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September 14, 2015

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Via email: rodney.a.christensen@usace.army.mil

Re: Permit Number: NWK-2015-64

Comments for Continental Coal Inc.'s
Clean Water Act, Section 404 Permit Application

Dear Mr. Christensen:

Great Rivers Environmental Law Center ("Great Rivers") and the Missouri Coalition for the Environment ("MCE") (collectively referred to herein as the "Commenters") respectfully submit the following comments regarding Clean Water Act ("CWA"), Section 404 permit application and public notice, NWK-2015-64. The applicant, Continental Coal Inc., ("Continental Coal") proposes to conduct surface mining activities in Bates County, Missouri in close proximity to the City of Foster. The project will result in the placement of fill into 1.51 acres of wetlands and 3,000 linear feet of intermittent stream and 1,175 linear feet of ephemeral stream. We request that the U.S. Army Corps of Engineers ("Corps") and the Missouri Department of Natural Resources ("MDNR") consider the following comments before deciding whether to grant the applicant a 404 Permit and Clean Water Act, Section 401 Water Quality Certification ("401 Certification"), respectively.

The Corps should not grant the 404 Permit because the proposed project is not in the public interest, it will likely cause water quality standards to be violated, and it will likely cause Waters of the U.S. to be significantly degraded. Additionally, the proposed project fails to adequately avoid, minimize, and compensate for impacts to aquatic resources. Finally, the Corps should prepare an Environmental Impact Statement to address the significant effects the proposed project would have on the environment.

I. Continental Coal's Project Is Not in The Public Interest

The public interest review process requires a "careful weighing" of up to 21 relevant public interest factors, including economics, aesthetics, energy needs, safety and the general "needs and welfare of the people."[1] Here, the region's economic and environmental policy is being formulated to meet the short-term demands of extractive industries without assessing long-term harm to communities or to the environment. If permitted, the proposed mine could place downstream residents at increased risk from pollution, flooding, dewatering of ground water, decreases in property values, blasting, dust, and aesthetic injuries. The immediate area has taken 75 years to recover from previous mining activities in the 1940s, and the new proposal will resubject the area to the negative environmental and social impacts over at least the next twenty years. A comment letter from the U.S. EPA to the Illinois EPA regarding a similar coal mine in Illinois accurately describes how toxic and destructive coal mining is to the environment and surrounding communities:

> During mining, sediment concentrations and load rates increase dramatically compared to the pre-mining condition. Total suspended solids and total dissolved solids are likely to increase. Increased erosion and transport of sediments associated with mining can alter the flow rate of stream channels downstream, transport chemicals downstream, and adversely affect downstream aquatic ecosystems. Studies have found that more frequent, higher daily flow volumes occur during the active phases of mining compared to pre-mining conditions. This may be attributable to the loss of vegetative cover that normally reduces runoff volumes and promotes absorption of water for vegetation growth. Although modern reclamation practices may reduce some of the environmental effects of surface coal mining, significant harm to a landscape and its watershed still occurs during the active phases of coal extraction prior to reclamation.[2]

[1] 33 C.F.R. § 320.4(a).
[2] Swenson, Peter, EPA,"Public Notice C-0138-10 (CoE Apl. # 2010-247), Knight Hawk Coal Company, Hawkeye Surface Coal Mine," Letter to Thaddeus Faught. (Nov. 18, 2010).

Additionally, the proposed project fails to consider the changing landscape regarding energy production, especially as it relates to climate change. Renewable sources of energy, such as wind and solar power, continue to increase in both supply and demand in Western Missouri and Eastern Kansas. The use of fossil fuel is being more restricted under new laws such as the Clean Power Plan, and the proposed project will cause continued climate change impacts for at least the next twenty years and is thus not in the public interest. The coal from this area is "dirty" coal, which will exacerbate climate change impacts in the region through increases in carbon dioxide when it is burned for electricity at coal-fired power plants. Furthermore, surface mining is a major contributor of methane gas, comprising 15% of total anthropogenic releases.[3] Methane is a more potent greenhouse gas than carbon dioxide (approximately 4 times greater), and the release of significant amounts of methane from the proposed project is not in the public interest. Not only does the proposed project not promote the public interest, it would cause immediate harm to our environment and communities and further, would be a serious detriment to future generations.

