

**STATUS OF OBAMA ADMINIS-
TRATION'S REWRITE OF THE
STREAM BUFFER ZONE RULE
AND COMPLIANCE WITH COM-
MITTEE SUBPOENAS**

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

Thursday, July 19, 2012

Serial No. 112-120

Printed for the use of the Committee on Natural Resources



Available via the World Wide Web: <http://www.fdsys.gov>
or
Committee address: <http://naturalresources.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

75-492 PDF

WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON NATURAL RESOURCES

DOC HASTINGS, WA, *Chairman*
EDWARD J. MARKEY, MA, *Ranking Democratic Member*

Don Young, AK
John J. Duncan, Jr., TN
Louie Gohmert, TX
Rob Bishop, UT
Doug Lamborn, CO
Robert J. Wittman, VA
Paul C. Broun, GA
John Fleming, LA
Mike Coffman, CO
Tom McClintock, CA
Glenn Thompson, PA
Jeff Denham, CA
Dan Benishek, MI
David Rivera, FL
Jeff Duncan, SC
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Kristi L. Noem, SD
Steve Southerland II, FL
Bill Flores, TX
Andy Harris, MD
Jeffrey M. Landry, LA
Jon Runyan, NJ
Bill Johnson, OH
Mark Amodei, NV

Dale E. Kildee, MI
Peter A. DeFazio, OR
Eni F.H. Faleomavaega, AS
Frank Pallone, Jr., NJ
Grace F. Napolitano, CA
Rush D. Holt, NJ
Raúl M. Grijalva, AZ
Madeleine Z. Bordallo, GU
Jim Costa, CA
Dan Boren, OK
Gregorio Kilili Camacho Sablan, CNMI
Martin Heinrich, NM
Ben Ray Luján, NM
Betty Sutton, OH
Niki Tsongas, MA
Pedro R. Pierluisi, PR
John Garamendi, CA
Colleen W. Hanabusa, HI
Paul Tonko, NY
Vacancy

Todd Young, *Chief of Staff*
Lisa Pittman, *Chief Counsel*
Jeffrey Duncan, *Democratic Staff Director*
David Watkins, *Democratic Chief Counsel*

CONTENTS

| | Page |
|---|------|
| Hearing held on Thursday, July 19, 2012 | 1 |
| Statement of Members: | |
| Hastings, Hon. Doc, a Representative in Congress from the State of Washington | 1 |
| Prepared statement of | 3 |
| Markey, Hon. Edward J., a Representative in Congress from the Commonwealth of Massachusetts | 4 |
| Prepared statement of | 5 |
| Statement of Witnesses: | |
| Pizarchik, Hon. Joseph G., Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior | 7 |
| Prepared statement of | 9 |
| Response to questions submitted for the record | 13 |

**OVERSIGHT HEARING ON “STATUS OF OBAMA
ADMINISTRATION’S REWRITE OF THE
STREAM BUFFER ZONE RULE AND COMPLI-
ANCE WITH COMMITTEE SUBPOENAS.”**

**Thursday, July 19, 2012
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.**

The Committee met, pursuant to notice, at 10:06 a.m., in Room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Gohmert, Bishop, Lamborn, Wittman, Broun, Coffman, McClintock, Thompson, Denham, Benishek, Rivera, Duncan of South Carolina, Tipton, Gosar, Noem, Southerland, Flores, Harris, Johnson, Amodei, Markey, Kildee, Napolitano, Holt, Grijalva, Costa, and Hanabusa.

The CHAIRMAN. The Committee will come to order. The Chairman notes the presence of a quorum, which is two Members, and we have vastly exceeded that. And I appreciate the Members being here.

The Committee on Natural Resources is meeting today to hear testimony on an oversight hearing on the “Status of Obama Administration’s Rewrite of the Stream Buffer Rule and Compliance with Committee Subpoenas.”

Under Rule 4(f), opening statements are limited to the Chairman and the Ranking Member of the Committee. However, I ask unanimous consent that any Member that wishes to have their statement in the record submit that statement before the end of business today.

[No response.]

The CHAIRMAN. And, without objection, so ordered. I will now recognize myself for five minutes for my opening statement.

**STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF WASHINGTON**

The CHAIRMAN. Today’s hearing will focus on two specific issues: one, the status of both the Interior Department’s rewrite of the Stream Buffer Zone Rule and the lawsuit settlement agreement requiring a final rule to be in place by last month; and, two, the failure of the Department to comply with official Congressional subpoenas for documents.

Almost immediately after President Obama took office, his Administration tossed aside the 2008 Stream Buffer Zone Rule, which had taken over 5 years of thorough environmental and scientific analysis and public comment to complete. The Department then entered into a lawsuit settlement with environmental groups to rewrite the rule by June 29, 2012. The Administration has spent millions of taxpayer dollars working to rewrite this rule, including hiring new contractors, only to dismiss those same contractors once it was publically revealed that the Administration's new proposed regulation could cost 7,000 jobs and cause economic harm to 22 States.

To say this entire rulemaking process has been unorthodox would be a gross understatement.

The Department missed the June 29th deadline to produce the final regulation they agreed upon in court. In fact, the Department has yet to even release a draft regulation. For an Administration that was so eager to throw out the 2008 rule and rush the rewrite of a new one, it is bizarre that they are now missing their own self-imposed key deadlines.

One has to seriously question if the Department's plans have changed, now that the devastating job and economic impacts have been made public. For example, audio tapes of meetings between hired contractors and Department officials reveal the Administration's efforts to massage and conceal the true economic impacts of their proposed regulation. And no effort to refute the contents of these recordings has been made public.

So, is the Obama Administration now waiting until after the election, while the President will have more flexibility to release its job-destroying regulation? What is the Administration planning to impose after November that it doesn't want the American people to know now?

The pattern of secrecy has emerged from this Administration, an Administration that made bold promises of openness and unprecedented transparency. The Department has spent the last year-and-a-half avoiding questions from this Committee about their rewrite, and has failed to meet a single deadline for any document request. It is astonishing, the lengths this Administration will go to withhold information from the public.

While this Committee has tried to patiently work with the Department throughout the course of this long-running investigation, the Department's refusal and inability to cooperate left us with no other choice but to issue two subpoenas for specific documents and recordings. Yet the Department has ignored these Congressional subpoenas the same way that they have avoided other attempts to get answers to basic questions.

Repeated and baseless excuses of vague confidentiality interests and it being an ongoing rulemaking process frankly don't stand the test of openness and transparency. These are not valid excuses for defying Congressional subpoenas. I think Director Pizarchik knows that, the Department knows it, and the lawyers at the White House know it.

