June 7, 2019

Ameren Missouri
CCRCComments@Ameren.com

VIA ELECTRONIC MAIL ONLY

Re: Comments on Ameren Missouri’s Corrective Measures Assessments

Dear Sir or Madam:

The following comments are submitted by Great Rivers Environmental Law Center (“Great Rivers”) on behalf of Missouri Confluence Waterkeeper (“MCW”) concerning Ameren Missouri’s (“Ameren”) Corrective Measures Assessments (“CAMs”) for its four (4) coal utility plants: Sioux Energy Center (“Sioux”), Labadie Energy Center (“Labadie”), Meramec Energy Center (“Meramec”) and Rush Island Energy Center (“Rush Island”).

MCW is a nonprofit organization focused solely on clean water with the goal of providing drinkable, fishable, and swimmable water to all residents of the State of Missouri. MCW is a member of the Waterkeeper Alliance which is an international nonprofit organization that serves and protects waters by connecting local Waterkeeper Organizations and Affiliates worldwide with the goal of drinkable, fishable, swimmable water everywhere.

MCW requests that Ameren consider the following comments and adopt its recommendations before finalizing its CMAs and selecting remedies for closure of its unlined coal ash surface impoundments at its four facilities. MCW, based on its mission of protecting clean water, vehemently opposes Ameren’s preferred choice of closure-in-place (“CIP”) for the coal combustion residuals (“CCRs” at its facilities and strenuously requests Ameren to conduct closure-by-removal (“CBR”) instead. Energy utilities around the country required to close unlined surface impoundments pursuant to the CCR Rule have invariably chosen, or have been compelled to, close their surface impoundments by CBR. Those facilities that have chosen CIP demonstrate that such remedy is not protective of human health and the environment.
I. Closure-in-place fails to mitigate legal risks associated with CCR surface impoundments to both the long-term economic interests of shareholders and public health

At Ameren’s public meeting on May 31, 2019, corporate representatives stated several times that Ameren had not made a final remedy selection decision for the four power plants and their unlined surface impoundments and that Ameren was eliciting public comment to inform their decision-making process. However, Ameren’s earlier publications and the conclusions of the CMAs for each facility demonstrate that Ameren has already made the decision to rely on CIP at each of the four facilities. For example, in Ameren’s November 2018 “Report on Our Responsible Management of Coal Combustion Residuals,” Ameren states that:

Under the CCR Rule, closure of an ash basin can occur in one of two ways: (i) leaving the CCR materials in-place and installing a final cover system, known as closure-in-place, or (ii) removing the CCR to another permitted storage facility. We have selected closure-in-place as the prudent closure method.

(emphasis added). ¹

Furthermore, in the CMAs Ameren states that: “Ameren has prepared closure design documents, completed necessary closure notifications, engaged a qualified contractor and is currently in the process of closing the SCPA in place.” ² (emphasis added).

The primary reason given by corporate representatives at the public meetings on why Ameren prefers closure-in-place is to avoid the short-term risks to workers and the community in removing the waste. However, the only statement in the Sioux CMA about community risk or worker safety is: “Given the magnitude of the total estimated haul volume (6.1 MM CY) along with the travel distance required to transport the CCR to one or more landfills, injuries and fatalities would be likely.” ³ The CMA provides no evidentiary support for this statement and performs no risk assessment about these types of risks associated with this alternative. This unsupported, spurious, and conclusory statement fails to provide a justification for the risks from CBR that outweigh the risks from CIP and leaving pollutants in an unlined landfill. If this report were being submitted to EPA or MDNR for review and approval, they would laugh at Ameren’s report.

Ameren puts forth an Extraction & Transportation study (“E&T”) to support these supposed short-term risks. The E&T study states that “[i]t is anticipated that the additional truck traffic would result in an increase of 6 crashes total on an annual basis along the entirety of the haul route, as follow: Net increase of 2 Severe (Fatal or Injury) Crashes per year; Net increase of 4 PDO (Property Damage Only) Cashes [sic] per year;” ⁴ and that “semi-tractor trailer rigs are

³ Id. Page 20.
⁴ Ameren Extraction & Transportation Study: Rush Island Ash Pond Closure Assessment, Page 11.
responsible for emitting 12.5 grams of pollutants per mile into the air. The economic cost attributable to truck emissions using EPA’s methodology was estimated to be $434M. This accounts for increased healthcare costs, lost productivity, welfare costs, environmental remediation, etc.” However, these minor crashes are not properly weighed against the healthcare costs to surrounding communities related to the release of CCRs into the environment from unlined ash ponds. Similarly, pollution from present day emissions of trucks fails to account for increased regulation of emissions from trucks 20, 30, and 40 years from now and fails to compare these costs with the costs associated with the continued release of CCRs into the environment on the surrounding community. In short, this skewed report is a means to an end to try to quantify short-term costs to the community for CIP while ignoring short-term and long-term costs to those same communities by leaving CCRs in place.

