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U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

January 25, 2012

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The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1951 Constitution Avenue, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

For nearly one year, we've patiently and persistently sought the Department of the Interior's ("Department") compliance with our requests for documents, communications, and information related to the rewrite of the 2008 Stream Buffer Zone Rule ("Rule") by the Office of Surface Mining Reclamation and Enforcement ("OSM"). This is a serious matter that impacts the livelihood of entire communities and the jobs of thousands of coal miners across the nation, and the Department's failure to fully comply with repeated requests for information can no longer continue. This letter provides notice of our intent to move to compel cooperation and production of documents specified in this letter should they not be provided in the time requested.

I. Multiple Focuses of Oversight Investigation

This inquiry was originally initiated (by letter dated February 8, 2011) following public disclosure of analysis from the draft Environmental Impact Statement ("EIS") that the Rule rewrite would cause the loss of at least 7,000 existing jobs and economic harm across 22 states. Our focus on the Department's decision to undertake this sweeping, rushed rewrite of the Rule, and the economic impact it would cause, was expanded after the Department criticized and dismissed the contractor it had selected and hired to conduct this economic analysis. The existing Rule took five years of study and development to write and was published with the concurrence of the Environmental Protection Agency in 2008. We have very serious questions about how and why this rewrite was initiated and is to be completed on such a hastened schedule, how this rulemaking process itself is being managed including whether proper procedures are

being followed, the cost of this undertaking, and whether political implications of the rule are unduly influencing the process.

II. Department's Failure to Comply

The Department's response to this legitimate exercise of Congressional oversight authority has been extremely disappointing. Instead of prompt compliance, there is a pattern of dilatory tactics and non-responsiveness. Not a single deadline for the production of requested materials has been met. Despite months of effort, documents and communications requested multiple times have yet to be provided. On numerous occasions, we have requested that the Department produce documents and information, or as an accommodation to the Department, provide a detailed list identifying any withheld documents and the legal basis for withholding them. No such list has been produced. In response to questioning by Committee staff earlier this month, Department counsel said documents responsive to this inquiry had been collected as far back as February and March of last year, but that the documents remain un-reviewed and withheld. Department counsel was unable to provide even an estimate on the volume or type of documents being withheld.

Even more disturbing is the fact that the Department's efforts to collect documents and materials responsive to our April 1, 2011 letter failed to capture audio recordings of meetings and conversations between agency personnel and contractors hired to rewrite this federal regulation. It was only after the existence of these recordings were discussed in a November 18, 2011 hearing of the Subcommittee on Energy and Minerals that the Department acted to collect these materials, despite the recordings being in the possession of Department personnel since before February 2011. Based on information shared by the Department, we now understand there to be at least 43 digital audio recordings totaling 30 hours in combined length. The Department has, by their own estimation, been aware of these recordings for more than two months and still not provided them to us. It is alarming that the persons responsible for rewriting this Rule are the very same who failed to produce the audio recordings of their conversations months ago. Not only does this raise serious questions about the Department's willingness and ability to cooperate with this investigation, it also raises serious questions about the competence and motivations of those personnel empowered to rewrite a federal regulation that could destroy the jobs of thousands of Americans. The prompt production of these digital recordings is expected.

III. Department's Claims of Confidentiality and Privilege are Without Merit

To date, the Department has asserted only a generalized claim of an Executive Branch confidentiality interest as the reason for refusing to provide some requested material. As we expressed in our August 15, 2011 letter to you, this is not a legal basis for withholding information from Congress. The Department has failed to provide a detailed privilege log identifying the documents it is withholding in full or in part, and the legal basis that would justify applicability of a privilege to the withheld information, despite repeated requests for the Department to do so. An assertion of "important confidentiality interests of the Executive Branch" is not a recognized common law privilege. Furthermore, even if this claim could be

considered a privilege assertion, as we have noted on numerous occasions, claims of privilege are considered under Committee on Natural Resources Rule 4(h) and, similar to all common law privileges, are applicable only at the discretion of the Chairman. We expect the Department to provide the requested documents absent a valid claim of Executive Privilege by the President.

Further, the Department considers other withheld information to be protected from disclosure to Congress by the deliberative process privilege that is incorporated into FOIA exemption 5, 5 U.S.C. § 552(b)(5). As an initial matter, Department staff acknowledged on a January 14, 2012 telephone conference call that the Department may not rely on a FOIA exemption as a basis to withhold information from Congress. See 5 U.S.C. §552(d). For the deliberative process privilege to potentially apply, the information must be both predecisional and deliberative. See e.g., Petroleum Info. Corp. v. United States Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir.). However, factual information generally is not considered to be deliberative and, therefore, is not protected by the privilege. See e.g., EPA v. Mink, 410 U.S. 73, 91 (1973). Furthermore, "The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed." Pac. Fisheries, Inc. v. United States, 539 F.3d 1143, 1143 (9th Cir. 2008).