Today, this Committee expects answers—open, honest and complete answers. It is inexcusable, the way in which the Department has stonewalled this Committee's legitimate oversight efforts. The

Obama Administration has made no secret of their desire to reduce or prohibit coal production. Their war on coal is being carried out on multiple fronts, from the Environmental Protection Agency to the Office of Surface Mining (OSM), all using the same tactic of imposing onerous red tape that will slowly cripple the industry, never mind the thousands of American families and small businesses that depend on this industry for their livelihood.

CNN had a story last week entitled, “The War over Coal is Personal.” It featured an interview with a mother of five from Ohio who spoke about her way of life being at stake, and she said, “If coal fell, which is one of the main sources of employment around this area, everything would suffer. There would be no funding for the schools, which are already suffering. I can’t see how destroying one industry benefits anything.”

This is what is on the line with the Department’s new coal regulation. It is about jobs, American energy production, energy prices and the economic livelihood of communities. If this Administration has nothing to hide, then they should comply with our subpoenas and fully answer all questions today in this Committee.

[The prepared statement of Mr. Hastings follows:]

**Statement of The Honorable Doc Hastings, Chairman,
Committee on Natural Resources**

Today’s hearing will focus on two specific issues: 1). The status of both the Interior Department’s rewrite of the Stream Buffer Zone Rule and the lawsuit settlement agreement requiring a final rule to be in place last month; and 2). The failure of the Department to comply with official Congressional subpoenas for documents.

Almost immediately after President Obama took office, his Administration tossed aside the 2008 Stream Buffer Zone Rule, which had taken over five years of thorough environmental and scientific analysis and public comment to complete.

The Department then entered into a lawsuit settlement with environmental groups to rewrite the rule by June 29, 2012. The Administration has spent millions of taxpayer dollars working to rewrite this rule including hiring new contractors, only to dismiss those same contractors once it was publically revealed that the Administration’s new proposed regulation could cost 7,000 jobs and cause economic harm in 22 states.

To say this entire rulemaking process has been unorthodox would be a gross understatement.

The Department missed the June 29th deadline to produce the final regulation they agreed upon in court. In fact, the Department has yet to even release a draft regulation. For an Administration that was so eager to throw out the 2008 rule and rush the rewrite of a new one, it’s bizarre that they are now missing their own self-imposed key deadlines.

One has to seriously question if the Department’s plans have changed now that the devastating job and economic impacts have been made public. For example, audio tapes of meetings between hired contractors and Department officials reveal the Administration’s efforts to massage and conceal the true economic impacts of their proposed regulation. No effort to refute the contents of these recordings has been made public.

Is the Obama Administration now waiting until after the election, when the President will have more “flexibility,” to release its job-destroying regulation? What is the Administration planning to impose after November that it doesn’t want the American people to know about now?

A pattern of secrecy has emerged from this Administration—an Administration that made bold promises of openness and unprecedented transparency. The Department has spent the last year and a half avoiding questions from this Committee about their rewrite and has failed to meet a single deadline for any document request. It’s astonishing the lengths this Administration will go to withhold information from the public.

While this Committee has tried to patiently work with the Department throughout the course of this long-running investigation, the Department’s refusal and inability to cooperate left us with no other choice but to issue two subpoenas for spe-

cific documents and recordings. Yet the Department has ignored these Congressional subpoenas the same way they have avoided other attempts to get answers to basic questions.

Repeated and baseless excuses of vague confidentiality interests and it being an ongoing rulemaking process frankly don't stand the test of openness and transparency. These are not valid excuses for defying Congressional subpoenas. Director Pizarchik knows it, the Department knows it and all the lawyers in the White House know it.

Today, this Committee expects answers—open, honest and complete answers. It's inexcusable the way in which the Department has stonewalled this Committee's legitimate oversight efforts.

The Obama Administration has made no secret of their desire to reduce or prohibit coal production. Their war on coal is being carried out on multiple fronts—from the Environmental Protection Agency to the Office of Surface Mining— all using the same tactic of imposing onerous red tape that will slowly cripple the industry. Never mind the thousands of American families and small businesses that depend on coal for their livelihood.

CNN had a story this week entitled, "The War over Coal is Personal." It featured an interview with a mother of five from Ohio who spoke about her way of life being at stake. She said, "If coal fell, which is one of the main sources of employment around this area, everything would suffer. There'd be no funding for the schools, which are already suffering. I can't see how destroying one industry benefits anything."

This is what's on the line with the Department's new coal regulation. It's about jobs, American energy production, energy prices and the economic livelihood of communities.

If the Obama Administration has nothing to hide, then they should comply with our subpoenas and fully answer all questions today from this Committee.

The CHAIRMAN. And with that, I will recognize the distinguished Ranking Member from Massachusetts, Mr. Markey.

STATEMENT OF THE HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Thank you, Mr. Chairman. The Majority is right about one thing. There is a war on coal in America. But this war is being waged by cheaper, cleaner sources of energy, not the Obama Administration.

Six years ago coal produced one-half of America's electricity. Today, 6 years later, it is down to a little over one-third of electricity in America produced by coal. And it is still falling. Electricity from natural gas, meanwhile, has grown from 18 percent of U.S. power to 27 percent in that 6-year period. Wind has gone from almost nothing to 3 percent of American power, and it is growing rapidly. The free market is beating coal. This is the American way. New replaces old. Efficient replaces wasteful. Clean replaces dirty. High-tech replaces low-tech. And our country benefits when this happens.

Coal companies know they can no longer compete here against cheap natural gas, cheap wind, more efficient energy use, and rapidly dropping solar prices. They have responded by boosting exports to countries overseas, as the Committee's Democratic staff documents in a new report I am releasing today. According to this report, U.S. coal exports could reach 120 million tons this year, nearly 12 percent of U.S. production, and a 200 percent increase since 2009.

The Appalachian Region produces high sulphur coal that U.S. utilities have turned away from. So not surprisingly, much of this

exported coal comes from mountaintop removal mining, a devastating practice that has blanketed communities with soot, contaminated drinking water, and destroyed 2,000 miles of streams. Some mountaintop mines are now exporting 90 percent of the coal which they produce. While coal companies are happy to ship our coal overseas to the highest foreign bidder, it is surely the Appalachian people who bear the greatest cost for this coal that America, in an ever smaller percentage, does not use.

Consider the aptly named Twilight Mine in Boone County, West Virginia, which, in 2011, raked in an estimated \$40 million from exporting mountaintop coal. After mining began in 1997, nearby residents grew weary of breathing dust-laden air that is linked to cancer and heart disease. Many opted to sell their properties to the mine's owner, Massey Energy, and communities were transformed into ghost towns. One former resident explained to the New York Times, "You could wash your car today and tomorrow you could write your name on it in the dust. It was just unpleasant to live in that town."

Take a look at the photos on the monitors. Look at the boarded-up homes. Look at the ravaged landscape. Continuing on this path is a death sentence to Appalachia. The Department of the Interior's Office of Surface Mining is now evaluating options for a new stream protection rule that would protect Appalachian communities from the consequences of mountaintop removal mining.

