achieved the necessary level of utilization'" during baseline period, and that "'the increase is not related to the physical or operational change(s).'" (emphasis added)). Ameren undertook no emissions projection at all prior to the projects, ADD1199-1200, requiring the District Court to weigh competing *post hoc* testimony at trial—at the completion of which it found the United States' causation testimony to be more credible than Ameren's, for entirely justifiable reasons. *E.g.*, ADD1204-1214 (noting that Ameren's analysis failed to address whether emissions increases were related to the project, and used "artificial adjustments" that contradicted Ameren's analyses at the time of the projects).

Second, Ameren claims that the District Court unlawfully required it to show the existence of "unit-specific demand" to invoke the demand-growth exclusion, in contravention of the federal regulations. Brief 49. The regulations refute Ameren's assertion: "In determining the projected actual emissions" following a modification, "the owner or operator of the major stationary source … [s]hall exclude … that portion

of *the unit's* emissions following the project that *an existing unit* could have accommodated" during the baseline period if—and only if—those emissions "are also unrelated to the particular project." 40 C.F.R. § 52.21(b)(41)(ii)(c) (emphasis added). That regulatory text requires more than an increase in demand "system wide," Brief 47; it requires a showing that such system-wide demand, rather than the modifications, produced the specific "*portion of the unit's emissions*" that the plant-owner wishes to exclude. 40 C.F.R. § 52.21(b)(41)(ii)(c) (emphasis added).

The District Court, consistent with the regulation, identified "that portion of [each] unit's [increased] emissions" that "could have [been] accommodated" prior to the modifications—and found: (1) the units could not have accommodated the vast majority of the increases, because of the component-failures that spurred the replacement projects; and (2) that the emissions increases were enabled by, and therefore related to, the component-replacement projects, 40 C.F.R. § 52.21(b)(41)(ii)(c). ADD1195 ("Rush Island could not have served … the increasing system demand without the … upgrade projects.").

Ameren, for its part, failed to offer "any evidence at trial to show how changes in system demand, if any, would or did specifically impact the operation and emissions from the Rush Island units." ADD1195. In fact, the "standard measure" used by "Ameren itself … during the course of its business" indicated, according to Ameren's witnesses, that demand for the Rush Island units was "declining" and that "any emissions increases during [the relevant] time period cannot be the result of increased demand." *Id.* In considering that "standard measure"—known as a "utilization factor," *id.*— the District Court adhered to the regulations' requirement that an emissions projection "consider all relevant information, including … historical operational data, [and] the company's expected business activity and the company's highest projections of business activity." 40 C.F.R. § 52.21(b)(41)(ii)(a). *But see* Brief 47-48 (asserting that "federal regulations nowhere require" assessment of evidence addressed by District Court).[4]

[4] The District Court also found that "Ameren's Prosym modeling"—the modeling used by Ameren for its own business projections, ADD1181-82—"showed just how disconnected unit operations were from system level demand." ADD1250. Ameren claims that the regulations do not demand such evidence quantifying the specific "portion of [Ameren's] emissions projections" attributable to demand. Brief 47. But the regulatory text requires that quantification, 40 C.F.R.

That conclusion adheres to the regulations. As the Sixth Circuit has recognized, "[i]n order to exclude increased emissions as the product of increased demand under 40 C.F.R. § 52.21(b)(41)(ii), [a] company must establish (1) that the projected post-construction emissions could have been accommodated during the preconstruction period *and* (2) that the projected emissions are unrelated to the construction project." *DTE Energy,* 845 F.3d at 739. Where, as here, ADD1220, the plant "was running [a unit] at full capacity—that is, [the unit] was operating every hour that it could be operated" prior to the project, it cannot meet the first of those requirements. *DTE Energy.,* 845 F.3d at 740. And where, as here, *see* ADD1221-22, a project addresses "continual outages," so as to "allow the plant to operate for … additional … days each year," resulting in "increased emissions," given the owner's failure to install the "pollution controls" required by PSD, those increased emissions are not "unrelated to the construction process." *DTE Energy,* 845 F.3d at 740. The District Court applied no novel standards in reaching the same result.

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§ 52.21(b)(41)(ii)(c) (specifying causal showing addressing the "portion of [each] unit's emissions" attributable to demand), and consideration of this evidence, *id.* § 52.21(b)(41)(ii)(a) (requiring consideration of "the company's highest projections of business activity").