As Committee staff explained to Department staff in the January 14, 2012 call, it is impossible for us to evaluate the Department's concerns without a clear accounting of the documents being withheld. The deliberative process privilege is not an absolute bar against disclosure and cannot be used to shield alleged government wrongdoing. See In re Sealed Case, 121 F.3d 729, 737-38 (D.C. Cir. 1997). As we have detailed in this letter, we have very serious and legitimate concerns with the manner in which this rulemaking process is being handled. Even under the Department's faulty logic in support of the deliberative process privilege, it must examine each document and provide non-privileged portions. In contrast, the Department here is making a blanket claim of the privilege to withhold broad categories of information from Congress and appears to be refusing to provide even non-exempt documents or portions of documents or a detailed explanation of its search and withholdings. We are unclear as to why the Department has decided to produce some documents in their redacted form, while withholding other documents in their entirety – all with the claim of deliberative process privilege. In fact, the Department appears to also be withholding documents under this claim that it hasn't even bothered to review after collecting them nearly one year ago.

In a letter from the Department dated October 17, 2011, which was nearly ten months after our initial document request, it was stated that "in most cases, legitimate Congressional oversight interests can be satisfied by reviewing decisions . . . after they are made." While we appreciate the Department's willingness to comply with Congressional oversight once it has successfully codified its rushed rewrite of this federal regulation, we are not willing to wait until that time. To restate, this is an inquiry into the decision and actions to initiate the rewrite of this federal regulation, the manner in which the rewrite process is being managed or mismanaged, the cost of this undertaking, the termination of the contractor after disclosure of job loss information, and now the cooperation of personnel in complying with this legitimate exercise of Congressional oversight authority. We will not wait until the Department has cemented this rule into place and thousands of jobs are on the chopping block before getting answers to our

questions. We have waited nearly one year and the Department will not be able to use the excuse that it is in the middle of rewriting a federal regulation as a shield from providing requested information on that process and the decisions it has made. To be clear, it is within the purview of the Congress to determine what issues are germane to any given investigation, and what materials are responsive to a particular request. Furthermore, a number of our requests sought documents about decisions that have already been made, including the decisions to initiate this new rulemaking process, as described in the Advance Notice of Proposed Rulemaking published in the Federal Register on November 30, 2011, and the decision to terminate the contractor preparing the draft EIS.

IV. Noncompliance with the Administration's Stated Goal of Increased Transparency

The Department's failure to comply with these Congressional oversight requests is even more troubling considering the President's stated commitment to create "*an unprecedented level of openness in Government.*" See Memorandum for the Heads of Executive Departments and Agencies regarding Transparency and Open Government, Jan. 21, 2009. (Emphasis added.)

The President has advised agencies that "*[i]n the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.*" See Memorandum for the Heads of Executive Departments and Agencies regarding Freedom of Information Act, Jan. 21, 2009. (Emphasis added.) As part of the Department's efforts to implement the President's policy in favor of openness, you issued a memorandum on July 2, 2009 to all Department employees that, "*The Department will only withhold information when we reasonably can foresee that its release would harm an interest protected by a FOIA exemption (e.g., our national security or the privacy interests of individuals) or when disclosure is prohibited by statute. The President's and Attorney General's messages extend beyond the boundaries of the FOIA. They call upon agencies to aggressively increase proactive disclosures of information that is of interest to the public, thus vastly increasing information that is available on the internet. Our goal is to increase transparency.*" (Emphasis added.) When the Administration is rushing to rewrite a federal regulation that could cost thousands of American workers their jobs and careers during a time of economic hardship, the Department should be complying with rather than defying these pledges of transparency.

V. Final Opportunity for the Department to Comply

It is expected that the following items will be provided by the Department in the time requested. Each of the following documents is encompassed in the previous requests for documents made to the Department. This list does not include all of the outstanding items sought, and compliance with those requests is still expected. At this time, though, the following specific items are to be promptly provided. As stated at the outset of this letter, this serves as

notice of our intent to move to compel cooperation and production of these documents if this deadline is not met.

Documents and Items to be Produced

The following items are to be produced by the Department no later than February 2, 2012.

1. All recordings and all transcripts of recordings of meetings between OSM and contractors including recordings of any and all meetings related to the drafting and completion of the EIS and the RIA. This includes but is not limited to the 43 recordings containing 30 hours of recorded data in OSM's possession.
2. A complete, unredacted version of all items provided in redacted form, including those items listed in the Department index #00027094_Hastings_005_PRIV, received December 2, 2011, and Department index #00027094_Hastings_004_PRIV, received October 17, 2011.

The following items are to be produced by the Department no later than February 9, 2012.