But for the last year, the Committee Majority has carried on a baseless, politically motivated investigation designed to stop OSM from proceeding. The Majority has alleged that OSM improperly ended its relationship with an under-performing contractor that was hired to perform analysis for the rulemaking. However, in more than 13,000 pages of documents turned over by the Department of the Interior, there is only evidence that OSM made the right decision. Even officials in coal-mining States such as West Virginia and Kentucky harshly criticize the contractors' work as inaccurate, incomplete, and insufficient.

Recently, the Majority released audio recordings of meetings between OSM and the contractor, which were obtained from the contractor. The Majority has portrayed these recordings as incendiary. But instead, they only confirm the previously disclosed documents. OSM had good reason to end its relationship with an incompetent contractor. And we have good reason to end this investigation into OSM's rulemaking, and to start investigating the human and environmental costs of maintaining removal of mountaintops in a mining process that is slowly, but surely, harming the citizens of Appalachia.

Mr. Chairman, I yield back the balance of my time.
[The prepared statement of Mr. Markey follows:]

**Statement of The Honorable Edward J. Markey, Ranking Member,
Committee on Natural Resources**

The Majority is right about one thing: There is a war on coal in America. But this war is being waged by cheaper, cleaner sources of energy, not the Obama Administration.

Six years ago, coal produced half of America's electricity. Today, it's down to a little over a third, and still falling. Electricity from natural gas, meanwhile, has grown from 18 percent of U.S. power to 27 percent. And wind has gone from almost nothing to producing 3 percent of our power.

The free market is beating coal!

This is the American way. New replaces old, efficient replaces wasteful, clean replaces dirty, high-tech replaces low-tech. And our country benefits when this happens.

Coal companies know they can no longer compete here against cheap natural gas, cheap wind, more efficient energy use, and rapidly dropping solar prices. They have responded by boosting exports to countries overseas, as the Committee's Democratic staff documents in a new report I am releasing today. According to this report, U.S. coal exports could reach 120 million tons this year—nearly 12 percent of U.S. production and a 200 percent increase since 2009.

The Appalachian region produces high-sulfur coal that U.S. utilities have turned away from. So not surprisingly, much of this exported coal comes from mountaintop removal mining—a devastating practice that has blanketed communities with soot, contaminated drinking water, and destroyed 2,000 miles of streams. Some mountaintop mines are now exporting 90 percent of the coal they produce.

While coal companies are happy to ship our coal overseas to the highest foreign bidder, it's surely the Appalachian people who bear the greatest cost for this coal that America no longer uses.

Consider the aptly named Twilight mine in Boone County, West Virginia, which in 2011 raked in an estimated \$40 million from exporting mountaintop coal. After mining began in 1997, nearby residents grew weary of breathing dust-laden air that is linked to cancer and heart disease. Many opted to sell their properties to the mine's owner, Massey Energy, and communities were transformed into ghost towns.

One former resident explained to the New York Times, "You could wash your car today, and tomorrow you could write your name on it in the dust . . . It was just unpleasant to live in that town. Period."

Take a look at the photos on the monitors. Look at the boarded-up homes. Look at the ravaged landscape. Continuing on this path is a death sentence for Appalachia.

The Department of the Interior's Office of Surface Mining (OSM) is now evaluating options for a new Stream Protection Rule that would protect Appalachian communities from the consequences of mountaintop removal mining. But for the last year, the Committee Majority has carried on a baseless, politically-motivated investigation designed to stop OSM from proceeding.

The Majority has alleged that OSM improperly ended its relationship with an underperforming contractor that was hired to perform analysis for the rulemaking. However, in more than 13,000 pages of documents turned over by the Department of the Interior, there is only evidence that OSM made the right decision. Even officials in coal mining states such as West Virginia and Kentucky harshly criticized the contractor's work as "inaccurate," "incomplete," and "insufficient."

Recently, the Majority released audio recordings of meetings between OSM and the contractor, which were obtained from the contractor. The Majority has portrayed these recordings as incendiary, but instead they only confirm the previously disclosed documents: OSM had good reason to end its relationship with an incompetent contractor. And we have good reason to end this investigation into OSM's rule-making, and start investigating the human and environmental costs of mountaintop removal mining.

The CHAIRMAN. The time of the gentleman has expired. The gentleman from Ohio.

Mr. JOHNSON. Mr. Chairman, before we hear from our witness today, I would like to point out that our Committee Rule 4(e) allows the Chairman to swear in witnesses before the Committee at your discretion. Now, this oath reinforces that the witness is required to tell the truth, the whole truth, and nothing but the truth in testimony before the National Resources Committee. I understand that, unlike some former Chairman, this has not been your practice, even in cases where the Committee has been conducting investigative hearings like this one.

Now, I certainly understand and respect that this is your prerogative. However, I also want to make sure that the witness is aware of his obligations that even if he is not under oath, he is still obligated to tell the truth, the whole truth, and nothing but the truth.

And under the False Statements Accountability Act of 1996, which applies to unsworn testimony and any responses to Member questions, the penalty for lying or omitting a material fact is the same as that for Federal perjury: 5 years in prison and up to \$250,000 in fines.

Thank you, Mr. Chairman—

The CHAIRMAN. If the gentleman would yield, the gentleman is correct. During this Congress, the practice of this Committee has not been to administer the oath to witnesses appearing before it, because I am sure that all of our witnesses are aware that they simply cannot lie to Congress.

However, the False Statement Statute does apply to their testimony, even if an oath is not administered. So I appreciate the gentleman for pointing that out to the Committee today.

I want to welcome Director Pizarchik for being here. Thank you very much. You have been here before, and so you recognize how the lights work. When the green light goes on, you are doing very well. And when the yellow light comes on, it means you have 30 seconds left. And when the red light comes on, that means the 5 minutes have been expired.

Now, your testimony, written testimony, is much longer than 5 minutes. So I would ask you to summarize your written testimony. It will appear fully in the record, however.

So, with that, Mr. Pizarchik, welcome to the Committee again, and you are recognized for 5 minutes.

**STATEMENT OF THE HON. JOSEPH G. PIZARCHIK, DIRECTOR,
OFFICE OF SURFACE MINING RECLAMATION AND
ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR**

Mr. PIZARCHIK. Mr. Chairman and members of the Committee, thank you for inviting me to testify on the efforts by the Office of Surface Mining Reclamation and Enforcement to better meet our statutory responsibility to allow for the responsible development of our Nation's coal resources, while protecting the environment on which our communities depend for their health, safety, and way of life.

While the Administration strives to modernize our regulations and achieve an appropriate balance that allows responsible coal production and protects communities and the environment, we also recognize the vital role coal plays in our energy portfolio. We are committed to coal production and the jobs it supports.

