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CHAIRMAN DOC HASTINGS

President Obama's Covert and Unorthodox Efforts to Impose New Regulation on Coal Mining and Destroy American Jobs

Majority Staff Report
Committee on Natural Resources
Chairman Doc Hastings
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EXECUTIVE SUMMARY

For more than a year and a half, the Natural Resources Committee has been aggressively investigating one of the Obama Administration's most covert but outrageous fronts in its war on coal: a decision by the Interior Department to rapidly rewrite a regulation governing coal mining near streams.

Within days of taking office, the Obama Administration threw out the 2008 Stream Buffer Zone rule that had undergone five years of environmental analysis and public review. The Department of the Interior then entered into a lawsuit settlement agreement with environmental groups to rewrite and produce a final rule by June 29, 2012 and used a short-circuited process to hire a contractor to write this new regulation. When the Associated Press revealed official analysis showing the new Obama regulation would cost 7,000 jobs and cause economic harm in 22 states, the Administration fired the contractor and charged ahead.

To date, the Committee's ongoing investigation has exposed gross mismanagement of the rulemaking process, potential political interference, and the widespread economic harm this regulation would cause. The Obama Administration has already spent $7.7 million taxpayer dollars conducting this rewrite and is poised to spend even more if it continues with this mismanaged rulemaking.

The Department has missed its self-imposed deadline agreed upon in court to publish the final regulation by June 29, 2012, raising questions as to whether its new Stream Buffer Zone regulation on coal is being held back and concealed until after the November election, when President Obama would have more 'flexibility' to unleash its job-destroying impacts.

The Interior Department refuses to comply with Congressional subpoenas to reveal documents and information that would fully reveal how and why this regulation was being rewritten. These actions of secrecy come despite President Obama's pledges of unprecedented transparency and openness in government.

For these reasons, the Obama Administration's campaign to impose this rewritten regulation must be halted and an open, transparent rulemaking that fairly accounts for job and economic impacts must be undertaken.

I. Background of The Surface Mining Control and Reclamation Act

The Surface Mining Control and Reclamation Act ("SMCRA") of 1977 is the primary federal law that regulates coal mining in the United States. It was enacted to "provide for the cooperation between the Secretary of the Interior and the States with respect to the regulation of surface coal mining operations, and other purposes.[1] SMCRA created programs for regulating active coal mines and for reclaiming abandoned mine lands. SMCRA also created the Office of Surface Mining Reclamation and Enforcement ("OSM"), an agency within the Department of the Interior ("Department"), to administer programs for controlling surface coal mining operations, review and approve or disapprove State Programs for controlling surface coal mining operations, assist the States in the development of State programs and several other purposes. SMCRA has been amended or altered several times, including 1983 with the finalization of the original Stream Buffer Zone.

On December 12, 2008, OSM, with the concurrence of the Environmental Protection Agency, published a final rule on stream buffer zones and placement of excess spoil after consideration of 43,000 public comments and approximately 5 years of scientific study and analysis ("Stream Buffer Zone Rule").[2] Within 10 days, the first lawsuit was filed by environmental groups challenging the new rule,[3] with a second lawsuit following almost a month later.[4] The Obama Administration filed a motion to vacate the 2008 Rule, essentially joining the lawsuit on the side of the environmental groups. The Obama Administration has been trying to find a way to toss aside the 2008 Stream Buffer Zone Rule since the change in administration, even though evidence shows that its preferred alternative would cause devastating economic impacts throughout the country.

The Committee on Natural Resources has jurisdiction over mining interests generally.[5] As SMCRA is the primary federal law that regulates the production of coal in the United States, SMCRA and OSM fall within the direct jurisdiction of this Committee. The Committee is tasked with general oversight responsibilities including the obligation to determine whether laws and programs addressing subjects within its jurisdiction are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated.[6] The Committee is also responsible to review and study on a continuing basis any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation addressing the subjects within its jurisdiction.[7]

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[1] Surface Mining Control and Reclamation Act of 1977, Pub. Law 95-87.
[2] 73 Fed. Reg. 75, 813-75, 885 (Dec. 12, 2008).
[3] Coal River Mountain Watch, et. al. v. Salazar No. 08-2212 (D.D.C.).
[4] National Parks Conservation Association v. Salazar, No. 09-115 (D.D.C).
[5] Rule X(1)(m)(13).
[6] Rule X(2)(b)(1).
[7] Rule X(2)(c).

II. JOB AND ECONOMIC IMPACTS OF THE OBAMA ADMINISTRATION'S PREFERRED REGULATION

Preferred Regulation Would Cost Thousands of Jobs and Cause Widespread Economic Harm

In January 2011, the Obama Administration's own experts estimated that their "proposal for protecting streams from coal mining would eliminate thousands of jobs and slash production across much of the country."[8] The draft Environmental Impact Statement ("EIS") showed that more than 7,000 of the country's coal mining jobs would be lost, and that there would be economic harm in 22 states. Upon publication of these devastating numbers, the Administration attempted to close ranks. Joseph Pizarchik, Director of OSM, criticized the contracting team who had prepared the EIS, restructured the working group assigned to conduct the EIS and the Draft Regulatory Impact Analysis (RIA), and testified before Congress that the contractors did a poor job and fabricated numbers. Specifically, in November 2011, Director Pizarchik testified before the Subcommittee on Energy and Mineral Resources that the numbers used in the draft were "fabricated based on placeholder numbers and have no basis in fact."[9] Director Pizarchik went on to state, "the numbers . . . were based on no evidence."