3. All documents regarding the March 2010 settlement requiring OSM to make best efforts to sign a final action on the proposed rule no later than Friday, June 29, 2012; including drafts and any changes to the settlement with the litigants or ongoing discussions with the litigants about the Department's efforts to meet the terms of the settlement, and all documents related to attorney fees paid as a result of the settlement.
4. All documents including any drafts and briefing papers, related to the development of or analysis for the Advanced Notice of Proposed Rulemaking published on November 30, 2009.
5. All documents, including emails or memoranda, regarding the decision not to rely on the EIS for the 2008 rule, and to conduct a new EIS.
6. All documents, including emails or memoranda, within the Department and OSM, between the Department and OSM, between the Department and/or OSM, Office of Management and Budget, Council on Environmental Quality, Army Corps of Engineers, and White House Staff, and between OSM, the Department and any contractors or subcontractors (including but not limited to Polu Kai Services, ECSI, Morgan Worldwide, Plexus, and MACTEC) regarding the baseline parameters for the EIS and the RIA, specifically but not limited to documents regarding:
 - a. The baseline and parameters that were provided to the contractors prior to and including February 2011.
 - b. The baselines and parameters that were provided to the contractors after February 2011.

- c. The decision to expand the scoping opportunities for the re-write of the Rule.
- d. The decision to use the 2008 coal production numbers, the 2010 coal production numbers, or an average of the three years combined in creating assumptions for the EIS or RIA.
- e. Whether the proposed rule would cover only surface mining or surface and underground mining.
- f. The implementation timeline of the Stream Protection Rule.
- g. Assumptions that the 2008 Rule was in effect and being enforced across the United States.

Including but not limited to communications to/from and between the following individuals:

- a. Ellen Athas
- b. John Craynon
- c. Andy Devito
- d. James Laity
- e. Brent Means
- f. Dennis Rice
- g. Emily Sharp
- h. Dianne Shawley
- i. Nancy Sloanhoffer
- j. Stephanie Varvell
- k. William Winters

- 7. A complete and detailed privilege log for all items responsive to any current or previous request from the Committee that the Department continues to withhold from the Committee, regardless of reason.

An attachment to this letter provides additional information about responding to the Committee's request, including definitions and instructions for compliance. Please contact Machalagh Carr, Counsel, Office of Oversight and Investigations, with any questions regarding this request, or to make arrangements for the production. Thank you for the Department's prompt attention to this matter.

Sincerely,



Doc Hastings
Chairman
Natural Resources Committee



Doug Lamborn
Subcommittee Chairman
Energy and Mineral Resources

Cc: The Honorable Joseph G. Pizarchik, Director, Office of Surface Mining, Reclamation and Enforcement

Responding to Committee Document Requests

A. Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, recorded notes, letters, notices, confirmations, receipts, checks, envelopes, presentations, pamphlets, brochures, interoffice and intra office communications, electronic mails (e-mails), notations of any type of conversation, telephone call, voice mail, phone mail, meeting or other communication, diaries, analyses, summaries, messages, correspondence, circulars, opinions, work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and electronic, mechanical, and electric records or representations of any kind, and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, discussions, releases, personal delivery, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this document request. The singular includes the plural. The masculine includes the feminine.
4. As used herein, “referring” or “relating” means and includes “constituting,” “pertaining,” “evidencing,” “reflecting,” “describing,” or “having anything to do with,” and in each instance, directly or indirectly. These terms mean, without limitation, any reference or relationship which either (a) provides information with respect to the subject of the inquiry, or (b) might lead to individuals who, or documents which, might possess or contain information with respect to the subject of the inquiry.

B. Instructions

1. In complying with this document request, you are required to produce all responsive documents, materials, or items that are in your possession, custody, or control, whether held by you or your past or present agents, employees, representatives, subsidiaries,

affiliates, divisions, partnerships, and departments acting on your behalf. You are also required to produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. No records, documents, data or information called for by this request shall be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this document request has been, or is also known by any other name than that herein denoted, the document request shall be read also to include them under that alternative identification.
3. Each document produced shall be produced in a form that renders that document capable of being printed or copied.
4. Documents produced in response to this document request shall be produced together with copies of file labels, dividers, envelopes, or identifying markers with which they were associated when this document request was served. Documents produced to this document request shall also identify to which paragraph from the document request such documents are responsive. Moreover, please include with your response, an index identifying each record and label (preferably by bates stamping) the documents. The Committee prefers, if possible, to receive all documents in electronic format.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses documents that are non-identical or identical copies of the same document.
6. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, memory stick, or computer back-up tape), state the form in which it is available and provide sufficient detail to allow the information to be copied to a readable format. If the information requested is stored in a computer, indicate whether you have an existing program that will print the records in a readable form.
7. If compliance with the document request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
8. In the event that a document is withheld, in whole or in part, based on a claim of privilege, provide the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter of the document; (d) the date, author, and any recipients; and (e) the relationship of the author and recipients to each other. Claims of privileges are considered under Committee on

Natural Resources Rule 4(h) and, similar to all common-law privileges, are recognized only at the discretion of the Committee.

9. If any document responsive to this document request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.
10. If a date or other descriptive detail set forth in this document request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon location or discovery subsequent thereto.
12. Production materials should be delivered to:

Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington D.C. 20515