In December 2008, OSM published a final rule that modified the circumstances under which mining can occur in or near streams. This rule is known as the Stream Buffer Zone Rule. It was challenged by nine organizations in two separate complaints filed in the district court for alleged legal deficiencies. Prior to my appointment and subsequent Senate confirmation as OSM director in November 2009, the Administration had identified significant matters in the 2008 rule which it failed to address.

Significant advances in science and technology since the adoption of the 1983 rule were not addressed in the 2008 rule. Incorporating the most up-to-date science technology and knowledge about the effects of coal mining is essential to developing the best possible modern regulations. The 2008 rule also failed to provide objective

standards for important regulatory decisions, such as the requirement to collect all the information needed to establish a baseline to assess the likelihood of impacts during and after mining, and to assure proper reclamation.

Although the Surface Mining Control and Reclamation Act requires that each coal mining operation be designed to prevent material damage to the hydrologic balance outside the permit area, the 2008 rule provided no definition, no criteria, and no guidance that would assist the operators or interested parties in determining whether the statutory requirement is being met, despite clear evidence in the rulemaking record that some coal mining operations had negative impacts on stream health, fish, and wildlife.

In short, the 2008 rule failed to set forth basic rules of the road for operators and others. To address these concerns in 2009, the Department developed and then published an advance notice of proposed rulemaking on November 30th, soliciting comments on rulemaking alternatives. The ANPR yielded a large number of comments.

Based on the public input, we determined that a more holistic approach to develop a stream protection rule proposal, somewhat broader in scope than the 2008 rule, would be the most effective way to proceed. As we proceed with the development of a proposed rule, we are considering revisions that will provide solid benchmarks for companies to meet. And that will be based on the latest accepted science.

The draft Environmental Impact Statement that OSM is developing to support a proposed rule that we are developing will examine a range of alternatives. It will analyze the significant environmental issues associated with any proposed stream protection rule and its alternatives. It will evaluate the economic impacts of each alternative. It will provide OSM with critical information needed to inform its regulatory decision-making. We are proceeding in accordance with the National Environmental Policy Act, the Administrative Procedures Act, and other applicable laws. Once a proposed rule and draft EIS have been completed and published, we will ask the public to comment.

I stress, however, that currently there is no pending proposed rule. There is no completed Environmental Impact Statement that evaluates a proposed rule and alternatives. Consequently, there are no credible, meaningful job numbers. While this rulemaking effort is underway, the 2008 rule remains in effect on lands for which OSM is the regulatory authority. For those States that have assumed primary responsibility for coal mining, their programs continue, and they are still in effect.

The Department recognizes the Committee's oversight role, and is fully committed to working in good faith to accommodate the Committee's legitimate oversight interests in this matter. We hope the Committee will similarly engage in good faith with the Department in a manner consistent with the Constitution's separation of powers that recognizes the challenges and important interests presented where Congressional oversight involves ongoing executive branch deliberations.

The Department has been responsive to the Committee's interests. The Department has provided the Committee with meaningful

accommodations, including over 13,500 pages of documents responsive to the Committee's requests and its subpoenas, has made multiple offers for in camera review of additional documents, briefings, and testimony. We will continue to work with the Committee as the Committee exercises its oversight function.

Thank you for the opportunity to be here before the Committee today to testify on the development of the stream protection rule-making. The Department recognizes Congressional oversight is an important part of our system of government. We stand ready to continue to work together to satisfy the Committee's core oversight interests in this matter, while also safeguarding the independence, integrity, and effectiveness of the Department's ongoing efforts to develop a stream protection rule.

I am available for questions.

[The prepared statement of Mr. Pizarchik follows:]

Statement of The Honorable Joseph G. Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify on efforts by the Office of Surface Mining Reclamation and Enforcement (OSM) to better meet our statutory responsibility to allow for responsible development of our nation's coal resources while protecting the environment on which our communities depend for their health, safety and way of life.

Introduction

Along with responsible oil and gas development and the growth of clean, renewable energy, coal is an important component of our nation's energy portfolio, and the responsible development of this important resource is a key part of America's energy and economic security.

While the Administration is striving to improve our regulatory framework and achieve an appropriate balance that allows responsible coal production and protects communities and the environment, we also recognize the vital role coal plays in our energy portfolio, and we are committed to coal production and the jobs it supports. In the past three years the Bureau of Land Management has issued federal coal leases for more than 1.4 million acres, and nearly 1.4 billion tons of coal has been produced from more than 300 federal coal leases.

Further underscoring the Administration's commitment to the goals of energy security and job creation, federal coal leases on nearly a half million acres of federal mineral estate generated over \$780 million in royalties in Fiscal Year 2011. This coal is used to generate electricity in at least 40 states, accounting for more than one-fifth of all electricity generated across the country. Furthermore, the BLM held four coal lease sales in 2011, generating \$700 million in bonus bids.

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) established the Office of Surface Mining Reclamation and Enforcement for two basic purposes: First, to assure that the Nation's coal mines operate in a manner that protects communities and the environment during mining operations and restore the land to productive use following mining; and second, to implement an Abandoned Mine Lands (AML) program to address the hazards and environmental degradation remaining from two centuries of unregulated mining. These tasks are vital to public health and safety and the environmental and economic well-being of the United States.

Stream Protection Rulemaking

In December 2008, during the final weeks of the previous administration, OSM published a final rule that modified the circumstances under which mining can occur in or near streams. The so-called "Stream Buffer Zone Rule" was challenged by nine organizations in two separate complaints filed in District Court for alleged legal deficiencies, including the failure to properly conduct Endangered Species Act Section 7 consultation.

While the litigation was pending, the Administration identified significant matters the 2008 Rule failed to address. As a threshold matter, there have been significant advances in science and technology since the establishment of the 1983 rule which were not addressed in the 2008 Rule. Incorporating the most up-to-date science, technology, and knowledge about the effects of surface coal mining is essen-

tial to developing maximally beneficial modern regulations. The 2008 Rule also failed to provide objective standards for important regulatory decisions, such as a requirement to collect all the information needed to establish a baseline and to assess the likelihood of impacts during and after mining or to assure proper reclamation. In addition, although SMCRA requires that each surface coal mining operation be designed to prevent “material damage to the hydrologic balance,” the 2008 Rule provided no definition, criteria or guidance that would assist operators or interested parties in determining whether the statutory requirement is being met. Thus, in addition to the legal issues raised by a number of parties in their lawsuits challenging the rule, the 2008 Rule failed to set forth basic “rules of the road” for operators and interested third parties that would ensure that SMCRA’s environmental protection standards would be met, despite clear evidence in the rulemaking record that some coal mining operations were having a deleterious impact on stream health and fish and wildlife. Furthermore, OSM’s existing rules allow for the practice of dumping excess spoil over the side of mountains, burying streams in valleys below. This practice must be consistent with the requirement, in Section 515(b) of SMCRA, that the mine operators transport and place all excess spoil material resulting from coal surface mining and reclamation activities in a controlled manner to allow for compaction, and in such a way to assure mass stability and prevent mass movement. Without ensuring such compaction, operators may cause impacts to additional valleys and streams that need not be affected by these mining operations.