Director Pizarchik attempted to shield OSM, and the Obama Administration, from the fact that the revised Stream Protection Rule would cause significant job losses, reduce coal production, and result in higher energy costs throughout the country. Unfortunately, Director Pizarchik was wrong, and the job loss numbers are just part of the devastating consequences this desired rule would have on the American people.

For example, the draft EIS from January 2011 shows that the Obama Administration's preferred alternative for the revised rule would result in a net loss in total coal mining employment of over 7,000 employment positions nationwide,[10] and that while the consequences would be most severe in Appalachia, according to draft documents from the Department, "all coal producing regions show a decline in employment positions in the surface coal mining industry except the Northern Rocky Mountains and Great Plains region."[11] Additional problems that would be caused by this injurious regulation include an increase in unemployment in the Illinois Basin by 1.3%,[12] an increase in the unemployment rate of more than 1% in the Northwest and Gulf Regions,[13] and a loss of $2.7 million in coal royalties to tribes in New Mexico and Arizona.[14]

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[8] The Associated Press, New Rule Would Cut Thousands of Coal Jobs, January 26, 2011, http://wvgazette.com/News/MiningtheMountains/201101280708?page=2&build=cache

[9] Subcommittee on Energy and Mineral Resources Oversight Hearing on "Jobs at Risk: Waste and Mismanagement by the Obama Administration in Rewriting the Stream Buffer Zone Rule" November 4, 2011, testimony of Director Pizarchik, page 42 lines 895-903 (draft transcript).

[10] Environmental Impact Statement, Chapter 4 – First Working Draft 1-12-2011, 4-213.

[11] Id.

[12] Id. at 4-214

[13] Id. at 4-216

[14] Id. at 4-218

While these numbers were all released more than one year ago, no "corrected" job numbers or coal production numbers have been provided by OSM. Indeed, other sources claim that the job loss and coal production numbers will be much more significant than the Administration's estimate.[15] An economic analysis from March 2012 published by ENVIRON International Corporation estimates that the loss of direct mining jobs is predicted to be between 55,120 and 79,870, with the majority of these job losses being in the Appalachian region.[16]

Obama Administration Attempts to Change Numbers to Hide the Impact

According to documents received in the course of the Committee's investigation, OSM staff hired contractors and together, OSM clearly specified what methodology would be used to prepare the EIS and RIA. In an email obtained by the Committee, OSM staff sent a note to the subcontractors "confirming the methodology as described."[17] This included using the baseline for the alternative to be the status quo, which at the time did not include the implementation of the 2008 Stream Buffer Zone Rule.[18] Later, once the devastating job numbers were released to the press, OSM told the contractors to "pretend" that the 2008 rule was in place, and to use the coal production numbers from 2008.[19] This decision would artificially inflate the coal production numbers, and result in an inaccurate but smaller coal production loss for the analysis.

In audio recordings obtained by the Committee of a meeting just after the job numbers were made public, OSM Counsel to Director Pizarchik can be heard telling the contractors to pretend for the purposes of preparing the EIS that the 2008 Stream Buffer Zone Rule was implemented and applied across the country when this was not, in fact, true. The contractors and subcontractors explained to OSM that this is a significant change in instruction and would require them to use numbers and data that are not "the real world." OSM Counsel replied to them that, "It's not the real world, this is rulemaking."[20]

Just two days after that February 1 meeting where they were instructed that this isn't the "real world" and after the contractors had been working on the project for more than 6 months, email correspondence between the contractors highlights the impossible position

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[15] ENVIRON International Corporation, Economic Analysis of Proposed Stream Protection Rule Stage I Report, March 5, 2012, *available at* http://www.nma.org/pdf/tmp/030612_ENVIRON_study.pdf.
[16] Id. at 6.
[17] Dec. 17, 2010 email from contractor to group of contractors and OSM employees requesting confirmation of the methodology that should be used, including using "the US coal production at a 2008 level, as defined by the EIA (but adjusted for energy content)," and Dec. 20, 2010 email from OSM employee to contractors "I just spoke with John Craynon. He asked me to send a note to you confirming the methodology as described."
[18] November 5, 2010 email from OSM employee to contractors and other OSM employees. The email discusses the alternatives to be analyzed and states, "The baseline to which these options must be compared would be the status quo, in which the states have not yet adopted or implemented the 2008 rule."
[19] As the 2008 Stream Buffer Zone Rule was published in December 2008 and set to go into effect in January 2009, the 2008 coal production numbers did not reflect a regulatory environment that includes the 2008 Stream Buffer Zone Rule.
[20] Audio Recording February 1, 2011, *available at* http://naturalresources.house.gov/oversight/coalregsdocs.htm.