Third, Ameren accuses the District Court of improperly applying a "'reasonableness' standard" to its *post hoc* emissions calculations. Brief 49. It was Ameren who argued that "what a reasonable power plant operator or owner would expect" was a necessary element of the case. ADD1054. The District Court declined to adopt that "reasonable power plant operator" standard, holding that given the regulations' direction to consider "all relevant information," a "review of Ameren's own documents, with the help of expert testimony," would "provide sufficient evidence for the factfinder to determine whether Ameren's projections and expectations were reasonable and made in compliance with the regulations." ADD1054-55. It therefore applied "[t]he legal standards supplied by the PSD rules" as "sufficient to guide its analysis," *id*. *See* Brief 51 (accepting that "[t]he written regulations" govern).

In asking whether Ameren's *post hoc* projections were "reasonable" or not, ADD1054-55, the Court did not add anything to the regulations. *See* Brief 49. A district court is "not compelled to believe evidence which to it seem[s] unreasonable or improbable." *Noland v. Buffalo Ins. Co.*, 181 F.2d 735, 738 (8th Cir. 1950) (noting that this rule applies even where evidence is uncontradicted). Nothing required the District Court

to unconditionally accept Ameren's *post hoc* emissions calculation without regard to the usual credibility standards or the countervailing evidence. Brief 51 (arguing that District Court should not have "allowed EPA's experts" to contest "Ameren's conclusions"). Ameren's assertion that it "believed [the units' availability] would not" increase "compared to the baseline period," ADD1160, was, for example, belied by Ameren's "conce[ssion] that Unit 1 availability was projected to increase by 1.3%"—more than four times the increase necessary to trigger PSD. ADD1225 & n.6. And Ameren's own contemporaneous projection, "used in financially justifying the Unit 2" project, indicated that the component-replacement project would raise Unit 2's availability to "almost 97%"—an increase sufficient to trigger PSD many times over. ADD1227. Those facts (among others) caused the District Court to find that Ameren did in fact expect, and should have expected, the projects to increase the plants' emissions. ADD1237.

The credibility assessments underlying those factual determinations are wholly routine, and well within the District Court's discretion. The District Court found no reasonable basis for Ameren's projections. ADD1248-1267. And it expressly found that Ameren's projections failed

to comply with the regulatory requirements. *E.g.,* ADD1207-11, ADD1249 (noting projections' failure to assess whether the emissions increases in question were "unrelated to" the projects, as required by 40 C.F.R. § 52.21(b)(41)(ii)(c)). But even if the District Court had determined that Ameren's evidence had a reasonable basis, and complied with the regulations, it would not have been required to accept that evidence without regard to other, conflicting evidence presented by the United States. A trial court's core function is to resolve factual questions as to which "[r]easonable minds can differ," Brief 54. *Bjornestad v. Progressive N. Ins. Co.*, 664 F.3d 1195, 1200 (8th Cir. 2011) (district court, as "finder of fact," is entitled to resolve questions on which "[r]easonable fact-finders may disagree"). The District Court did not err by weighing the conflicting evidence before it and determining that, based on "all relevant information" including "the company's own representations," Rush Island's projected annual emissions after the projects exceeded the plant's baseline emissions. 40 C.F.R. § 52.21(b)(41)(ii)(a).

III. The District Court Did Not Err By Requiring Ameren to Provide Narrowly Tailored, Compensatory, Ton-per-Ton Relief For Its Unlawful Pollution.

In order to remediate the excess emissions that resulted from Ameren's PSD violations at the Rush Island plant, the District Court ordered Ameren to provide compensatory relief in the form of sulfur dioxide reductions offsetting, on a ton-per-ton basis, the excess pollution resulting from Ameren's violation of the Act. ADD1449 (requiring Ameren to secure sulfur dioxide reductions of "the same amount" as "the volume of Rush Island's excess emissions"). The Court narrowly tailored its injunction to the geographic area affected by Ameren's violation, ensuring that it serve that compensatory purpose; to that end, the Court required Ameren to undertake the necessary reductions at a source—the Labadie plant—that "will benefit the same communities burdened by the harm caused by the [Rush Island] violations." ADD1449.[5] *See* ADD1447 (Noting "tight geographic nexus between the harms Rush Island caused and the benefits gained through reducing

[5] Ameren did not suggest any other source that would narrowly and effectively remediate Rush Island's emissions. ADD1394-1401 (noting that Ameren proposed only surrender of allowances that would not "lead to actual emissions reductions remedying the harm to the populations impacted by Rush Island's excess emissions").

Labadie's emissions"). That injunction was well within the District Court's statutory and equitable discretion. ADD1448.