Ameren’s decision to rely on these purported short-term risks as a cover for short-term costs will, in fact, result in long-term costs to the economic interest of shareholders and long-term health impacts and costs to the surrounding communities. Ameren’s approach to mitigation of litigation risk is based on faulty premises. In November 2018, Ameren made the following statement regarding mitigating legal risks:

Environmental groups have also attempted to use the Clean Water Act (CWA) to compel certain utilities to remove CCR from their ash basins. However, appellate courts in three recent decisions have rejected those efforts. The courts have concluded that such claims should be based on the Resource Conservation and Recovery Act (RCRA) and the CCR Rule, not the CWA. Under RCRA, a litigant must establish the existence of an ‘imminent and substantial endangerment.’ These decisions provide further support for Ameren’s decision to close our ash basins in-place.

This cursory litigation risk analysis is faulty on several fronts. First, the applicability of the CWA to ash ponds that discharge into groundwater is currently being decided by the Supreme Court. Second, this perfunctory analysis assumes without support that Ameren is immune from a successful RCRA “imminent and substantial endangerment” claim (“ISE”) for releases of toxic constituents from the unlined coal ash ponds. Third, this litigation risk analysis fails to account for the possibility that EPA could classify coal ash as hazardous waste under Subtitle C of RCRA, which would result in Ameren managing several CERCLA Superfund sites. Fourth, this litigation risk analysis fails to account for common claims of trespass and nuisance from nearby property owners based on the uncontroverted evidence of large amounts of pollution migrating through groundwater from unlined ash ponds off of Ameren’s properties.

A. Clean Water Act

With respect to the CWA issue, the Supreme Court has recently granted certiorari to answer the question of whether the Act regulates discharges of pollutants to groundwater that make their way to navigable (surface) waters. The exact question presented in the case is:

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5 Id.
6 ORM Report, Page 7.
Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.\(^7\)

Courts faced with the issue have reached different results, and a recent circuit split among federal courts prompted the Supreme Court to resolve the issue. In *Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), and *Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), the Sixth Circuit determined that discharges from coal ash ponds to groundwater were not covered by the CWA and dismissed the cases based on the fact that the discharge had occurred to groundwater, which is not a navigable water. In both *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), and *Hawai‘i Wildlife Fund v. Cty. of Maui*, 881 F.3d 754 (9th Cir. 2018) amended by 886 F.3d 737 (9th Cir. Mar. 30, 2018), the Fourth and Ninth Circuits extended CWA jurisdiction to discharges that occurred to groundwater where those discharges were conveyed to navigable waters.

In *Hawai‘i Wildlife Fund*, the Ninth Circuit based its holding on three facts: (1) the County discharged pollutants from a point source (i.e. man-made surface impoundments), (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*. Id. At 749 (emphasis added). Clearly, all of these factors are met at each of the four Ameren facilities: (1) the ash ponds are discrete conveyances of pollutants as demonstrated by the NPDES permits held by each facility; (2) the discharge of pollutants into groundwater that is directly connected to major surface waters such as the Mississippi River, Missouri River, and Meramec River are fairly traceable from the ash ponds to the surface waters and therefore are the functional equivalent of a discharge to navigable water; and (3) based on the groundwater sampling at each of the facilities that demonstrate elevated levels of arsenic and molybdenum in groundwater, more than *de minimis* amounts of pollutants are reaching surface water from the ash ponds.

Even if the Supreme Court rejects the Ninth Circuit’s test, it could side with EPA which, in its amicus brief, argued that the court should apply a “direct hydrological connection” test. *Id.* at Footnote 3. EPA, even under the Trump Administration, continues to promote the “direct hydrological connection” test in its briefs filed with the Supreme Court. Clearly, Ameren’s ash ponds would meet the direct hydrological test advanced by the EPA because of the proximity of the ash ponds to adjacent surface waters including the Mississippi River, Missouri River, and Meramec River and the indisputable evidence that Ameren has gathered that there is a direct hydrological connection between surface water and groundwater at the four facilities. In fact, Ameren relies on the premise that the groundwater contamination from the ash ponds is reaching major rivers and being diluted by them to argue that there is no risk to human health or the environment from pollutants entering these waterways.\(^8\) However, this dilution argument misses the mark that significant amounts of CCRs are being discharged into our most significant waterways.