in which the Administration has placed them. In one email, one contractor writes to the team:

> I think a big question is set for in your number 1. What is the baseline? Is it "pretending" that the SBZ was in effect for the coal producing states? If so, it really skews the production analysis. If baseline is "current condition" then chapter 2 and the production shift work in Chapter 4 . . . are pretty much final. I can tell you that the Chapter 2 matrix (all of the team's work AND OSM's input) did not assume that the SBZ was in place. I think this is called a conundrum.[21]

In November 2011, some of the subcontractors hired by OSM testified before the Subcommittee on Energy and Mineral Resources that the coal production impacts and resulting job loss numbers used for the EIS and RIA were forecast using specified models. When the resulting job loss numbers were revealed, OSM "suggested that the [contracting] team revisit the production impacts and associated job loss numbers, and with different assumptions that would then change the final outcome to show less of an impact."[22] According to the testimony of subcontractors, the team told OSM that it was "not appropriate" to alter underlying assumptions "just to get a different answer."[23] It's important to note that there has been no testimony or evidence that the Administration wanted to change the alternatives, or the preferred alternative, to create a rule that would have a minimal impact on the nation's hardworking families in the coal industry. The concern was to change the underlying assumptions so that the impact would not *appear* to be as shattering.[24]

The Administration has since ended the contract with the prime contractor and some of the subcontractors working on this job. Indeed, these relationships ended more than a year ago, and because of the allegations made by OSM that the contractors did poor work and plagiarized portions of the work product, the Committee is investigating the separation of these contractors, and how OSM handled this rewrite. The Department has documents that would allow the American people to understand whether it followed the appropriate process in preparing the EIS and RIA for the rule or whether the political implications of ending 7,000 direct coal jobs has led the Administration to try alter the methodology supporting its policies.

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[21] February 3, 2011 email between contractors and subcontractors. Subject: Actions from Feb 1 meeting.
[22] Nov. 17, 2011 testimony for the record of Mr. Steven Gardner, President and CIO, ECSI, LLC.
[23] Id.
[24] Director Pizarchik denied that he or any OSM employee instructed the subcontractors to alter their assumptions. Subcommittee on Energy and Mineral Resources Oversight hearing on "Jobs at Risk: Waste and Mismanagement by the Obama Administration in Rewriting the Stream Buffer Zone Rule" Nov. 4, 2011, testimony of Director Pizarchik, page 53 lines 895-897 (draft transcript).

Obama Administration Backs Away from Claim That Numbers were "Placeholders"- While Claiming It Will Push for the New Rule

While Director Pizarchik was adamant in his November 4, 2011, testimony before the Committee that the numbers discussed in the Administration's Draft EIS were "fabricated based on placeholder numbers and have no basis in fact," it appears that he is no longer so certain. In testimony before the Committee on July 19, 2012 Director Pizarchik was asked: "Do you continue to assert that those were placeholder numbers or do you want to revise your previous testimony?" Director Pizarchik responded:

> "At the time I made that statement, the information I had that those were placeholder numbers, and as I understood placeholders, that they did not have any basis in fact. . . . But I have since learned that their definition of placeholder was different than was my understanding."[25]

While it is disappointing that Director Pizarchik was apparently mistaken in his November 4 testimony, it is more disappointing that the Obama Administration's job loss numbers were correct and they continue to attempt to hide this information from the American people, while holding steadfast to its efforts on the re-write. As recently as July 19, Director Pizarchik again stated that OSM was "making our best efforts to get the rule completed as soon as possible"[26] and "trying our best to get it out as quickly as possible."[27]

It remains unclear why Director Pizarchik originally claimed that the numbers were "fabricated" and had "no basis in fact." The documents received by the Committee show that the contractors at all times acted at the direction of and with the consultation of OSM, and that OSM was heavily involved in the process of preparing both the draft EIS and the draft RIA. Additionally, OSM sent draft chapters of the EIS to state agencies acting as "cooperating agencies" for the rulemaking, and presumably reviewed the work it was sending to the state and agency partners in this endeavor. This purportedly allowed the agency to receive edits and feedback from knowledgeable and vested parties. This process would have been useless if OSM was knowingly sending documents whose numbers were "fabricated based on placeholder numbers and have no basis in fact."

[25] Oversight Hearing on "Status of Obama Administration's Rewrite of the Stream Buffer Zone Rule and Compliance with Committee Subpoenas" Thursday, July 19, 2012, testimony of Director Pizarchik pages 53-54 lines 1227-1240, (draft transcript).
[26] Id. at p. 22 lines 442-443.
[27] Id. at p. 90 lines 2144-2145.