A. *The Clean Air Act's Text Authorizes the District Court's Remedial Injunction.*

The text of the Clean Air Act describes the District Court's broad remedial authority: "Any action … may be brought in the district court of the United States … to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States … and *to award any other appropriate relief."* 42 U.S.C. § 7413(b) (emphasis added). *See Argus Leader Media v. U.S. Dep't of Agric.,* 740 F.3d 1172, 1175 (8th Cir. 2014) ("Our analysis begins, as always, with the statutory text."). The Supreme Court has established that, in construing such provisions, courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett Cty. Pub. Sch.,* 503 U.S. 60, 66 (1992).

Consequently, when a statute not only fails to expressly limit the District Court's remedial authority, but also "explicitly makes available 'any appropriate relief,' referencing the broad power of the federal courts to award both compensatory and punitive damages, we can infer that Congress intended prevailing plaintiffs to recover compensatory …

remedies." *Gaffney v. Riverboat Servs. of Ind., Inc.,* 451 F.3d 424, 459 (7th Cir. 2006).[6] *See also Reich v. Cambridgeport Air Systems, Inc.,* 26 F.3d 1187, 1191 (1st Cir. 1994) ("*Franklin* strongly suggests that 'all appropriate relief' … embraces monetary damages as well as other relevant forms of relief normally available."). *See also Porter v. Warner Holding Co.,* 328 U.S. 395, 398-99 (1946) (statute providing authority to "enforce compliance" through any "other order" allows for "[a]n order for the recovery and restitution of illegal rents," as "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.").[7]

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[6] Indeed, a statute that empowers a court to "require compliance" permits the full range of traditional equitable remedies, even where that permission is not underscored (as in the Clean Air Act) by an explicit authorization of "any other appropriate relief," 42 U.S.C. § 7413(b). *See Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 295 (1960).

[7] Ameren contends only that the Act provides no more than the power to "forestall future violations." Brief 72 (citation omitted). That reading, first, inserts the word "future" into the text of the Act—which does not limit courts' authority to "restrain … violation[s]" to merely forestalling 'future violations.' 42 U.S.C. § 7413(b). *See Mitchell,* 361 U.S. at 295 (statutory power to restrain violations generally includes equitable power to issue remedial relief). And second, that interpretation—authorizing the District Court only to "restrain … violation[s]" of the

The Clean Air Act therefore provides the district courts with authority to require plant-owners who violate the Act to remediate the pollution produced by their violation. "[I]f the operator actually begins construction … and it later turns out that a permit was required, a violation of NSR has occurred, and the operator risks penalties and injunctive relief requiring *mitigation of illegal emissions*," in addition to "a retrofit with pollution controls to meet emissions standards." *DTE Energy*, 845 F.3d at 740 (emphasis added). *See United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1057-63 (S.D. Ind. 2008), *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010) (By providing for "any other appropriate relief," Clean Air Act allows for "mitigation of past health and environmental harms," not just "prospective relief").[8] Moreover,

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Act—effectively reads the words "any *other* appropriate relief" out of the text, 42 U.S.C. § 7413(b) (emphasis added). *See Clark v. Rameker,* 573 U.S. 122, 130-31 (2014) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."); *Harrison v. PPG Indus., Inc.,* 446 U.S. 578, 588-89 (1980) (Congress' use of "expansive" terms "any other" is unambiguous, and precludes use of canons suggesting "limit[ed] construction").

[8] Courts' broad remedial authority is constrained only where Congress has provided "elaborate" language expressly limiting the statutory remedies. *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 487-88 (1996). *See also Mumid v. Abraham Lincoln High Sch.,* 618 F.3d 789, 797 (8th

courts construing the similarly broad framework of the Clean Water Act have held that it provides equitable authority to remedy violations. *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (rejecting proposition that "the remedy for [the] failure to get a permit should go no further than requiring them to do what would have been lawful in the first place," and upholding district court's issuance of "remediation order" that "bears 'an equitable relationship to the degree and kind of wrong it is intended to remedy'"); *U.S. Pub. Interest Grp. v. Atlantic Salmon of Maine, LLC,* 339 F.3d 23, 31 (1st Cir. 2003) (A "court may grant additional injunctive relief governing [future] operations of the companies *insofar as the court is remedying harm caused by their past violations*," because "court's equitable power to enforce a statute includes the power to provide remedies for past violations.").[9]

Cir. 2010) (discussing language necessary to support conclusion that Congress intended to limit remedies).