To address legal and policy concerns, the Department published an Advance Notice of Proposed Rulemaking (ANPR) on November 30, 2009, at 74 Fed. Reg. 62664, soliciting comments on ten potential rulemaking alternatives. The ANPR resulted in a large number of comments provided to OSM which indicated that technological advances not addressed in the 2008 Rule may enable industry to do a better job of repairing any damage by reclaiming the land and restoring natural resources for the benefit of the communities that will remain long after the coal is gone. We determined that development of a comprehensive stream protection rule proposal, broader in scope than the 2008 rule, would be the most effective way to proceed.

In March of 2010, the parties to the litigation over the Stream Buffer Zone Rule ultimately entered a settlement agreement in which the Department agreed, in line with the comments received on the ANPR, to propose a new rule to replace the 2008 Rule. This settlement agreement did not prescribe any specific provisions that must be included in either the proposed or final rule.

While this ongoing rulemaking takes place, the 2008 rule remains in effect on lands for which OSM is the regulatory authority (i.e., in Tennessee and Washington, and on Indian lands). For those states that have assumed primary responsibility—or “primacy”—for their own surface coal mining programs, the provisions approved in existing state programs govern mining in and near streams. In all primacy states, existing state programs are based upon the 1983 stream buffer zone rule. While the 2008 rule has not yet been adopted by any primacy state, the 2008 rule is the current federal regulation and has replaced the 1983 rule in OSM’s regulations.

The Committee has expressed great interest in the on-going, administrative deliberations that the Office of Surface Mining is engaged in as it develops a proposed regulatory approach for meeting SMCRA’s mandate that surface coal mining and reclamation operations be conducted to minimize disturbances to fish, wildlife, and related environmental values to the extent possible using the best technology currently available. Central to this exercise is the on-going preparation of a draft Environmental Impact Statement that will, in accordance with the law, fully evaluate whatever proposal the Office of Surface Mining releases for comment while, at the same time, it identifies and evaluates a range of other potential alternatives.

When OSM has completed its deliberative process, both its proposed rule, and the accompanying draft Environmental Impact Statement, will be released and made available for public comment. At that time, the Office of Surface Mining will welcome public and Congressional comment on whatever proposal is advanced by OSM, and on the adequacy of the draft environmental analysis that will accompany the proposed rule. Currently, however, there is no pending proposed rule and there is no completed environmental impact statement that evaluates a proposed rule and alternatives. Rather, the deliberative process is ongoing.

OSM is continuing to review its rulemaking options, and is continuing to ensure that the analysis included in the environmental review that will accompany the proposed rule will be accurate and comprehensive. Indeed, given concerns expressed about unreleased elements of a prior environmental analysis, OSM is taking the extra step of subjecting economic analysis of the potential impacts of a variety of potential rulemaking approaches to robust peer review. The Office of Surface Mining will welcome full scrutiny of the regulatory approach that it ultimately determines

is most appropriate, along with the comprehensive analysis that will accompany the proposal.

The Office of Surface Mining is taking great care as it develops a proposed approach for meeting SMCRA's statutory requirements that operators protect and restore streams and lands that are impacted by mining activities.

As we proceed with development of a proposed rule, we are considering ways to improve key regulatory provisions. For example, SMCRA requires that surface coal mining and reclamation operations be conducted to minimize disturbances to fish, wildlife, and related environmental values "to the extent possible using the best technology currently available." We are considering revisions that will provide solid benchmarks for companies to meet, and that will be based on the latest accepted scientific methods.

The ANPR published on November 30, 2009, contains a brief description of additional possible rulemaking options. It includes, for example, the fact that while SMCRA prohibits "material damage to the hydrologic balance outside the permit area," the phrase has never been defined in OSM's regulations. We are considering ways to provide a clear definition that can be applied uniformly across the country and to ensure that the law is fully implemented to protect water resources both within and beyond the area covered in the mining permit; to protect drinking water; and to protect water quality and resources for recreation, wildlife, and scenic values. Protection of our waterways is a high priority as we continue to develop our important coal resources.

The ANPR also invited the public to identify additional provisions in the regulations, such as the requirement for coal operators to return mine sites to their approximate original contour, that the bureau should consider revising. SMCRA requires that mine operators reclaim mined areas to closely resemble their original pre-mining shape and size. Decades of research and on-the-ground practice have demonstrated that careful restoration of post-mining areas can limit, and, in many cases, eliminate, harmful levels of pollution from mines that often impact the public health of local communities and degrade downstream aquatic resources. Uniform regulations that result in carefully reclaimed areas will create opportunities for continued productive use of the land and water after coal mining ends.

As previously noted, we have already received extensive input from the public, states, and other Federal agencies on issues that we should consider in drafting a proposed rule, including more than 32,000 comments in 2009 on the ANPR, and more than 20,000 received following the public scoping meetings we held in 2010. We will consider these comments, as well as the benefits and the costs, of the agency's regulatory alternatives, as we move forward.

The draft Environmental Impact Statement (EIS) that OSM is developing in support of a proposed rule will examine a range of alternatives. In addition to analyzing the significant environmental issues associated with any proposed Stream Protection Rule and its alternatives, the EIS will evaluate the economic impacts of each alternative, and will provide OSM with critical information needed to inform its regulatory decision-making and the public. As we work toward publication of a proposed rule and draft EIS, OSM will take the time necessary to make informed regulatory decisions supported by the draft EIS analysis, with ample opportunity for additional public input on both the proposed rule and its draft EIS.

Once a proposed rule and draft EIS have been published, we will ask interested stakeholders—from Congress, industry, environmental organizations, or members of the public—to read and comment on the documents, consistent with the National Environmental Policy Act, the Administrative Procedure Act, and other applicable laws.

We look forward to receiving additional public review and comment on a proposed rule and draft EIS once they are published.

Requests for Documents Related to the Stream Protection Rule

The Department is fully committed to continuing to work in good faith to accommodate the Committee's legitimate oversight interests in this matter. We have made significant accommodations and will continue to do so. We hope that the Committee will similarly work in good faith with the Department in a manner that recognizes the challenges and important interests presented where congressional oversight involves ongoing Executive Branch deliberations. The Constitution envisions, as courts have long recognized, a process of accommodation between the Legislative and Executive branches to resolve any conflicts that may arise when each Branch's interests and prerogatives are in tension. As Attorney General William French Smith wrote during the Reagan Administration, "The accommodation process is not, and must not be, simply an exchange of concessions or a test of political strength. It is the obligation of each branch to make a principled effort to acknowledge, and if possible

to meet, the legitimate needs of the other Branch.” 5 Op. O.L.C. 27, 31; 43 Op. Atty Gen. 327 (1981).