III. OBAMA ADMINISTRATION'S RUSHED AND UNORTHODOX RULEMAKING PROCESS

The Administration has made no secret of its disdain for the 2008 Stream Buffer Zone Rule. However, a change of administration is not a sufficient reason for an agency to toss aside validly drafted and passed regulations absent a showing of need for new regulations. Indeed, courts have noted that an "agency may not repudiate precedent simply to conform with a shifting political mood. Rather, the agency must demonstrate that its new policy is consistent with the mandate with which Congress has charged it."[28]

Interior Secretary Ken Salazar first attempted to have the 2008 Stream Buffer Zone Rule tossed aside through the courts, and when this effort was rebuked, he struck a deal with the special interest groups who brought those lawsuits to draft new regulation in a very short timeframe. While the Obama Administration has failed to lay the groundwork that a new regulation is needed, this exercise has already cost the taxpayers at least $7.7 million dollars.[29,30]

Administration's Attempt to Circumvent the APA Blocked by Federal Court

There has been no clear stated purpose of the need for a new rule. In April of 2009, Secretary Salazar filed court documents stating that the promulgated 2008 Stream Buffer Zone Rule was legally infirm;[31] in February 2011 Director Pizarchik claimed that the 2008 Rule was "clearly not adequate,"[32] and in November 2011 he testified before the Committee that the rewrite would allow OSM to utilize "emerging science."[33] Indeed, when one member asked Director Pizarchik to "list some of the categories where the rule is failing," Director Pizarchik went on to discuss the 2008 Rule as though it were implemented and in effect across the nation, which is not true. The Administration has yet to fully explain why the decision was made to rewrite this rule, and whether the objective decision-making of the agency is being controlled by influence from special interest groups.

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[28] National Black Media Coalition v. FCC, 775 F.2d 342, 356 n.17 (D.C. Cir. 1985).

[29] Oversight Hearing on "Status of Obama Administration's Rewrite of the Stream Buffer Zone Rule and Compliance with Committee Subpoenas" Thursday, July 19, 2012, testimony of Director Pizarchik page 55 line 1274-1275, (draft transcript).

[30] While the most recent estimate was $7.7 million, Director Pizarchik testified at a hearing in Mach 2012 and placed the estimated cost at $5 million dollars. Subcommittee on Energy and Mineral Resources Oversight hearing on the "Effect of the President's FY 2013 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction" Mar. 6, 2012, http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=282080 18:26 – 19:40. It is unclear whether Director Pizarchik was mistaken in March or whether OSM spent an additional $2.7 million between March 2012 and July 2012 on this project.

[31] Apr. 27, 2009, Secretary Salazar filed a motion to voluntary remand and vacate of the 2008 Rule in National Parks Conservation Ass'n.

[32] Feb. 11, 2011 telephone conference call addressing this issue with Director Pizarchik, available at: http://blogs.wvgazette.com/coaltattoo/2011/02/11/osmre-director-joe-pizarchik-speaks/.

[33] Subcommittee on Energy and Mineral Resources Oversight hearing on "Jobs at Risk: Waste and Mismanagement by the Obama Administration in Rewriting the Stream Buffer Zone Rule" Nov. 4, 2011, testimony of Director Pizarchik page 24 lines 476-481.

The Department's April 30, 2010, proposed rule, notice of intent to prepare an environmental impact statement and June 18, 2010, notice of intent to prepare an environmental impact statement, state that OSM had "already decided" to change the rule following the change of administrations.[34] This shows the Obama Administration decided to rewrite the Rule as soon as eight days after the Rule was scheduled to go into effect, if not sooner. Since the 2008 Stream Buffer Zone Rule was only published on December 12, 2008, and was set to go into effect January 12, 2009, OSM's claim that they had "already decided to change the rule" upon the change of the administration shows this decision was made without the benefit of any analysis of the legitimacy or efficacy of the rule itself. Indeed, Director Pizarchik's statement that the 2008 rule was "clearly not adequate" is not based in any objective analysis of the rule or its substance. The Committee has asked for the internal memorandums discussing the decision to initiate this rule. According to the Department, this decision was made January 20, 2009 – more than three years ago.[35] Only one responsive document has been provided, and it was provided in a redacted form.

The 2008 Stream Buffer Zone Rule was published in final form in December 2008, with the concurrence of the Environmental Protection Agency "EPA." Immediately after this Rule was published, special interest groups brought suits challenging the newly finalized rule.[36] Rather than defending the rule OSM had just promulgated, the Obama Administration made a decision to join in litigation challenging the 2008 rule. The Department went so far as to ask a Federal Court to vacate the rule that had just been finalized, blatantly ignoring the millions of taxpayer dollars spent in the promulgation of the 2008 Rule, and ignoring the Administrative Procedure Act. A Federal Court admonished OSM for failing to follow the appropriate process in its hastened attempt to rewrite this rule.[37] While the Obama Administration desires the American people to trust it in the rulemaking process, its record so far shows that it is only going through a formal rulemaking process because its first attempt to bypass the appropriate procedures were struck down by a Federal Court.