[9] The Third Circuit has held that the Act does not permit "an injunction against *former* owners and operators for a wholly past PSD violation," at least where the injunction is "impossible to fulfill." *United States v. EME Homer City Generation,* 727 F.3d 274, 291-95 (3d Cir. 2013) (emphasis added). That holding is inapplicable here. Ameren is the current owner of the plant. *See id.* at 295 (distinguishing possibility of relief against current owners, but holding that because current owners

That is all the District Court's injunction requires: remediation of "Rush Island's excess emissions." ADD1449. *See* ADD1446-49, ADD1284 (noting that injunction encompasses only that which "offset[s] the SO_2 illegally emitted," which cannot be addressed by "belated … compliance at Rush Island"). The District Court ensured close tailoring not just by crafting its injunction to provide "ton-for-ton" reductions, but also by rejecting measures that might create "significant lost capital assets," ADD1447-48, and rejecting measures whose benefits would not occur "in the same geographic area" as those affected by Rush Island's violation, ADD1401. *See also* ADD1448 (avoiding major capital expenditures to ensure that injunction does not "penaliz[e] Ameren").

Ameren disputes none of the factual or equitable determinations underlying the District Court's order—that the sulfur dioxide reductions required by its injunction redress "pollution … affect[ing] the same communities—and to the same degree—as" the pollution resulting from Ameren's PSD violations at the Rush Island plant "on a ton-per-ton basis," ADD1415, and that this pollution was causing ongoing harm

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did not violate the Act, court "has no authority to enjoin them"). And the District Court's injunction is entirely feasible. ADD1437-38.

including "an average of 62 or 86 premature mortality events per year," ADD1387.[10] Nor does (or could) Ameren contest the District Court's determination that the injunction therefore was narrowly tailored "to remediate Rush Island's excess emissions." ADD1444-7. Ameren instead offers two unavailing arguments. First, it offers variants of an effort to confuse Ameren's violation of the Act with the remedies available to respond to that violation. *See* Section III.A.1, below. Second, it suggests that even as EPA stated its intent to seek a remedial injunction, it waived its right to seek that relief. *See* Section III.A.2. These arguments are divorced from the statutory text and purpose, and neither meaningfully undermines the remedy ordered by the District Court.

1. *Ameren's Violation of the Act and the Remedy for that Violation Are Distinct.*

Ameren first argues that because its *violations* occurred at Rush Island, the District Court was powerless to craft a *remedy* affecting any other plant. Brief 59-64. Ameren's arguments fundamentally conflate

[10] "Ameren did not present evidence or testimony challenging" the conclusion that "pollution from the Labadie Energy Center" produces downwind of "the same scope and degree as the SO_2 pollution from the Rush Island facility." ADD1395.

two "analytically distinct" concepts: Ameren's violation of the Act, and the remedies available to address that violation. *Franklin,* 503 U.S. at 65-66 ("[T]he question of what remedies are available under a statute … is 'analytically distinct' from the issue of whether [the right of action] exists in the first place."). That the former—Ameren's violation—occurred during the modifications of Rush Island does not mean that the latter—relief—could reach no further than Rush Island, nor that the District Court could not remedy the results of Ameren's unlawful modification.

a. The Act Requires Notice of Violation, Not Notice of Relief.

First, Ameren misconstrues the Act's provisions requiring that when EPA "finds that any person *has violated* or is in violation of any requirement" of a SIP, it "notify the person and the State … *of such finding,*" before bringing suit. 42 U.S.C. § 7413(a)-(b) (emphasis added).[11] Ameren attempts to re-write the Act by substituting notice of the "remedy," Brief 59, where the text demands notice of EPA's "finding" of "violation." 42 U.S.C. § 7413(a)-(b). But "remedy" and

[11] "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into … compliance." *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).

"violation" are not interchangeable terms. *Franklin,* 503 U.S. at 65-66. Here, EPA provided Ameren with the requisite notice—that by undertaking its projects at Rush Island without complying with PSD, Ameren had violated the Act, ADD1092. Nothing in the Act requires EPA to do anything further in order to invoke the District Court's authority to provide appropriate compensatory relief for that violation. 42 U.S.C. § 7413(b).

The District Court carefully eschewed any relief that might suggest a violation of the Act at the *Labadie* plant. It did not order Ameren to comply with PSD at Labadie by obtaining a permit or installing the best available control technology. ADD1284. *See* 42 U.S.C. § 7475(a) (enumerating PSD requirements). Its order required only "reductions commensurate with the excess emissions from Rush Island," ADD1286, and it ensured that such reductions would not exceed the emissions unlawfully produced by the Rush Island plant. ADD1448 (ensuring that Ameren can "terminate" reductions once it has "remediate[d] Rush Island's excess emissions… without suffering significant lost capital assets"). That compensatory injunction operates solely to remediate Ameren's violations at Rush Island; the Act required EPA to provide

only notice of those violations, in order to seek that appropriate relief. 42 U.S.C. § 7413(b).

b. That Post-Construction Emissions Do Not Constitute an Ongoing Violation of the Act Does Not Prevent the District Court from Remediating Those Emissions.

