UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
SIERRA CLUB,	)	No. 4:11 CV 77 RWS
	)	
Plaintiff-Intervenor,	)	
	)	
vs.	)	
	)	
AMEREN MISSOURI,	)	
	)	
Defendant.	)	

ORDER

This matter is before me on Ameren Missouri's (Ameren) motion to stay injunction pending appeal. On September 30, 2019, I issued a Memorandum and Order and Judgment ordering injunctive relief that requires Ameren to undertake several actions to remedy its violations of the Clean Air Act. [See ECF Nos. 1122, 1123]. Ameren asks that I stay all ordered injunctive relief pending the outcome of Ameren's appeal to the United States Court of Appeals for the Eighth Circuit. Ameren argues the appeal raises issues of first impression and compliance with the ordered relief would impose unrecoverable costs on Ameren. In response, the Plaintiffs argue that they will continue to suffer irreparable harm if the injunction is stayed pending appeal, and that the costs of initiating compliance do not provide reason to stay the case while the Eighth Circuit considers it. For the reasons below, I will grant Ameren's motion in part.

Courts consider a motion for a stay of injunction under Federal Rule of Civil Procedure 62(c) by balancing four factors: "(1) whether the stay applicant has made a strong showing that

he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Trial courts have viewed the first prong as favoring a stay "where the legal questions were substantial and matters of first impression." Sweeney v. Bond, 519 F. Supp. 124, 132 (E.D. Mo. 1981), aff'd, 669 F.2d 542 (8th Cir. 1982). Ameren contends it has raised a number of substantial issues of first impression over the course of this litigation. In support of its contention, Ameren highlights some of the arguments it presented during the liability and injunctive relief phases. These fully litigated arguments do not demonstrate that Ameren should be permitted to violate the Clean Air Act. However, I am aware, and courts have recognized, that "any trial judge is reluctant to find that a substantial likelihood exists that he or she will be reversed." Id. Accordingly, I find that Ameren's appeal may raise issues of first impression sufficient to satisfy the first prong.

I also find that Ameren will be irreparably harmed if it must spend an unrecoverable $10 million on construction costs and site testing during the pendency of the appeal. See Iowa Utilities Bd. v. F.C.C., 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of unrecoverable economic loss, however, does qualify as irreparable harm."). On the other side of the balance, the interests of the opposing parties in this proceeding, and the public interest at large, both heavily weigh against any stay pending appeal. Based on factual premises and arguments I rejected at trial, Ameren incorrectly asserts that a stay will not cause any harm to the public. As documented by the extensive findings and analysis in the September 30, 2019 Memorandum and Order, the excess pollution that has resulted from Ameren's failure to obtain a PSD permit

continues to harm the downwind communities in irreparable ways. For each year Ameren delays compliance with the ordered relief, an estimated 16,000 additional tons of excess SO_2 emissions are released from Rush Island. [See Memorandum Opinion & Order, ECF No. 1122, p. 58, ¶ 210] Those emissions convert into harmful $PM_{2.5}$, which "leads to increased risk of high blood pressure, hardened arties, heart attacks, strokes, asthma attacks, and premature mortality." [Id. p. 67, ¶ 251]

In its Reply, Ameren attaches an affidavit from Christopher A. Stumpf, P.E., PMP, supporting its assertions about the costs it will face while the appeal is pending. [1130-1] That affidavit shows that the costs of compliance will significantly increase as time goes on. It also shows that the initial costs of compliance that result from permit applications and bid solicitations are relatively small, and that the Missouri Department of Natural Resources "could take up to two years to evaluate a PSD permit application following a complete submission." [1130-1, ¶ 9] The phased nature of the costs of complying with the injunction provides an opportunity for a partial stay. It is possible to issue an order that stays the phases of the injunctive relief that will require the most cost to Ameren, while also requiring it to proceed in ways that will minimize additional harm to the public.

Ameren must begin the process of complying with the ordered injunctive relief so that it can be in the position to immediately begin the more substantial phases of compliance upon the ruling of the Eighth Circuit. A complete freeze on all ordered relief during the entire pendency of the appeal would cause injury to the public that significantly outweighs the potential harm to Ameren that would result from the relatively minimal unrecoverable costs of taking initial steps to comply. In balancing the four factors enumerated in Hilton, I will grant Ameren's application for a stay of injunction insofar as the injunction would require Ameren to commence any actual

testing or construction at Rush Island and Labadie.

However, the ordered relief is not stayed insofar as compliance requires Ameren to submit a PSD application within ninety days in which it proposes wet FGD as BACT and an emissions limitation that is no less stringent than 0.05 lb SO_2/mmBTU on a thirty-day rolling average. The application alone can take up to two years to evaluate; Ameren can greatly reduce the post-Eighth Circuit ruling compliance timeline by beginning that process now. The stay also does not stop Ameren from moving forward with test plan development and a test permit application for DSI at Labadie to ensure timely compliance with the injunction upon ruling by the Eighth Circuit.

Accordingly,

IT IS HEREBY ORDERED that Ameren's motion to stay injunction pending appeal [1124] is **GRANTED** in part. The portions of the injunction that would require Ameren to begin actual testing or construction are **STAYED.** However, Ameren must still comply with the order to submit a PSD application within ninety days, and must propose wet FGD as BACT and an emissions limitation no less stringent than 0.05 lb SO_2/mmBTU on a thirty-day rolling average in that application. Ameren must also submit its DSI testing application for the Labadie plant, and should continue to prepare to quickly comply with the full injunction after the Eighth Circuit issues its ruling.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of October, 2019.