Obama Administration Established an Unreasonable Time Frame Through Costly Litigation and a Voluntary MOU

While the litigation on the rule was ongoing, the Obama Administration entered into a memorandum of understanding ("MOU") with EPA and the Army Corps to "reduce the

[34] 75 Fed. Reg. 83 (Apr. 30, 2010), p. 22723; 75 Fed. Reg. 117 (June 18, 2010), p 34667.
[35] The Interior Department has alleged Congress is attempting to interfere with predecisional deliberative process. The decision to rewrite this rule was made, according to their own statements, more than three years ago.
[36] Coal River Mountain Watch, et. al v. Salazar, No. 08-2212 (D.D.C.), National Parks Conservation Ass'n v. Salazar, No. 09-115 (D.D.C.)
[37] The U.S. District Court for the District of Columbia denied the Government's motion to vacate the existing rule because a grant of the motion would "wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule" and that granting vacatur would "allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comments, without judicial consideration of the merits." National Parks Conservation Ass'n v. Salazar, 660 F. Supp 2d 3 (D.D.C. 2009).

harmful impacts" of Appalachian surface coal mining.[38] In March 2010, the Administration entered into a settlement agreement with the plaintiffs challenging the 2008 Rule which established a very short timeframe to rewrite the rule, including signing a proposed rule by February 28, 2011,[39] and publishing a final rule by June 29, 2012.[40] This settlement agreement included paying the attorney fees for the plaintiffs[41] – even though the Obama Administration attempted to vacate the very rule the plaintiffs were challenging. Setting policy and rulemaking priorities through settlement negotiations with litigious special interest groups is not the task of OSM, and not the governance that this country deserves.

Timeframe and Scope of the Rulemaking Raised Concerns for Stakeholders

The Obama Administration appears to have initially rushed this process at the behest of a litigation settlement rather than thoughtful and thorough adherence to National Environmental Policy Act guidelines. The MOU signed by the Department purported to focus on surface coal mining in Appalachia, and expressly referred to mining techniques requiring permits under the Surface Mining Control and Reclamation Act ("SMCRA") and the Clean Water Act ("CWA") in Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. However, the rulemaking has been significantly expanded into the largest rulemaking in the 30 year history of SMCRA and will be applied to coal mines throughout the United States.[42] This compressed timeframe and the expanded scope of this rulemaking have caused concern for many stakeholders.

The Committee has found many flaws in the Administration's attempted rewrite, but several other parties have been raising concerns for several year as well. In November 2010, four Senators wrote a letter to Director Pizarchik expressing concern that he was attempting to short-circuit the rulemaking process,[43] and several State agencies that would be impacted by this rule sent a joint letter highlighting concerns about the compressed timeframe, and the need and justification for the rule.[44] In December 2010 the governors of Wyoming and Kentucky wrote separate letters each expressing concern about the rushed timeframe, the failure of allowing cooperating agencies to comment, and the lack of a

[38] Memorandum of Understanding between the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining, June 11, 2009.
[39] No proposed rule was signed by Feb. 28, 2011.
[40] Mar. 19, 2010 Agreement to settle cases seeking judicial review of the 2008 Stream Buffer Zone Rule. No proposed rule and no final rule was published by June 29, 2011.
[41] Department of Interior paid $12,840.00 to the Coal River Plaintiffs and $48,142.40 to the National Parks Conservation Association in May and August of 2010.
[42] Draft environmental impact statement, Chapter 1, see also 75 Fed. Reg. 117 (June 18, 2010) defining the proposed rule as "much broader in scope."
[43] Nov. 3, 2010 letter *available at:* http://barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=177f584b-beda-09fe-9b73-34efaed4d1d3&IsPrint=true.
[44] Letter from Cooperating Agencies signed Nov. 23, 2010. Signed by Director, Alabama Surface Mining Commission; Director, Division of Reclamation, Indiana Department of Natural Resources; Commissioner, Kentucky Department for Natural Resources; Director, Surface Mining and Reclamation Division, Railroad Commission of Texas; Director, Utah Division of Oil, Gas and Mining; Deputy Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection; and Director, Wyoming Department of Environmental Quality.

justification for the need for the rule. In February 2011, the Western Governors' Association expressed concerns that OSM had not provided sufficient basis to support the need for the rulemaking.[45]

The Obama Administration has never provided a justification for this rushed process. While the settlement agreement sets a deadline for the publication of a final rule, this settlement agreement was entered into by the Administration only after the Department attempted to join in the litigation on the side of the plaintiffs. This self-imposed time limit for such a sweeping rewrite of an important regulation needs to be carefully examined and explained to the American people. The Committee has asked for documents related to the decision to conduct an additional EIS, rather than use the EIS prepared for the 2008 Rule, and for documents that would show the decision to expand the scope of the rulemaking effort and how this decision was reached. These documents have not been produced.