II. The Corps Must Ensure Water Quality Standards Will Not Be Violated.

No discharge of dredge or fill materials may be permitted if such discharge will cause or contribute to a violation of any applicable water quality standard.[4] The Corps, EPA and MDNR all have an independent responsibility to ensure that water quality standards are not exceeded.[5] This review must be undertaken carefully, as "EPA has reason to believe that discharges from surface mining activities have a significant potential to cause nonattainment of applicable water quality standards downstream from valley fills, impoundments and sediment ponds."[6]

EPA's Coal Mining Guidance further states, "[t]he Section 404 permit must independently ensure that water quality is protected. The applicant should be required to demonstrate up front, based on proposed mining techniques, best management practices or other actions that the project will not cause or contribute to an excursion from applicable water quality standards or to significant degradation." [7] As Continental Coal's proposed project will likely contribute additional and significant manganese, sulfates, Total Dissolved Solids (TDS), and other mining pollutants into the watershed, the project has the potential to cause or contribute to violations of water quality standards in the watershed. Mining activities will occur over at least the next twenty years and will likely lead to violations of water quality standards.

[3] An Improved Inventory of Methane Emissions From Coal Mining in the U.S., David A. Kirchgessner, EPA. Located at: http://www.epa.gov/ttnchie1/ap42/ch14/related/mine.pdf. (Last visited Sept. 11, 2015)
[4] 40 CFR 230.10(b)(1).
[5] EPA Coal Mining Guidance at 18.
[6] *Id.* at 7.
[7] *Id.* at 20.

III. The Corps Must Ensure that Waters of U.S. Will Not be Significantly Degraded.

No discharge of dredged or fill material may be permitted if the nation's waters would be significantly degraded. This is a consideration separate from the question of whether the project will cause or contribute to a violation of water quality standards.[8] The 404(b)(1) Guidelines provide that "effects contributing to significant degradation" include significantly adverse effects on: human health or welfare, aquatic life and other water-dependent wildlife; aquatic ecosystem diversity, productivity, and stability; or recreational, aesthetic, and economic values.[9] In order to decide whether Continental Coal's discharges will cause or contribute to significant degradation of the affected streams, the 404(b)(1) Guidelines require the Corps to determine "the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms."[10]

While it is unclear from the Public Notice and accompanying Mitigation Plan whether Continental Coal has conducted a biological assessment for its project, it would be reasonable to assume that macroinvertebrate communities use Stream 1 and Stream 2 and the 1.51 acres of wetlands on the site. Time and time again, mining activities have contributed to the impairment of aquatic life in similar watersheds. For example, a recent report on coal mining in the Appalachian region found consistent degradation of macroinvertebrate communities and degraded water quality:

1. springs, and ephemeral, intermittent, and small perennial streams are permanently lost with the removal of the mountain and from burial under fill;
2. concentrations of major chemical ions are persistently elevated downstream;
3. degraded water quality reaches levels that are acutely lethal to standard laboratory test organisms;
4. selenium concentrations are elevated, reaching concentrations that have caused toxic effects in fish and birds; and
5. macroinvertebrate and fish communities are consistently degraded.[11]

The Corps must consider the cumulative impacts of the loss of streams and wetlands as well as anticipated degradation in water quality caused by the proposed "mining through" activities on the individual aquatic organisms found in the impacted

[8] *Id.* at 21.
[9] 40 CFR 230.10 (c)(1)-(4).
[10] 40 CFR 230.11(e).
[11] The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields, p. 1 (Mar. 2011), http://wvgazette.com/static/coal%20tattoo/MTM_FINAL.PDF.

streams. Moreover, the Corps must consider the cumulative impacts of the loss of streams and wetlands that have historically occurred in Bates County and surrounding areas from similar mining operations and how those impacts negatively impact aquatic life and have significantly degraded Waters of the United States.

IV. The Applicant Must Avoid, Minimize, and Compensate for Potential Impacts.

The Public Notice and Mitigation Plan fail to demonstrate that Continental Coal's project has avoided or minimized potential adverse impacts to aquatic resources. The compensatory mitigation identified in the Mitigation Plan fails to comply with the 2008 Compensatory Mitigation Rule, 33 C.F.R. 332, for various reasons.