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\(^8\) Sioux Energy Center, Corrective Measures Assessment Plan, May 2019 (“Sioux CMA”), Page 17.
While it is not clear how the Supreme Court will resolve the issue, Antonin Scalia’s plurality opinion in *Rapanos v. United States* noted that “the CWA does not forbid the ‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’” *Id.* citing *Rapanos v. United States*, 547 U.S. 715, 743, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006) (emphasis in original). Scalia noted that “from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the CWA], even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” *Id.* (emphasis in original). Justice Scalia favorably cited a Second Circuit decision in which “the discharge of manure from point sources onto fields (which were not necessarily point sources themselves) and eventually into navigable waters constituted point source discharges under the CWA.” *Id.* This same logic could equally extend to groundwater, especially where there is a “direct hydrological connection” between groundwater and surface water like at all four of Ameren’s power plants. Thus, it is extremely premature for Ameren to conclude that they have no CWA liability for their ash ponds and the discharge of pollutants that undoubtedly make their way to surface waters such as the Mississippi River, Missouri River, and Meramec River.

**B. RCRA ISE Claims**

With respect to RCRA ISE claims, Ameren relies on incomplete groundwater monitoring and a faulty risk assessment to conclude that Ameren is immune from ISE claims. The basic premise that Ameren adopts is that no wells around its facility could be contaminated by its CCRs and therefore no ISE claims exist. For example, at Rush Island, Ameren states:

> There are no on-site users of alluvial groundwater adjacent to the RCPA. As documented in the 2014 and 2018 risk assessment reports, there are approximately 16 private wells recorded within a one-mile radius of the facility, and all are located west and upgradient of the facility. There are no users of groundwater impacted by molybdenum, arsenic or any other CCR constituent in the vicinity of the RIEC ash management area and sampling results from the off-site network demonstrate that bedrock groundwater fully complies with federal and state drinking water standards.\(^9\)

Regarding Meramec, Ameren states that:

> There are no on-site users of alluvial groundwater adjacent to the MEC. As documented in the 2018 risk assessment report, all private and public wells recorded within a one-mile radius of the facility are upgradient of the facility or located on the opposite side of the Meramec River and, therefore, such groundwater is isolated from the facility (see the February 2018 report for more details).\(^10\)

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\(^9\) Rush Island CMA, Page 12.  
\(^10\) Meramec CMA, Page 11.
For Labadie, Ameren states:

There are no on-site users of alluvial groundwater adjacent to LEC. As documented in the 2018 risk assessment report, while there are approximately 76 private wells recorded within a one-mile radius of the facility, all are located in the bluff area south and upgradient of the facility (a detailed discussion of the wells is presented in the AECOM 2014 report). Thus, there are no users of groundwater impacted by molybdenum or any other CCR constituent in the vicinity of the LEC ash management areas and sampling results from the off-site network demonstrate that bedrock groundwater fully complies with federal and state drinking water standards.\footnote{Labadie CMA, Page 11.}

All of these conclusions are based on the results of only a few years of groundwater monitoring around Ameren’s facilities. These conclusions are not based on any samples taken from these private wells. Nor do they take into account the fact that other property owners in the vicinity of the facilities have a right to drill wells on their land for irrigation, agriculture, or domestic purposes and that the groundwater contamination from Ameren’s facilities could pose and imminent and substantial endangerment to such persons.

C. Subtitle C Hazardous Wastes

Given the evolving understanding of the harmfulness of CCRs and their effects on human health and the environment, EPA (or Congress) will eventually decide to reclassify CCRs as a hazardous waste rather than a solid waste, or this result could be achieved by litigation against EPA. Ameren estimates that CBR, if selected as the remedy, would occur over 15-40 years. Assuming Ameren selects CIP and the CCRs sit for an undetermined length of time in place, should the CCRs become hazardous wastes, Ameren would then incur significant costs in having to comply with CERCLA to determine if CIP still meets regulatory standards when they could have already been a step ahead in removing the CCRs. Ameren’s litigation risk assessment fails to take into consideration that it may end up with several CERCLA Superfund sites. These long-term cost risks have been ignored in the selection of CIP.