Second, and similarly, Ameren notes that its violation occurred during its "modification of" the Rush Island "plant without a PSD permit or BACT," rather than its "operation" of the plant following that modification. Brief 62 (quoting *Sierra Club v. Otter Tail Power Co.,* 615 F.3d 1008, 1018 (8th Cir. 2010)). From that premise, Ameren leaps to the false conclusion that the District Court was powerless to provide any remedy for the air pollution that resulted from that unlawful modification. Brief 60.

The Act required Ameren to comply with the PSD program before undertaking its modification of the Rush Island plant—including by installing the best available control technology to reduce the plant's pollution. 42 U.S.C. § 7475(a)(4). The most important consequence of Ameren's violation of the Act was the increased air pollution that resulted from that violation. *See* 42 U.S.C. §§ 7401(b)(1) (purpose of Clean Air Act is, *inter alia,* "to protect and enhance the quality of the

Nation's air resources"), 7470(1) (purpose of PSD program is "to protect public health and welfare from any actual or potential adverse effect … anticipated to occur from air pollution"). The District Court exercised its equitable authority to remedy that critical consequence of Ameren's unlawful action, which was well within its power under the Act. 42 U.S.C. § 7413(b).

In attempting to argue that the District Court was powerless to address the public-health consequences of Ameren's violation, Ameren once again conflates its violation of the law—in particular, the timing of the violation for purposes of the statute of limitations—with the remedies available for that violation. Ameren points out that its "excess emissions" occurred during its "post-Project operation of Rush Island," rather than during its unlawful modifications. Brief 60. Ameren further notes that these post-project operations are not a continuing violation of the Act, for purposes of the applicable statute of violations. *Otter Tail,* 615 F.3d at 1014 (text of Act prohibits "modification of a facility without a PSD permit and [best-available control technology]").

But the presence of an "ongoing violation" is not a condition of the District Court's remedial authority. The Act expressly permits EPA to

seek a remedy for wholly past violations, 42 U.S.C. § 7413(b)(1) (permitting "appropriate relief" where a person "has violated" a SIP). That plain text permits an enforcement suit even where there is no ongoing violation; and it provides the courts with full remedial authority both to cure the violation and address its effects. *See Nucor Steel–Ark. v. Big River Steel, LLC*, 825 F.3d 444, 449 (8th Cir. 2016) (holding that Clean Air Act permits suit, where "a person [has] allegedly … violated" the Clean Air Act "*in the past*").

Ameren's central (if unstated) claim—that the courts' remedial authority extends only to the cessation of activities that are "ongoing violations" for purposes of an applicable statute of limitations—lacks any basis in the statutory text, *id.,* or in the law generally. Retention of the benefits of an antitrust violation is not an ongoing violation, for purposes of the applicable statute of limitations. *Varner v. Peterson Farms,* 371 F.3d 1011, 1020 (8th Cir. 2004). That has never prevented courts from ordering the violator to return those benefits. *Fishman v. Estate of Wirtz,* 807 F.3d 520, 551-52 (7th Cir. 1987). A statute that prohibits securities fraud may be complete, for purposes of the limitations period, "on the date the sale of the instrument is completed."

McCool v. Strata Oil Co., 972 F.2d 1452, 1460 (7th Cir. 1992). That does not inhibit courts' authority to order the return of funds resulting from the fraud to the defrauded party. *See SEC v. Team Resources Inc.,* 942 F.3d 272, 275 (5th Cir. 2019).

Ameren does not (and could not) dispute that the emissions remedied by the District Court's injunction are the *result* of Ameren's violation of the Act. ADD1324-1361. Those emissions are, in fact, the single most relevant result of that violation, given the purpose of the governing law: "protect[ing] health and welfare from any actual or potential adverse effect which … may reasonably be anticipated to occur from air pollution." 42 U.S.C. § 7470(1).[12] *See United States v. DTE Energy Co.,* 711 F.3d 643, 651 (6th Cir. 2013) (purpose of the New Source Review requirements is to prevent increases in pollution). Congress authorized any "appropriate relief" for a violation, 42 U.S.C. § 7413(b)(1); that text provides express authority to address the "harm *caused* by [Ameren's] past violations," notwithstanding that the harm necessarily post-dates the violation. *Atlantic Salmon of Maine,* 339 F.3d at 31 (emphasis