A. Avoidance.

Continental Coal should not be granted a 404 permit for its currently proposed project if there are practicable alternatives that would avoid destroying streams and wetlands. Continental Coal has failed to adequately assess alternatives that avoid wetland and stream impacts. The applicant must submit an alternatives analysis for its coalmine project to be in compliance with 404(b)(1) Guidelines.

The 404(b)(1) Guidelines require that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[12] Practicable alternatives to Continental Coal's project could include reconfiguring the coal mine impacts to avoid streams and wetlands or buying another parcel of land where no streams and wetlands would be destroyed. Continental Coal could also consider less-damaging methods of coal extraction, such as auger mining. An alternative is practicable if:

> …it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonable be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.[13]

An alternative cannot be considered impracticable if it results in an increase in cost, a decrease in profits or if the applicant is unwilling to pursue it. The burden is on the applicant to show no practicable alternatives exist. As the 404(b)(1) Guidelines

[12] 40 C.F.R. 230.10(a).
[13] 40 C.F.R. 230.10(a)(2).

state, "[t]he burden of proof to demonstrate compliance with the Section 404(b)(1) Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued."[14] The Corps clearly violates CWA regulations and acts arbitrarily and capriciously when it permits a developer to obtain a permit authorizing the "preferred action" simply because that action is the most practicable or the most profitable.[15] "Wetlands can't be permitted to be destroyed simply because it is more convenient than not to do so."[16]

There is a presumption that if a project activity is not a water dependent activity, then practicable alternatives to the project exist. Water dependent activities are those that require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.[17] The wetlands on Continental Coal's project site are considered a special aquatic site according to 40 C.F.R. 230, Subpart E. Because Continental Coal's mine does not require siting in a special aquatic site, it is not a water dependent activity. Therefore, it is presumed that practicable alternatives exist to go forward with the project in a manner that will not impact special aquatic sites. Continental Coal must submit a thorough alternatives analysis to the Corps, proving no practicable alternatives exist before any decision is made by the Corps to grant a 404 permit. If any practicable alternatives exist that would not destroy streams and wetlands, the permit application for the project, as proposed, should be denied.

Continental Coal's current proposal requires completely filling two streams and 1.51 acres of wetlands. No other jurisdictional wetlands are identified on the property. There is significant acreage at the proposed project site that does not contain jurisdictional wetlands. To reiterate, an alternative cannot be considered impracticable if it results in an increase in cost, forgone profit or if the applicant is unwilling to pursue it. Because coal mining is not a water dependent activity, destroying the only special aquatic site in the mining area is not a legal option when the mining can simply avoid the wetland.

Continental Coal should also not be allowed to claim, without any support, that every parcel that could be purchased to mine elsewhere is not a viable alternative because the parcels necessarily contain special aquatic sites that will be inevitably destroyed as well. "The Corps clearly violates the CWA regulations…when it permits a developer to obtain a permit on his chosen site because that site is the 'most practicable' or 'most profitable,' if development of that site will result in greater environmental damage than would be realized at another available site."[18]

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[14] 404(b)(1) Guidelines, 61 Fed. Reg. 30,990, 30,998 (June 18, 1996) (citing 40 C.F.R. 230.12(a)(3)(iv)).
[15] *Sierra Club v. Flowers*, 423 F. Supp. 2d at 1351 (D.C.Cir.2006).
[16] *Id.* at 1356.

[18] *Flowers*, 423 F. Supp.2d at 1351-52 (footnote omitted).

There are also other alternatives to "mining through" and completely filling the streams on the proposed site. In another proposed surface mining project similar to Continental Coal's, a permit applicant admitted that "[a]ugering will aid in avoidance and minimization" but recover only 50 percent of the coal augered.[19] Additionally, "[p]od mining would consist of the excavation of smaller pits in between the aquatic resources" but was dismissed because costs would be higher. While coal mining can generate profits in the hundreds of millions of dollars, the Corps cannot satisfy its obligation to limit the damage to the least practicable alternative by deferring to conclusions that are based on the size of financial gains on investment to Continental Coal.