D. Common law claims

Ameren’s justification for choosing closure-in-place is based on risk assessment models that assume that because human beings are not “exposed” to chemicals of concern in CCR, then there is no legal justification for removing the waste. Thus, Ameren concludes that the litigation risks of leaving CCRs in place has been mitigated. This premise is entirely faulty and does not relieve Ameren or its shareholders of potential liability. For example, in the Sioux CMA, Ameren states that there are only two wells within 1 mile of the facility.\footnote{Sioux CMA, Page 11.} According to Ameren one well is not in service and the other is screened in bedrock.\footnote{Id.} While this may be relevant to the current viability of an ISE claim, it has no relevance to the issue of whether CCRs are leaving Ameren’s property and trespassing on other property owners. Similarly, it has no relevance to
whether CCRs are causing a nuisance to nearby landowners by preventing them from using their groundwater. Ameren’s own reports show that significant quantities of CCRs are leaching into groundwater and that these constituents are migrating offsite. These facts are completely ignored in its litigation risk assessment and demonstrate that Ameren could face significant legal costs in addressing these contamination issues in the future.

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Ameren states that “while we continue to evaluate alternatives, we believe that our current closure-in-place plan is both technically feasible and significantly less-costly to our customers than one that would remove and transport all CCR materials to another permitted storage facility.”\(^\text{14}\) While this statement may be true related to short-term costs, the statement is untenable in terms of long-term costs to Ameren, its shareholders and ratepayers, surrounding communities, and the environment. According to Ameren, “Alternative 5 (CBR with MNA) has the lowest long-term residual risk in that removal of the source material reduces the likelihood of future releases to groundwater.” Despite this uncontroverted statement, somehow, Ameren has decided that the CBR alternative should be given the lowest “red” ranking. It is clear that Ameren has chosen the CIP remedy because of its lowest short-term costs, not because it addresses the litigation risks, health risks, and environmental risks associated with continued releases of CCRs into groundwater and the surrounding environment.

II. Ameren’s rejection of closure-by-removal is based on significantly inflated costs required to implement this preferred remedy

As mentioned above, Ameren admits that CBR provides the lowest long-term risk to human health and the environment, yet the only reason CBR is rejected by Ameren, in truth, is because of the costs associated with this remedy. However, the figures that Ameren has put forth as to the cost of both onsite and offsite removal is drastically inflated over other similar utilities across the country and allows Ameren to skew its remedy selection decision. The below chart shows that Ameren’s estimated costs for onsite CBR is 2.34-2.81 times higher and offsite CBR is 2.55-3.08 times higher than Duke Energy in North Carolina. These extreme over-inflations of costs are entirely unexplained by Ameren and show that Ameren’s attempt to skew the costs of CBR upward to justify CIP is absurd.

III. Molybdenum and arsenic concentrations in groundwater at the four facilities demonstrate that CBR is the only appropriate remedy to provide long-term assurances of reduced risk from releases of CCRs into the environment.

Ameren relies on the higher NAS standard of 0.6 mg/L to conclude that only Sioux has a problem with molybdenum with 49 out of 244 samples or 20.08% being above this standard. However, at Sioux, 77 of the 244 samples or 31.56% are above the 0.1 mg/L standard approved by EPA under the CCR rule. At Labadie, 81 out of 208 or 38.94% of samples exceed the EPA approved limit. At Meramec, 35 of 88 (39.77%) of the samples exceed the EPA standard. These numbers are shocking. With respect to Sioux, the following chart shows how much higher the levels of molybdenum are compared to the NAS standard (600 ug/L), the EPA CCR standard...
(100 ug/L), and the EPA Health Advisory Level (HA) (40 ug/L)\textsuperscript{15}. These results demonstrate that a serious molybdenum issue exists at Sioux. Samples are on average, 3 times greater than the NAS standard, 18 times greater than the CCR standard, and 45 times greater than the HA standard. Yet, Ameren concludes that these wastes should be left in place to slowly leach out into groundwater and surface water \textit{ad infinitum}.

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\textsuperscript{15} The USEPA Office of Water value for the Health Advisory Level (HA) is 40 ug/L, which is based on the DWEL, but using a default assumption that only 20% of intake can come from water (USEPA, 2018c). This figure should be used for all risk assessments because, as Ameren notes in its “What You Need to Know about Molybdenum” pamphlet, EPA is considering developing an MCL for molybdenum in drinking water, which could easily track EPA's HA.
The same is true of arsenic at the other facilities. These indisputable facts demonstrate that CBR is the only appropriate remedy for Ameren’s unlined coal ash ponds located in the floodplains of the Mississippi River, Missouri River, and Meramec River.