[12] The statute's emphasis on preventing increased emissions is confirmed by the definition of a modification triggering PSD as one that produces increased emissions. 42 U.S.C. §§ 7479(2); 7411(a)(4).

altered). The Act consequently permits a district court to issue a narrowly tailored injunction requiring Ameren to remedy the pollution resulting from its violation. *See Cigna Corp. v. Amara,* 563 U.S. 421, 441 (2011) (equitable remedies traditionally include "'compensation' for a loss *resulting from"* the violation (emphasis added)).

2. The District Court's Compensatory Injunction is Not a Penalty and Was Not Waived.

Ameren also challenges the District Court's compensatory injunction by characterizing it as a "penalty," and insisting that EPA "waived it" when it relinquished remedies that would require a jury trial under the Seventh Amendment. Brief 64. That argument is triply wrong.

First, EPA never waived its ability to seek an injunction addressing Ameren's excess emissions. The United States explained that it was retaining its request for "equitable and injunctive relief," SCADD001, including "an injunction requiring Ameren to remediate and mitigate the harm to public health and the environment caused by the excess emissions that resulted from its illegal modification," SCADD004-005. *See* SCADD008-009 (explaining why remedial injunction is equitable, rather than punitive). The United States further stated that it had yielded only its demand for "civil penalties," in the specific sense of

'penalties' that require a jury trial under the Seventh Amendment. *Id.* There is no reason to read that release of relief beyond its express terms, or to encompass a remedy that the United States expressly retained.

The context of EPA's decision reinforces that conclusion. EPA relinquished "civil penalties" when it sought trial by judge rather than jury. *Id.* at 1. Under the Seventh Amendment, the penalties that require a jury are those divorced from "equitable determinations, such as the profits gained from violations of the statute," and intended to "further retribution and deterrence." *Tull v. United States,* 481 U.S. 412, 422-23 (1987). Compensatory relief, in contrast, "limited to 'restoring the status quo and ordering the return of that which rightfully belongs to'" an injured party, is an equitable remedy and not a "penalty" for Seventh Amendment purposes. *Id.* at 423-24. *Accord Cass Cty. Music Co. v. CHLR, Inc.,* 88 F.3d 635, 643 (8th Cir. 1996). Both the terms of EPA's waiver, and the standards under which that waiver operated, contradict Ameren's assertion that EPA relinquished its right to request the District Court's remedial injunction.

Second, Ameren's reliance on *Kokesh v. SEC,* 137 S. Ct. 1635, 1642 (2017)—which arose in a completely different context—is misplaced. Brief 64. *Kokesh* does not address when an injunction might be considered a non-equitable claim, necessarily waived along with a jury trial under the Seventh Amendment. Instead, *Kokesh* addresses when the remedy of disgorgement should be understood as a "penalty," as that term is used in the five-year statute of limitations at 28 U.S.C. § 2462. 137 S. Ct. at 1642. The Court, in *Kokesh,* expressly disavowed any intention to address the scope of judicial "authority to order" disgorgement, or any other relief, under the securities laws. *Id.* at 1642 n.3. *A fortiori*, *Kokesh* cannot be understood to have addressed the nature of the remedies available under the Clean Air Act, 42 U.S.C. § 7413(b)-(c), much less their proper characterization under the Seventh Amendment.[13]

Third, the District Court's injunction is not a penalty, even as *Kokesh* interprets that term within 28 U.S.C. § 2642. *Kokesh* makes clear that the remedy it defined as a penalty—disgorgement—was "not

[13] The Supreme Court has granted certiorari in a case that presents the question of the remedies available under federal securities laws, reinforcing the conclusion that *Kokesh* did not address that issue. *Liu v. SEC,* 140 S. Ct. 451 (2019).

compensatory" because the disgorged funds were not directed towards "investors as restitution," but rather as a "noncompensatory sanction to the Government." 137 S. Ct. at 1644. *Kokesh* centrally emphasized that the remedy it addressed "does not go to victims" and "is not limited to the amount of harm to victims"; for those reasons, *Kokesh* deemed the disgorgement remedy "punitive" rather than "remedial." *Saad v. SEC,* 873 F.3d 297, 305 (D.C. Cir. 2017) (Kavanaugh, J., concurring). That reasoning offers no basis to classify the District Court's injunction as punitive. The District Court ensured both that its injunction benefited only the victims of Ameren's violation, and that it was precisely limited to the "amount of harm" those victims suffered. ADD1446-47. It thereby ensured that the injunction served a purely remedial purpose. *See Mitchell,* 361 U.S. at 336 (a "remedy is not … punitive, where the measure of reimbursement is compensatory only").