B. Minimization.

In the event no practicable alternatives exist to completely avoid destroying the wetlands and streams at the project site, Continental Coal must do everything it can to minimize these impacts through project modifications or the addition of permit conditions. According to 40 C.F.R. 230.10(d), "…no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." Continental Coal could utilize its land in a different way or change the location, size or configuration of its mining location to minimize impacts to the two streams and wetlands.

C. Compensation.

1. Background.

If Continental Coal's destruction of streams and wetlands is unavoidable and all measures to minimize impacts have been taken, then compensation for the destruction of the remaining resources must comply with the 2008 Compensatory Mitigation Rule, 33 C.F.R. 332, and fulfill the federal government's policy of maintaining "no net loss" of aquatic resources. The Memorandum of Agreement between EPA and the DA states that "[a]ppropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required."[20] The compensatory mitigation as proposed does not conform to the 2008 Compensatory Mitigation Rule ("2008 Rule") for various reasons.

[19] *See* Permit Application for Public Notice Number LRL-2012-1006-sew, p. 29.
[20] Memorandum of Agreement between the EPA and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines." (February 6, 1990). http://water.epa.gov/lawsregs/guidance/wetlands/mitigate.cfm#5.

2. *The Preference for Compensation Provided Through Mitigation Banks Over Permittee-Responsible Mitigation Is Not Met*

The 2008 Rule establishes a preference for the use of mitigation banks over permittee-responsible mitigation.[21] The project site is located within the service area for the Camp Branch Mitigation Bank. RIBITS indicates that this mitigation bank has available credits for both wetland impacts and riparian buffer as of the last transaction for this bank in June 2015.[22] Available credits at this mitigation bank include 8.29 wetland credits and 64388.18 riparian buffer credits. Despite the fact that the proposed project site is in a different HUC 8 than Camp Branch Mitigation Bank, utilizing a mitigation bank if the project is in its service area is the preferred alternative under the 2008 Rule because of the assurances of success and the lack of temporal lag due to the fact that the mitigation work is already complete and performance standards have been met. Permittee-responsible mitigation that contemplates both risky establishment of new streams and wetlands (rather than restoration) and severe temporal lag from mining impact to completed mitigation (over 20 years as identified in the Riparian Buffer Worksheet), should not be the chosen compensatory mitigation where credits at a mitigation bank within the service area are available.

While the proposed project is not within the service area of a Missouri Stream Stewardship Trust Fund in lieu fee project, and the proposed project undoubtedly will have in-stream/channel impacts to Stream 1 and Stream 2, requiring purchase of riparian buffer credits and wetland credits from the Camp Branch Mitigation Bank would help to eliminate temporal lag and risk of failure of the proposed establishment of aquatic resources.

3. *Establishment Is Not the Most Preferred Method of Permittee-Responsible Mitigation.*

Continental Coal proposes to establish two streams and wetland acreage onsite during the reclamation phase of the coal mine during Phase II of the project. The Corps should not allow Continental Coal to use establishment as a form of mitigation since there are other, more preferred mitigation methods that have a higher likelihood of success. The 2008 Mitigation Rule states:

> Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic

[21] 33 C.F.R 332.2(b)(1).

[22] https://ribits.usace.army.mil/ribits_apex/f?p=107:6:4873456050141:ledger:NO:RP,6:P6_HOLDWHERE,P6_HOLDGET,P6_BANK_ID:,,2716 (Last visited Sept. 11, 2015).

> resource functions are greater, compared to enhancement and preservation.[23]

If permittee-responsible mitigation is approved, despite the Corps' preference for compensation through mitigation bank credit purchase, Continental Coal should use restoration, even if off-site, over any other method of permittee-responsible compensatory mitigation for unavoidable losses. Establishment is less likely to succeed than restoration in most circumstances.