Agency Refuses to Reveal the Current Status and Timeline of Rewrite

Oddly enough, even after negotiating with special interest groups to replace a regulation that took years to promulgate, the Obama Administration has failed to meet a single deadline provided in this settlement, including the June 29, 2012, deadline to publish the final rule. According to the settlement agreement, the sole remedy for the failure of the Administration to meet these deadlines is to "ask the Court to lift the stay and establish a schedule for further proceedings."[46] This would lead to additional costly litigation – and significant cost to the taxpayers.[47] The Committee has subpoenaed communications between DOI and the special interest groups in this case to better understand the state of the litigation and the process the Department intends to follow going forward. No such communications have been provided. The Department refuses to give a timeline for finalizing the Obama preferred rewrite.

Additionally, Director Pizarchik testified July 19, 2012 that OSM had "a status conference with [the litigants] to apprise them of the fact that we had missed the deadline, and some of the explanation as to why."[48] He also stated that "the court has asked for a status report from the parties in the litigation."[49] Again, the Committee has repeatedly asked for this information; in written document requests, in subpoenas, and recently in Questions for the Record, submitted after this testimony. Time and again, the Department has failed to provide this information. It is now unclear where the Administration is in the process of conducting this rewrite, and whether it is hiding the ball and intentionally concealing the rule and the true economic impacts until after November.

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[45] Feb. 27, 2011 letter from Western Governors' Association to Secretary Salazar.
[46] Mar. 19, 2010 Agreement to settle cases seeking judicial review of the 2008 Stream Buffer Zone Rule.
[47] The Department paid the plaintiff's attorney's fees in this litigation notwithstanding the fact that in the Department's motion to vacate, they claimed that there was "no case or controversy between the parties remains." National Parks Conservation Ass'n v. Salazar, case 1:09-cv-0015-HHK, document 10 filed Apr. 27, 2009.
[48] Oversight Hearing on "Status of Obama Administration's Rewrite of the Stream Buffer Zone Rule and Compliance with Committee Subpoenas" Thursday, July 19, 2012, testimony of Director Pizarchik page 104 line 2501-2503, (draft transcript).
[49] Id. page 105 line 2523-2524 (draft transcript).

IV. THE OBAMA ADMINISTRATION CONTINUES TO OBSTRUCT EFFORTS FOR MEANINGFUL OVERSIGHT BY HIDING INFORMATION, WITHHOLDING DOCUMENTS, AND REFUSING TO COMPLY WITH SUBPOENAS

When President Obama took office, he promised the American people that he was "committed to creating an unprecedented level of openness in government."[50] The obstructive antics of this Administration in responding to legitimate oversight initiatives from Congress have shown that promise to be hollow.

The Department Has Used Delay Tactics to Avoid Accountability

The Committee sent the first letter to the Department requesting answers and information about this regulatory process in February 2011.[51] That means it has been more than a year and a half since this Committee, and others, have been requesting that OSM and the Department explain what they are doing, why they are doing it, and in addition to the more than the $7.7 million already spent, what the ultimate costs will be to the American people.

The Department has dragged its feet at every step. In the year following the first document requests, Committee staff worked diligently to extract information from the Department, while battling arguments that the Department didn't understand what was being asked, didn't understand why certain questions were being asked, and telling the Committee that certain questions "implicate important Executive Branch confidentiality interests"[52] – a claim that has no basis in law, falls short of claiming that any of the documents should be protected by Executive Privilege, and fails to overcome the clear and compelling need for this information.

Due to the sweeping nature of the preferred rewrite, the Committee requested documents and information from other agencies of the Administration as well, in an attempt to understand the scope of the work being completed. This effort included sending document requests to the Army Corps of Engineers,[53] the EPA,[54] the Council on Environmental Quality ("CEQ"),[55] and the Office of Management and Budget ("OMB").[56] With the exception of the

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[50] Memorandum for the Heads of Executive Departments and Agencies from President Obama, Subject: Transparency and Open Government, January 21, 2009.

[51] The Department received the first letter from Congress expressing concern and dismay at their behavior as early as November 3, 2010 when Senators Barraso, Bunning, Enzi, and Inhofe sent a letter to Director Pizarchik identifying concerns with the process the Administration was following, including the denial of an extension of time for comment, failure to provide appropriate scoping , violating the spirit of NEPA, and contradicting the Administration's pledge of transparency and openness in government, *available at* http://barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=177f584b-beda-09fe-9b73-34efaed4d1d3&IsPrint=true

[52] August 1, 2011 letter from Christopher Mansour to Chairman Hastings.

[53] February 3, 2012 letter from Chairman Hastings to Assistant Secretary of the Army (Civil Works) Jo-Ellen Darcy.

[54] Letters sent February 3, March 22, May 15, and May 23, 2012 from Chairman Hastings to EPA Administrator Lisa Jackson, *available at* http://naturalresources.house.gov/uploadedfiles/sbzruleagencycorrespondence05-15-12.pdf.

[55] Letters sent February 3, and May 15, 2012 to CEQ, *available at* http://naturalresources.house.gov/uploadedfiles/sbzruleagencycorrespondence05-15-12.pdf.