Given that careful tailoring, *Kokesh* cannot be understood to deem the District Court's injunction as punitive. *See United States v. Telluride Co.,* 146 F.3d 1241, 1246 (10th Cir. 1998) ("[R]estorative injunction" under Clean Water Act "is not a penalty because it seeks to restore only the wetlands damaged by Telco's acts to the status quo or

to create new wetlands for those that cannot be restored."); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 82 (3d Cir. 1990) ("[A] court may fashion injunctive relief requiring a defendant to pay moneys into a remedial fund, if there is a nexus between the harm and the remedy," and such relief is distinguishable from "civil penalties … paid into the Treasury"); *United States v. Price,* 688 F.2d 204, 212 (3d Cir. 1982) (that injunction requiring "abatement" of pollution from action requires expenditure of money does not transform into a punitive award of damages). *Accord SEC v. Collyard,* 861 F.3d 760, 764 (8th Cir. 2017) (declining to resolve whether an "injunction can be § 2462 penalty," because injunction in question was not punitive).[14]

[14] The District Court's injunction is thus distinguishable from the injunction deemed punitive by *United States v. Cinergy Corp.,* 618 F. Supp. 2d 942, 967 (S.D. Ind. 2009), *rev'd by* 623 F.3d 455, 461 (7th Cir. 2010). The requested injunction in *Cinergy* was deemed non-remedial because it would require reductions that "far exceed[ed]" the emissions resulting from the violation. *Id.* The District Court's injunction, in contrast, was tailored to avoid any such excess reductions. ADD1446-47. The court in *United States v. Midwest Generation, LLC,* deemed a "penalty" relief directed against a party who no longer owned the violating plant—a holding that has no relevance here. 781 F. Supp. 2d 677, 685-86 (N.D. Ill. 2011).

B. The Court Had Article III Jurisdiction.

Ameren's arguments regarding Article III jurisdiction hinge upon a single, incorrect claim: that pollution produced by "[o]perations" at a facility that has violated PSD does "not cause an injury that the PSD program recognizes." Brief 67 (emphasis added). That claim is incorrect, first, because it ignores the District Court's determination (the substance of which Ameren does not dispute) that the excess pollution produced by Rush Island was *caused* by Ameren's failure to comply with PSD—in particular, its failure to adopt the best available control technology. ADD1324-1356. That the resulting pollution was emitted after the project was completed, and the plant recommenced operations, does not undermine that causal link. Pollution *always* occurs after the modification is complete—a fact Congress recognized within the statutory definition of a "modification," as a physical change which "increases the amount of" pollution "emitted by such source" *after* the change. 42 U.S.C. §§ 7479(2)(c) & 7411(a)(4).

By failing to comply with PSD, Ameren emitted 162,000 tons of sulfur dioxide pollution that would never have been produced if Ameren had complied with the law when it modified the Rush Island Plant.

ADD1305. For standing purposes and otherwise, that is sufficient to demonstrate that the pollution was caused by Ameren's unlawful modification. "An injury may be 'fairly traceable' to a defendant for causation purposes even when [the defendant's unlawful actions] are not 'the very last step in the chain of causation.'" *Wieland v. U.S. Dep't of Health & Human Servs.,* 793 F.3d 949, 954-55 (8th Cir. 2015) (quoting *Bennett v. Spear,* 520 U.S. 154, 168-69 (1997)). That the pollution was produced during post-project operations does not, consequently, prevent it from being traceable to Ameren's PSD violations under Article III's causation requirement. *See Sierra Club v. Cedar Point Oil Co.,* 73 F.3d 546, 557 (5th Cir. 1996) (so long as unlawful pollution "causes or contributes to the kinds of injuries alleged", causation prong is satisfied). *See also Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 106-7 (1998) (distinguishing remedy that provides "compensation or redress" to the injured party from "[r]elief that does not remedy the injury suffered," for purposes of redressability).