Accommodating the Needs of Coordinate Branches

The Department recognizes the important role of congressional oversight, including oversight of the Department’s activities. The Department appreciates that oversight is an important underpinning of the legislative process. Congressional committees, such as this one, need to gather information about how statutes are applied and funds are spent so that they can assess whether additional legislation is necessary either to rectify practical problems in current law or to address problems not covered by current law.

At the same time, as the Department has explained on many occasions, attempts to conduct congressional oversight of an ongoing rulemaking effort, while deliberations are ongoing, raise substantial separation of powers concerns. By attempting to insert itself into an ongoing Executive Branch deliberative process, the Committee threatens to impede the ability of OSM to accomplish its statutory duties. The Committee’s requests for internal, deliberative, pre-decisional communications concerning OSM’s ongoing development of a rulemaking proposal go to the heart of the relationship between the Legislative and Executive Branches and the separation of powers in the Constitution.

The Department is committed to complying with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations and interests of the Executive Branch. And, in the case of the Stream Protection rulemaking, the Department has provided the Committee with many meaningful accommodations including over 13,500 pages of documents responsive to the Committee’s requests and subpoenas, multiple offers for *in camera* review of additional documents (some of which the Committee has yet to accept), briefings, and testimony before the Committee on several occasions. The accommodation approach the Department has taken has been consistent with oversight practices across administrations.

However, as the Department has previously explained, the Executive Branch’s well-established confidentiality interests regarding its internal deliberations are heightened when requests for such deliberative communications are made before the Executive Branch has made a decision regarding the pending issue and disclosure would thus reveal the Executive Branch’s preliminary, non-final thinking on the matter. Indeed, there is a substantial question regarding the extent to which such requests pertain to an appropriate subject of congressional oversight. As Attorney General William French Smith explained:

It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such “oversight” is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be conducted with reference to information concerning decisions which the Executive Branch has already reached. . . . Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch’s function of executing the law. At the same time, the interference with the President’s ability to execute the law is greatest while the decisionmaking process is ongoing.

5 Op. O.L.C. 27, 43 Op. Atty Gen. 327.

Even aside from the question of oversight authority, the Committee has not articulated to the Department why review of the proposed rule and draft analysis after they are completed and made public is not sufficient to address the Committee’s concerns regarding the proposed rule’s scope and potential impacts. As noted above, the next step in the process is not a final rule, but a *proposed* one—and after that proposal is made public, Congress, states, regulated industry and the rest of the American public will have a chance to provide feedback that will inform the final rule.

In response to the Committee’s multiple document requests and subpoenas for documents pertaining to deliberations about developing a Stream Protection Rule proposal, the Department has been striving to accommodate the Committee’s oversight interests in the bureau’s process and handling of a contractor while protecting the substantive decision-making inherent in the Executive Branch function of executing the law.

Striking the right balance between the Committee's and the Executive Branch's legitimate interests takes time and effort. To be clear, the Department is not refusing to comply with the Committee's requests and subpoenas. To the contrary, the Department has been working diligently to satisfy the Committee's core oversight interests, consistent with the important confidentiality and independence of the deliberative process in which the Department is engaged to develop a Stream Protection Rule proposal.

Conclusion

Thank you for the opportunity to appear before the Committee today to testify on the development of OSM's Stream Protection Rule. The Department recognizes congressional oversight is an important part of our system of government, and we remain hopeful that the Department and the Committee can continue to work together to satisfy the Committee's oversight interests in this matter, while also safeguarding the independence, integrity, and effectiveness of the Department's ongoing efforts to develop a Stream Protection Rule. In that effort, we remain committed to developing a proposal that will more fully carry out the bureau's mission, make use of the best available science and technology, better protect communities and water supplies from the adverse impacts of surface coal mining, and provide greater clarity and certainty to the mining industry and the affected communities. We remain just as committed to providing ample opportunity for the Congress, public, industry, stakeholders and others to provide input on that proposal that will help us develop a balanced and responsible final rule. I would be happy to answer your questions.

Response to questions submitted for the record by Director Joseph Pizarchik, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior

Questions from Chairman Doc Hastings:

1. **You mentioned in the hearing that there was a settlement conference with the plaintiffs to the litigation surrounding the Stream Buffer Zone Rule. Please provide the following information regarding this status call?**
 - **The name of all organizations involved in the status update mentioned in your testimony.**
 - **The name of all individuals from each organization involved in or present during the status mentioned in your testimony.**

Answer: Representatives of the plaintiff National Parks Conservation Association and of Coal River Mountain Watch and its co-Plaintiffs participated in the status call.

2. **During your testimony on July 19, 2012 you indicated that the team assigned to the drafting of the environmental impact statement, regulatory impact analysis, and Stream Protection Rule were currently not working on the rewrite but has been reassigned to their normal roles. Can you please provide the number of staff currently working on the EIS, RIA, and draft rule, including but not limited to OSM and DOI staff as well as third party contractors? Additionally, can you please provide the number of staff working on the project in January 2011, including those working on the draft EIS, RIA, and the draft Stream Protection Rule?**

Answer: The proposed Stream Protection Rule, accompanying draft EIS, and regulatory impact analysis have not yet been completed or published. Throughout the rulemaking process, the number of staff working on the project—in January 2011 or at any other time—varies on a daily basis as other assignments intervene. Career OSM staff, with assistance from contractors, are currently taking the time necessary to conduct a thorough analysis of the possible draft proposed rule changes, a reasonable range of alternatives, and the necessary supporting documents.

Questions from Rep. Bill Johnson:

In 2004, the Pennsylvania Department of Environmental Protection closed the Maple Creek Mine. That was a longwall mine and four of the five panels had already been mined, and all five had been permitted as of 2001. The 5th had been set up to be mined, but then the DEP shut down the mine because, it claimed, there was a stream on the surface. To most people, that stream was actually a ditch with no water except occasionally, with it rains. DEP called it an ephemeral stream and forced the closure of the mine. 550 people lost their jobs. You were assistant director in the Bureau of Regulatory Council at the time.

- a. What is the difference between what you did at Maple Creek and what you are proposing here?
- b. The basis of the policy in both cases appears to be the same: stopping mining wherever there is any presence of water. If this policy resulted in the layoffs of over 500 people at Maple Creek, why would you expect it to turn out any differently if replicated on a nationwide scale?
- c. If you know, based on what happened at Maple Creek that this type of policy undoubtedly ends up closing mines and laying off miners, why are you continuing down the same destructive path at OSM?
- d. You previously testified before Congress that the SBZ would not result in any lost jobs, yet when you implemented the almost identical program at the state level in Pennsylvania, 550 jobs were lost. Did you forget about what happened in Pennsylvania, or were you not honest with us the last time you testified?

Answer: At this time, there is no Stream Protection Rule. OSM has yet to publish a proposed rule. Thus, it is premature to compare potential rule changes that are still being developed to the matter to which you are referring.