Army Corps of Engineers, each of these agencies failed to meet any deadline for document production, or to provide the documents requested. In many instances, months went by before OMB or EPA even pretended to begin looking for the responsive documents that were the subject of the document request. In May 2012, EPA, OMB, and CEQ all provided matching productions with corresponding redactions of relevant and important information. The Administration's thinly veiled collusion in obstructing meaningful oversight shows that it is fundamentally unwilling to provide the American people with the open and transparent government they were promised.

Defying President Obama's Pledge of Unprecedented Transparency, Department Continues to Withhold Information Required by Subpoena

When a full year had passed without the Department meeting one document request deadline, the Department sent a letter to Chairman Hastings explaining that "a committee letter request for information in furtherance of an oversight inquiry does not impose a legal obligation to comply."[57] The Department had by now made clear that any claims of "openness in government" were mere window dressing and that without being forced to provide information the Department felt no obligation to answer to the American people.

On March 28, 2012, more than one year after the initial document request letter was sent, the Committee approved a motion giving the Chairman authority to issue subpoenas for documents regarding the Secretary of the Interior's decision and the process to rewrite this coal production regulation.

Left with no other alternative, Chairman Hasting issued the first of two subpoenas for the production of documents: the first on April 5, 2012, and the second on May 11, 2012.[58] Not a single line item in either of the subpoena schedules has been complied with. The Department continues to claim, in the face of valid subpoenas, that it is not withholding documents, and that the Committee is being unreasonable for refusing to "provide the Department with specific questions it seeks to answer through its investigation."[59] The information sought by the Committee is clearly laid out in the correspondence to the Department, and the two Congressional Subpoenas.[60] If the Department had complied with the subpoenas, the Committee would have the documents and information necessary to complete the investigation.

The Department has also claimed that the information requested implicates "separation of powers between the two branches with respect to rulemaking and the Executive Branch's long-recognized interest in preserving the confidentiality of its pre-decisional

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[56] Letters sent February 3, March 21, and May 15 to OMB, *available at* http://naturalresources.house.gov/uploadedfiles/sbzruleagencycorrespondence05-15-12.pdf.
[57] February 2, 2012 letter from Christopher Mansour to Chairman Hastings.
[58] Subpoenas and all additional documentation *available at* http://naturalresources.house.gov/oversight/coalregs/.
[59] May 24, 2012 letter from Christopher Mansour to Chairman Hastings, *available at* http://naturalresources.house.gov/oversight/coalregs/.
[60] All correspondence available at http://naturalresources.house.gov/oversight/coalregs/.

deliberations."[61] The deliberative process privilege, even if it applied to Congress, is not an absolute bar against disclosure and cannot be used to shield alleged government wrongdoing.[62] The Department's claim that it is not required to answer questions about deliberative process materials, even if true, does not explain its refusal to turn over non-deliberative material. What the Department fails to acknowledge is that many of the items subpoenaed relate to decisions already made, including the documents surrounding the decision to toss out the 2008 Rule, and the information and communication surrounding the settlement that led to this muddle of a rulemaking. The fact that an agency may be in the process of improperly imposing new regulations, eliminating thousands of jobs, and raising energy costs on the American people is absolutely not a shield against transparency and Congressional oversight.

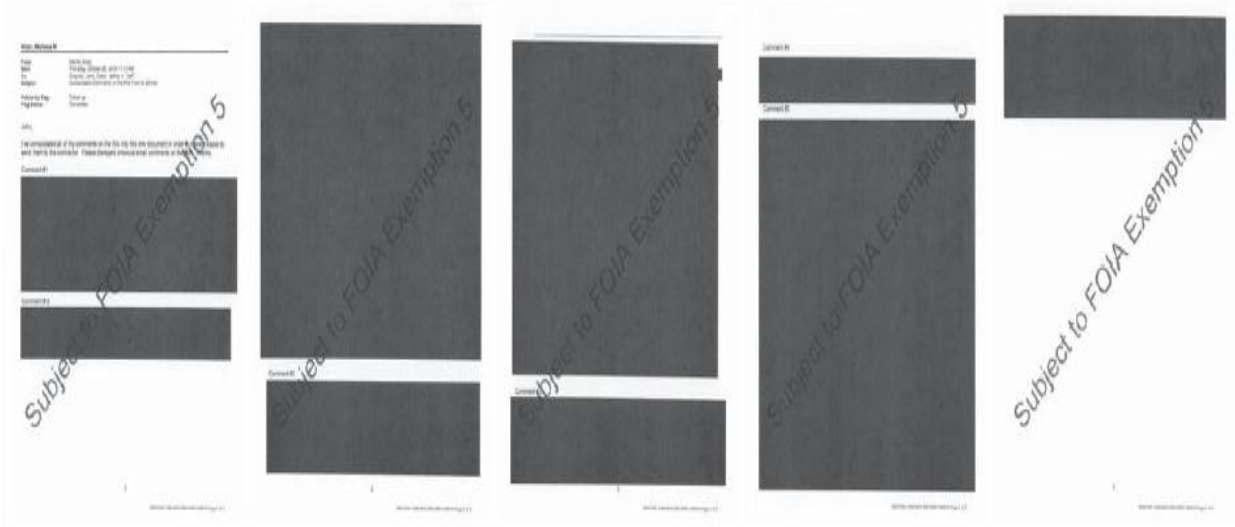
Moreover, for many months, the Committee has tried to work with the Department and the Department's view that it is protecting confidential information. An assertion of "important confidentiality interests of the Executive Branch" is not a recognized common law privilege, and even if it were, claims of privilege are applicable only at the discretion of the Chairman.[63] No privilege claim has been made, yet documents continue to be withheld. The Department also refuses to turn over a privilege log or any accounting of the documents it wishes to protect. It is impossible to evaluate the Department's concerns without a clear accounting of the documents being withheld.