The proposed mitigation is based upon creating two new streams that are similar to existing streams on the site, yet there is no evidence presented that if a channel form is created, that it will function ecologically at the level that the streams functioned at prior to being mined through by the proposed project. Even if there is some downstream connectivity to existing channels and a possibility that groundwater will reach "created" wetlands and streams, without a quantitative evaluation of groundwater and surface flow paths and soil and substrate porosity, it is not clear that the hydrology could mimic intact streams.[24]

During the proposed mining, the structural systems perching water will be destroyed and replaced with spoil. It is likely that the spoil will have such increased permeability that percolation will occur much deeper and faster, and also allow water to transverse horizontally much faster for any given hydraulic gradient. If this occurs, the watershed will be drained and there will be less groundwater flowing into the post-mining, man-made streams. These changes will also affect the ability of created wetlands to function successfully. Because there is no evidence that the ecosystem functions of the created streams and wetlands will replace the ecosystem functions of natural streams and wetlands that will be destroyed, the proposed mitigation is insufficient.

4. The Mitigation Plan Is Insufficient

The 2008 Rule sets forth the required items for a mitigation plan. While the mitigation plan submitted by Continental Coal provides a section for each of these required items, there are various inadequacies in the discussion or content of the items, which renders the proposed compensatory mitigation insufficient.

a. Lack of Site Protection

The 2008 Rule requires that "the aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available

[23] 33 C.F.R. § 332.3(a)(2).
[24] *See generally* Palmer et al., *River Restoration, Habitat Heterogeneity and Biodiversity: A Failure of Theory or Practice?*, Freshwater Biology, 55 (Suppl. 1) 205–222 (2010), for discussion of stream establishment failure.

mechanisms, as appropriate."[25] The mitigation plan proposes no specific site protection instruments based on the notion that the mitigation activities are "of a permanent nature and not likely to be impacted due to future landowner agricultural activities."[26] This level of detail in the form of a conclusory statement for not using a site protection instrument is not commensurate with the scale and scope of the impacts from the proposed project. Moreover, the conclusory statement is false. The massive scale of mining and similarly massive scale of establishment and restoration work to mitigate is not guaranteed to succeed, and if it does, the lack of site protection further subjects the compensatory mitigation to risk of failure due to incompatible uses such as grazing or other agricultural practices that could diminish the quality of the aquatic resources. If Continental Coal is allowed to profit from the destruction of jurisdictional waters, it should be required to ensure that its compensatory mitigation is maintained through adequate site protection.

b. Inadequate Performance Standards

The language that appears in the Performance Standards section provides, at best, a brief description of the general objectives of the proposed compensatory mitigation, such as maintaining water quality and preventing soil erosion. This discussion does not comport with the 2008 Rule which requires the mitigation plan to discuss "[e]cologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives."[27] Furthermore, "[p]erformance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres)."[28] Finally:

> Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position.[29]

The discussion of Performance Standards in the Mitigation Plan is completely void of verifiable, objective, ecological standards that can be used to assess the success of achieving compensatory mitigation objectives through use of best available science.

[25] 33 CFR 332.7(a)(1).
[26] See Continental Coal Mitigation Plan Section 2.C.
[27] 33 C.F.R 332.4(c)(i)(9).
[28] 33 C.F.R. 332.5(a).
[29] 33 C.F.R. 332.5(b).

Merely stating general objectives rather than providing specific performance standards violates the 2008 Rule. At a minimum, the Corps must require specific performance standards as it relates to hydrology and ecological function of the establishment of new streams and wetlands in the final mitigation plan. As drafted, the Mitigation Plan does not provide the public with enough information to provide meaningful comment on whether the proposed compensatory mitigation will result in "no net loss" of aquatic resources.

c. Non-existent Adaptive Management Plan

An adaptive management plan must be included in a final mitigation plan.[30] The level of detail of this item should be commensurate with the scale and scope of the impacts.[31] The conclusory statement provided by Continental Coal in its mitigation plan that "[s]hould mining activities not enter the existing wetland or stream systems, it will remain undisturbed"[32] clearly does not constitute an adaptive management plan and is likewise not commensurate with the scale and scope of the impacts of the proposed mining activities. Where the permitted impacts will consist of completely filling two streams and 1.5 acres of wetlands and the mitigation plan relies heavily on the risky method of establishment of new wetlands and streams, this conclusory statement is insufficient and in violation of the 2008 Rule. An Adaptive Management Plan is defined as a

> "management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success."[33]

Thus, the permittee must address the potential that the proposed mitigation will not succeed as planned and offer methods for addressing such failures. In light of the reliance on establishment of new wetlands and streams, this requirement is even more crucial.