Second, and more fundamentally, the statute directly contradicts Ameren's assertion that the "PSD program" does not "recognize"

injuries caused by the pollution produced when plants fail to comply with PSD. Brief 67. Those injuries are—in plain, statutory text—the whole point of the PSD program. 42 U.S.C. § 7470(1). Ameren's pollution caused harm to the "public health and welfare," *id.,* of the populations who are the beneficiaries of the District Court's remedial injunction, ADD1386-87, including "hundreds to thousands of premature deaths." ADD1384. That is exactly the "adverse effect" against which Congress intended the PSD program to "protect" the public. 42 U.S.C. § 7470(1). Accordingly, courts have uniformly recognized that "exposure to increased [air pollution]" is an injury sufficient to support standing in a PSD challenge. *LaFleur v. Whitman,* 300 F.3d 256, 270-71 (2d Cir. 2002).[15]

[15] Ameren asserts that "[t]here can be no legally cognizable injury from lawful conduct." Brief 69. Given the District Court's factual determinations that the injuries were caused by Ameren's unlawful failure to comply with PSD, that assertion is irrelevant. But it is also incorrect; this Circuit has recognized that even injuries that might result from compliance with the law are sufficient to support standing. *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 974-75 (8th Cir. 2014) (holding that intervenor has standing because it would be injured by actions allegedly necessary to comply with law).

C. The District Court's Injunction Addressed Ongoing Irreparable Harm.

Ameren argues that injunctions cannot address the harms caused by violations of law that occurred in the past. Brief 70. That is not the law. *See CSX Transp., Inc. v. Bd. of Pub. Works of W. Va,* 138 F.3d 537, 541-42 (4th Cir. 1998) (where a "past violation 'continue[d] to harm'" the injured party, an "injunction to correct this ongoing harm [is] permissible") (alteration in original)). The cases upon which Ameren relies hold, rather, that wholly "past *injuries*" are not redressed by a prospective injunction. *Frost v. Sioux City,* 920 F.3d 1158, 1161 (8th Cir. 2019) (emphasis added). Here, the Court found that Ameren's violations caused an ongoing, irreparable injury, and its injunction was tailored to redress of that injury. ADD1435-36 ("Because of Rush Island's excess emissions, an increased risk of disease and premature mortality extends across thousands of miles of the Eastern United States.").[16]

[16] Amici, but not Ameren, contest the District Court's authority to determine what measures Ameren was required to undertake to comply with the Clean Air Act. Brief of Amici Curiae Chamber of Commerce *et al.* 26. This court generally declines to consider arguments raised solely by an amicus. *Nebraska v. U.S. Dep't of Interior,* 625 F.3d 501, 512 n.10 (8th Cir. 2010). In any event, that argument conflicts with the text of the Act, which authorizes the District Court to "require compliance" with the Act—a task that necessarily requires determining what

IV. The District Court Had Statutory Jurisdiction.

Finally, Ameren contends that the Title V violation in this case "is reviewable exclusively by the courts of appeals," pursuant to 42 U.S.C. § 7607(b), and that the District Court therefore lacked jurisdiction, primarily citing *Otter Tail,* 615 F.3d at 1020. Brief 73. But *Otter Tail* recognizes that this "would not necessarily" hold true "in EPA enforcement actions." 615 F.3d at 1023. The statute confirms that conclusion. *Otter Tail* held that citizens could not seek review in a district court of claims for which review "could [be] obtained … through the process established by 42 U.S.C. § 7661d" and 42 U.S.C. § 7607(b). *Id.* But the process set out in 42 U.S.C. § 7661d, and the judicial review provided by 42 U.S.C. § 7607(b), do not permit any action or claim by EPA. Those provisions authorize private parties to petition EPA, and to sue EPA; they offer no path by which EPA can seek judicial enforcement against those who violate the Act (Congress did not,

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"compliance" entails. 42 U.S.C. § 7413(b). The Supreme Court has, furthermore, rejected the proposition that "state administrative … processes" are the only means by which a best available control technology determination may be made. *Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 491-92 (2004) ("It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law" solely to state proceedings).

presumably, require EPA to sue itself). *See* 42 U.S.C. § 7607(b) (allowing "petition for review of any action … *by the Administrator*" (emphasis added)).

CONCLUSION

For those reasons, the District Court's decisions and judgment should be affirmed.

Respectfully submitted,

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March 27, 2020

CERTIFICATE OF COMPLIANCE

1. In compliance with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the **Response Brief of Plaintiff-Appellee Sierra Club** contains 12,748 words, as calculated by Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

2. In compliance 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), this brief has been prepared in a proportionally-spaced typeface in Microsoft Word in Century Schoolbook 14-point font.

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

Dated: March 27, 2020

/s/ Sanjay Narayan
Counsel for Sierra Club

CERTIFICATE OF SERVICE

On March 27, 2020, I electronically filed the foregoing **Response Brief of Plaintiff-Appellee Sierra Club** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: March 27, 2020

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