IV. The CMA violates 257.97 by failing to discuss the degree to which community concerns are addressed by a potential remedy

Section 5.2.1 and its subparts address “the long- and short-term effectiveness and protectiveness of the potential remedy(s), along with the degree of certainty that the remedy will prove successful” as required by 40 CFR §257.97(c)(1); Section 5.2.2 and its subparts address “the effectiveness of the remedy in controlling the source to reduce further releases” as required by 40 CFR §257.97(c)(2); and Section 5.2.3 and its subparts address “the ease or difficulty of implementing a potential remedy” as required by 40 CFR §257.97(c)(3). Shockingly absents is a section 5.2.4 or any subparts discussing “the degree to which community concerns are addressed by a potential remedy” as required by 40 CFR §257.97(c)(4). This total absence of consideration of this modifying factor violates 40 CFR § 257.97. No doubt, Ameren does not want to face the fact that CIP in no way addresses community concerns, so it just decides to ignore the issue. The fact that the ash ponds are in the floodway or the 100-year floodplain, the fact that they are unlined, the fact that Appendix IV chemicals are leaching into groundwater are all completely ignored by Ameren in its CMA analyses.

Ameren has stated that “[b]alancing criteria four, which considers community concerns, will be evaluated following a public information session scheduled for May 2019”16; that “[p]ublic input and feedback will be considered following a public information session;”17 and that “[t]his Corrective Measures Assessment, and the input received during the public comment period, will be used to identify a final corrective measure for implementation at the MEC.”18 However, as explained above regarding Ameren’s predetermined decision to select CIP and the below comments about the inadequacies of Ameren’s public participation process, clearly the communities concerns are not going to be addressed by Ameren. The CMAs themselves and the public meetings required by the CCR Rule about the CMAs are Kafkaesque. If Ameren does not select CBR the community will forever wonder why they were even made a part of the process to begin with.

V. Ameren failed to comply appropriately with the public notice and comments requirements of the CCR Rule and erroneously failed to extend the deadline for comments

Ameren did not post the CMAs to the homepage of the “Managing CCRs” website until after the public meetings were held and after the public complained about the difficulty of locating and accessing the CMAs prior to the public meetings. The inability to easily access these documents violates the spirit of the CCR Rule to provide transparency to the public as required by 40 CFR § 257.107. The refusal of Ameren to extend the deadline to comment in

16 Labadie CMA, Page ii; Rush Island CMA, Page ii; and Meramec CMA, Page ii.
17 Rush Island CMA, Page 25; Meramec CMA, Page 22; Labadie CMA, Page 22.
18 Meramec CMA, Page 31; Rush Island CMA, Page 34; Labadie CMA, Page 32.
light of this fact similarly violates the spirit of the CCR Rule to engage the public in the decision-making process. Overall, the process by which Ameren chose to inform the public about the CMAs was unfortunate. Clearly, Ameren has participated in several public hearings and meetings hosted by government agencies, and understands the value of this type of process. The attempt by Ameren to dilute these meetings by segregating members of the public into small groups is not commendable. Hopefully, Ameren will provide adequate responses to the public’s written comments and incorporate the public’s concerns into the CMAs, but given the fact that Ameren has refused to extend the deadline to submit comments, Ameren has probably already decided to pay lip-service to the written comments being filed.

VI. The CMAs do not consider climate change and increased flooding in the risk analysis for the appropriateness of CIP

None of the CMAs mention climate change. Not once. Despite the undisputed evidence that the region will experience more frequent and more intense flooding, the CMAs do not analyze what the impacts of climate change would be on CIP. Ameren attempts to assure the public that their ash ponds will be built with berms 18 feet above the 1993 flood levels. Will this be good enough? The public certainly doesn’t know because Ameren has not conducted any sort of analysis about the issue. All of Ameren’s coal ash ponds are unlined and located adjacent to the State’s three primary rivers—Mississippi, Missouri, and Meramec. Currently, the facilities are nearly underwater. What good would a cap do if the ash ponds are washed away by record floods? Nothing. The pictures below show the flooding at Sioux and Labadie right now. These locations are no place to leave millions of tons of pollutants that will find their way to our state’s groundwater and surface waters.

MCW urges Ameren to remove all coal ash at its Missouri facilities immediately. MCW and the community will not let down in fighting Ameren’s preferred remedy of CIP.

Sincerely,

Bob Menees
Staff Attorney