Moreover, the conclusory statement provided is false. In the event that mining activities do no enter existing wetlands and stream systems, the mining activities authorized would certainly have significant adverse impacts on the existing wetlands and streams and they would therefore not "remain undisturbed."

[30] 33 CFR 332.4(c)(1)(i).
[31] Id.
[32] *See* Continental Coal Mitigation Plan, Section 2.K.
[33] 33 CFR 332.4(c)(12) and 332.7.

This would result in a situation where adverse impacts would occur indirectly, and the Corps would not be able to ensure that impacts were adequately compensated.

The adaptive management plan should include, at a minimum, a requirement that if the risky proposals for onsite establishment of streams and wetlands fails to meet performance standards and cannot be achieved as planned, that Continental Coal is obligated to either restore similar aquatic resources off-site in the watershed or to purchase credits from a mitigation bank or ILF that would compensate for the adverse impacts caused by the mining. Additionally, the adaptive management plan should address the potential for adverse mining impacts discussed above to the proposed compensatory mitigation itself, and how such pollution, subsidence, or other adverse impact would be addressed or otherwise compensated.

Continental Coal's proposed compensation for its proposed adverse impacts to aquatic resources and the public interest is inadequate. The proposed mitigation plan does not meet the Corps' preference for mitigation bank credit purchase when available and further relies on establishment activities over restoration, the preferred permittee-responsible mitigation activity. Lastly, the mitigation plan itself is insufficient and in violation of the 2008 Rule.

V. The Corps Must Prepare an Environmental Impact Statement

The National Environmental Policy Act ("NEPA") requires federal agencies to prepare an Environmental Impact Statement ("EIS") prior to authorizing activities that significantly affect the environment.[34] The EIS must consider the direct, secondary and cumulative effects of the project.[35] A decision to forego an EIS must be supported by evidence in the record that the agency 1) took a hard look at the environmental effects of the proposed project, 2) identified the relevant areas of environmental concern, 3) made a convincing case that proposed impacts are insignificant and 4) where impacts are significant, convincingly established that changes were made to the project that sufficiently reduced impacts to a minimum.[36]

A finding of no significant impact ("FONSI") based on mitigation of impacts is inappropriate where stream establishment is proposed. "Mitigation measures that rely on establishing or re-establishing streams, rather than rehabilitating or enhancing streams have less certainty of successfully offsetting impacts and should generally not be used to support a FONSI."[37]

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[34] 42 U.S.C. § 4332(2)(C)).

[35] *Id.*

[36] *Audubon Society of Central Arkansas v. Dailey,* 977 F.2d 428, 434 (8th Cir. 1992).

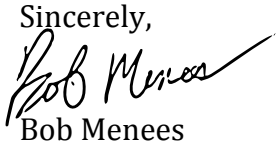
[37] U.S. EPA Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order (EPA Coal Mining Guidance), p. 30 (Apr. 1, 2010).

Moreover, the large-scale surface coal mining operation for which Continental Coal seeks authorization by the Corps will significantly affect the environment as it relates to climate change impacts. As previously noted, surface mining causes significant releases of methane from the ground, which is a potent greenhouse gas. The "dirty" coal that will be mined is also a significant contributor to climate change causing carbon emissions once burned as fuel. Courts have recently ruled that federal agencies that do not analyze climate change impacts when authorizing large-scale coal mining violate NEPA.[38] In light of the obligation for federal agencies to consider climate change impacts in its analyses, the Corps must address the climate change impacts threatened by the proposed federal authorization through an EIS that adequately analyzes the environmental impacts of coal as it relates to both methane from mining and carbon dioxide from burning.

Conclusion

The Corps should not grant the 404 Permit because the proposed project is not in the public interest, it will likely cause water quality standards to be violated, and it will likely cause Waters of the U.S. to be significantly degraded. Additionally, the proposed project fails to adequately avoid, minimize, and compensate for impacts to aquatic resources. Finally, the Corps should prepare an Environmental Impact Statement to address the significant effects the proposed project would have on the environment.

Sincerely,



Bob Menees
Staff Attorney

[38] See *WildEarth Guardians, et al v. United States Forest Service, et al.*, Civil Action No. 13-cv-01723-RBJ (United States District Court, District of Colorado), Order, June 27, 2014.