The CHAIRMAN. Thank you very much, Director Pizarchik, and your timing was incredibly good. I appreciate that. I will recognize myself for 5 minutes. And there are a number of topics that I have. So I would appreciate if you would keep your answers short as possible.

First, you just mentioned—and the Department constantly recites—that you have provided the Committee with over 13,000 pages of documents as a way of being cooperative. So my question to you, Mr. Director, does this 13,000-page figure include multiple documents running hundreds of pages that are widely available on the Internet?

Mr. PIZARCHIK. I am sorry, Mr. Chairman, I don't know the answer as to what is available on the Internet.

The CHAIRMAN. Well, the answer to that is yes, Mr. Director. The answer to that is yes. Large parts of that were available there.

A follow-up on that. Part of that 13,000 pages that you have sent to us, does it contain pages that have been largely or almost entirely blacked out, so that they are sometimes unreadable?

Mr. PIZARCHIK. Mr. Chairman, I believe that a number of the documents that have been provided by the Department have had appropriate provisions redacted in order to protect the Administration's legitimate—

The CHAIRMAN. So the answer to that question, then, is yes.

Mr. PIZARCHIK. That is what I said. Yes, sir.

The CHAIRMAN. Yes, that is this. OK. So, when you are trying to defend yourself by being cooperative, what you are saying is that you have provided this Committee with 13,000 pages. A large part of that can be found on the Internet, and a large part of it is redacted. It just seems to me that if you are trying to be open, and you are providing things and blacking out things, that is hardly being transparent and open. And that, of course, is what this Administration has said that they are going to do from the outset, was be open and transparent. And that has not been the case.

Second question that I have. In 2010 the Obama Administration voluntarily entered into a court settlement—I mentioned that in my opening statement—with several anti-coal groups. The deadline for finalizing that rule by the court settlement was June 29th, which is nearly—well, not quite a month, but some time ago. Yet

there is no final rule, and there has not even been a draft rule. So the deadline that the Department has committed to has not been upheld by the Department.

So, my question to you is on what date will the Department publish this draft rule?

Mr. PIZARCHIK. The settlement agreement to which you refer we provided to make our best efforts to publish a proposed rule and a final rule by the date that you said. We continue to make our best efforts. We are in the process of continuing to develop a proposed rulemaking to analyze the options in accordance with the—

The CHAIRMAN. I understand all of that. When—but my question to you is what specific date do you anticipate that being done?

I mean the court said it is supposed to be on June 29th. That wasn't met. So what specific date?

Mr. PIZARCHIK. The date was the date that we had agreed to attempt to provide our best efforts. We will publish a proposed rule when we have completed the analysis—

The CHAIRMAN. When is that going to be?

Mr. PIZARCHIK. Once we have completed the analysis—

The CHAIRMAN. When is that going to be? I am asking you when you will have that complete date. I mean you agreed in court on June 29th. You haven't met that deadline. Now I am asking you specifically.

If you can't give me a specific date, can you give me a month?

Mr. PIZARCHIK. I can only give you the answer that we will publish it as proposed, once we have completed the analysis, because it would be premature for us—

The CHAIRMAN. You can't even give me a month. Let me try to help you. Will it be before or after November of this year?

Mr. PIZARCHIK. It will be after we complete the analysis required by law—

The CHAIRMAN. You can't—Mr. Director, I am sorry. You can't give me a date where you entered into an agreement to have it done in June, and I am asking you to give me a range, and you can't even give me a month on when. Is that your answer?

Mr. PIZARCHIK. We are making our best efforts to get it completed as soon as possible—

The CHAIRMAN. All right.

Mr. PIZARCHIK [continuing]. So we could publish it.

The CHAIRMAN. I thank you for that answer, which, to me, is honestly a non-answer. I am reminded of what President Obama said to the Russian Prime Minister, "more flexibility." And I don't know if that is applicable here or not, but it might be.

Final question I have here in my brief time. Does the Department have additional documents that it is prepared to provide to the Committee in response to the subpoenas that we have sent you?

Mr. PIZARCHIK. As I indicated earlier, Chairman Hastings, the Department is continuing to work with the Committee to provide documents that are responsive to your previous requests and your subpoenas.

The CHAIRMAN. So there are other documents that are coming?

Mr. PIZARCHIK. The Department—

The CHAIRMAN. Can you tell me the nature of them?

Mr. PIZARCHIK. The Department is continuing to work to provide responsive documents. I am not personally familiar with all of the documents.

The CHAIRMAN. All right.

Mr. PIZARCHIK. I know the Department—

The CHAIRMAN. Well, Director Pizarchik, I just—you know, the purpose of this hearing was to try to get some direct answers. Now I have asked questions on if more information is coming out of subpoenas, didn't get a direct answer. I asked when the draft rule would be out, did not get a direct answer. I hope that, in ensuing questions, that you will be more direct on that.

And my time has expired, and I recognize the gentleman from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman. In the Appalachian region, 70 percent of the coal is exported from the United States, is exported from Appalachia, exported to other countries. And coal exports from surface mines in West Virginia and Pennsylvania and Kentucky and Virginia, which include mines using mountaintop removal mines, have grown by 91 percent since 2009, in order to feed this export market for other countries to burn the coal. So, the environmental damage is done here, the health damage is done here. The coal is then burned in other countries.

These mines contaminate water supplies, they devastate the environment, and they threaten public health. Would you agree that communities in the Appalachian region are bearing the massive environmental and public health costs that come with mountaintop coal mining removal, so that much of the coal can be exported to benefit foreign countries?

Mr. PIZARCHIK. Yes, Congressman, I do agree with that.

Mr. MARKEY. Is it still increasing, as a phenomenon in our country?

Mr. PIZARCHIK. Based on the latest projection of the numbers that—of which I am aware, I understand that it is increasing, and that there is additional interest to ship coal overseas.

Mr. MARKEY. And they ship this coal, then, to countries that have very weak clean air standards, like China, which then burn this coal and further pollute the planet. Is that correct?

Mr. PIZARCHIK. It is my understanding that other countries do not have the environmental protection standards that America does, yes.

Mr. MARKEY. So the mercury, the sulphur, the carbon dioxide is sent up into the atmosphere after mountaintops are removed here in the United States, after stream beds are harmed when they dispose of materials. And, as I mentioned earlier, communities are now being devastated with the amount of soot and other contaminants that are now descending upon these communities.

Can you elaborate a little bit more about what you have learned about the impact that it is having upon communities?

Mr. PIZARCHIK. Yes, sir. It is my understanding that some of the pictures that you showed earlier are representative of some of the larger operations where the company, rather than dealing with the community, creates conditions that makes it more difficult for the folks who are living in those communities, between the dust, et

cetera. And our authority under the Surface Mining Act is limited to activities on the mine site. We do not have responsibility or the authority to regulate those types of adverse impacts that affect communities off the mine.