The Department has refused to provide the subpoenaed material, and has the audacity to claim that it is not withholding documents. Director Pizarchik, at the July 19, 2012, hearing stated clearly, "Mr. Chairman, the Department is not withholding documents."[64] The Department has repeatedly shown obstinacy and outrage that it should be held to account for their actions, or their spending. The Department has failed to assert any constitutionally-based privilege, nor has the Department asked that the subpoena be held in abeyance pending an assertion of Executive Privilege from the President. The Administration simply refuses to comply.

Department Makes Arbitrary Redactions of Subpoenaed Information

While the Department has provided numerous pages of documents purportedly in response to the document requests and subpoenas sent by the Committee, much of the information was either publically available, or was so heavily redacted as to be meaningless. When the Department discusses the number of pages provided to the Committee in the course of this investigation, it is referring to thousands of pages like the following.

[61] April 27, 2012 letter from Christopher Mansour to Chairman Hastings.
[62] In Re Sealed Case, 121 F.3d 729, 737-38 (D.D.C. 1997).
[63] Committee on Natural Resources, Rule 4(h).
[64] Oversight Hearing on "Status of Obama Administration's Rewrite of the Stream Buffer Zone Rule and Compliance with Committee Subpoenas" Thursday, July 19, 2012, testimony of Director Pizarchik page 102 line 2445-2446, (draft transcript).



This is an example of what the Administration considers "open and transparent." Fully blacked-out pages were only one problem that the Committee faced when attempting to obtain information from the Administration. "Selective Redactions" were also used to obfuscate the meaning and content of provided information and were inconsistently applied. For example, the Committee was surprised to note that Administration would redact some sentences and words in one document, and not redact those same sentences in duplicate copies of the same documents.[65]

[65] Duplicate copies of the same documents were also included in the document page number the Department continues to trumpet to defend their lack of compliance with the outstanding subpoenas.

The following chart shows the differences between two documents, both received from the Department, in the same production – but with significantly different redactions. This document is a transcript of an audio recording. The audio recordings and unredacted transcripts of the recordings were subpoenaed. The Department has continued to withhold the audio recording and the unredacted transcripts, but has provided various versions of redacted transcripts. The arbitrary nature of the following redactions shows that there is no honest attempt to redact "deliberative process" information or protect "executive branch confidentiality interests" but merely an attempt to hide the actions of the Administration from the American people. The following transcript is of a conversation from the meeting held on February 1, 2010, between OSM staff and the contractors. The stricken words in the second column were redacted in that version, but not the version listed in the first column – both documents were produced in the same Interior Department production on the same day.

00027094 OSM-WDC-B14-00003-000027	00027094 OSM-WDC-B14-00003-000035
This was the whole basis for the disingenuous letter, which is, I've got out on the wall.	This was the whole basis for ~~the disingenuous letter, which is, I've got out on the wall.~~
Now what you're saying makes much more sense, I've got to tell you. But you have to understand, OSM has to understand, we have done an analysis based on what we were instructed to do.	~~Now what you're saying makes much more sense, I've got to tell you. But you have to understand, OSM has to understand, we have done an analysis based on what we were instructed to do.~~
Well, and I will tell you, and I'm sorry (unintelligible), I will tell you that the most common phrase I have uttered in the last month and a half is "they did exactly what I told them to do. We did.	Well, and I will tell you, and I'm sorry (unintelligible), I will tell you that the most common phrase I have uttered in the last month and a half is ~~"they did exactly what I told them to do.~~ We did.

V. CONCLUSION

A year and a half into this ongoing investigation and the Committee has more questions than answers. There are still serious questions about the need for the proposed Stream Protection Rule, the process the Administration is following, and the haste with which the decision to rewrite the rule was made. The answers that the Administration has provided do nothing to instill confidence that it is capable of accurately and transparently implementing SMCRA. Due to the actions of the Administration, there are now additional concerns about its refusal to produce subpoenaed documents and cooperate with an ongoing congressional investigation. The Committee will continue to analyze the information available, seek compliance with outstanding requests, and try to find the truth behind the Administration's actions.