Mr. MARKEY. Now, one of the OSM employees says in the audio recordings that the aim of the rule is not reduce coal production, as the Majority asserts, but “that production will improve, and the technology will improve, and the environmental impact will be lessened over time, as practices improve.” This is an important point, and one I am familiar with.

The Waxman-Markey bill of 2009 would have allocated \$60 billion to the coal industry, so the industry could innovate and make clean coal a reality. We believe this was a necessity for the climate, but also for the coal industry’s future role in the U.S. domestic energy mix. It is now becoming clearer, given coal’s falling market position, that we were right and the coal industry was wrong. It is just collapsing. So, I see a parallel here.

Isn’t it true that OSM believes that the coal industry can innovate and improve production techniques in ways that not only benefit the environment, but also benefit the coal industry?

Mr. PIZARCHIK. Yes. I have great confidence in the ingenuity of our coal industry, in our academic institutions, in our State and Federal regulators to do a better job of more responsible and protective coal mining for a strong and viable industry.

Mr. MARKEY. Now, the Department has spent significant time and taxpayer money responding to the Majority’s request for information. By our staff count, DOI has produced more than 13,000 pages of documents, over 15 separate document productions. The Majority has also received documents from CEQ, OMB, EPA, and the Army Corps of Engineers. And the contractors have provided almost 7,000 pages of documents and roughly 25 hours of audio recordings.

Considering the voluminous data at our disposal, does this Committee, in your opinion, lack any significant information related to the investigation?

Mr. PIZARCHIK. Not to my knowledge, sir.

Mr. MARKEY. Thank you. And thank you for your testimony. And thank you for the voracity of your testimony.

Mr. PIZARCHIK. You are welcome.

Mr. MARKEY. I am very impressed by your honesty and your candor with the Committee.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Utah, Mr. Bishop.

Mr. BISHOP. Mr. Director, this has been a rather lengthy process, but I hope I can move us a little bit forward, if I ask some specific questions as a follow-up as to the information that has been requested. And I will try and phrase these in questions that can easily be answered in a yes and a no fashion.

So, the first week in April in 2012, the Committee issued and served a subpoena requesting information, and I want to ask you specifically about that request.

First, has OSM provided unredacted copies of over 30 hours of meetings on 43 separate recordings and their subsequently created

transcripts between the Department and OSM personnel and contractors who were hired to develop a new EIS and RIA?

Mr. PIZARCHIK. It is my understanding the Department provided redacted transcripts.

Mr. BISHOP. All right. So they have been redacted, they are not unredacted.

Number two. Has OSM provided a complete and unredacted copy of all the items previously provided to the Committee?

Mr. PIZARCHIK. I have not reviewed every document provided, but it is my understanding that the documents that have been provided have been redacted to protect the——

Mr. BISHOP. All right.

Mr. PIZARCHIK [continuing]. Executive deliberative process.

Mr. BISHOP. We will talk about the redaction later on, but—so I appreciate that.

Has OSM provided all complete and unredacted documents, including any drafts and briefing papers related to the development of, or analysis for, the Advance Notice of Proposed Rulemaking and the Notice of Intent to Prepare a Supplemental EIS for the Stream Buffer Zone?

Mr. PIZARCHIK. Again, I have not reviewed every document provided. I believe that the Department is continuing to work to provide documents in response to the subpoena and the document requests.

Mr. BISHOP. Are they complete and unredacted?

Mr. PIZARCHIK. I have not reviewed all of the documents. But my understanding is that documents that had information that is covered by the separation of powers would have been redacted.

Mr. BISHOP. Has OSM provided a complete and unredacted copy of the draft EIS and the draft RIA related to the proposed stream production rule?

Mr. PIZARCHIK. We do not have a draft EIS for the stream protection rulemaking. And therefore, I do not believe that there would have been a copy provided to the Committee, because that document does not yet exist.

Mr. BISHOP. OK. So if we review on those areas in which the subpoena requested, so far OSM has not complied with any of those categories of the requested subpoena that was done more than 3 months ago.

Now, in the second week of May of 2012 the Committee issued a second subpoena requesting additional information. Has OSM provided all the documents regarding the March 2012 settlement between the Administration and the special interest groups?

Mr. PIZARCHIK. Again, I have not reviewed every document that the Department has provided. But I believe the Department has been working with the Committee to provide documents——

Mr. BISHOP. Have you provided all the documents? Once again, these are yes or no answers.

Mr. PIZARCHIK. I do not know the answer to that, sir.

Mr. BISHOP. OK, you don't know. Has OSM provided all the documents regarding the decision not to rely on the EIS or the RIA and the 2008 Stream Buffer Zone Rule, and to conduct a new EIS and RIA?

Mr. PIZARCHIK. Again, there is no draft EIS which to provide. And I—again, I am not familiar with every page of the 13,000-plus documents the Department has provided.

Mr. BISHOP. So, once again, you don't know if you provided all the documents personally. That is your answer.

Mr. PIZARCHIK. I personally do not know that.

Mr. BISHOP. Good. OSM provided all the documents—has OSM provided all the documents regarding the cost benefit analysis for the stream reduction rule? Yes or no.

Mr. PIZARCHIK. There is no stream cost benefit analysis for—

Mr. BISHOP. OK.

Mr. PIZARCHIK [continuing]. A rulemaking, because we are still in the process—

Mr. BISHOP. Has OSM provided all the documents and communication between the senior level Administration officials regarding the baseline parameters used for the EIS and the RIA? And that includes, but not limited to assuming the 2008 Stream Buffer Zone Rule was in effect being enforced across the United States to lower job loss numbers?

Mr. PIZARCHIK. I am sorry, I don't understand that question.

Mr. BISHOP. I will help you out. It is going to be the same answer you gave on all the others.

Has the OSM office ever provided a log explaining all the documents you are withholding, and why?

Mr. PIZARCHIK. The Department is not withholding any documents. We have been working together with the Committee to accommodate your legitimate interests, recognizing the separation of powers—

Mr. BISHOP. I have only got 50 seconds, so I am going to cut you off, I am sorry. I apologize for that.

Can you throw up a number one? This is one of the 13,000 pages that you have given us. It says at the beginning on page one, "I have consolidated all the comments on the RIA into this one document, in order to make it easier to send them to the contractor. Please disregard previous email comments in there."

Then, comment one is the black part. Comment two is the black part. Go to page two, that is comment two. Continuing on, go to the next page and you have comment three. Comment four. Go to the next page, and you got comment five. That is part of the 13,500 pages you have given us. That is the information you have given us. Now, do you consider that to be adequate information to help us join together and work together to come up with a solution and come up with an understanding? That is the kind of document you have provided to us. You are willing to support that?

Mr. PIZARCHIK. Congressman, it is my understanding we provided every document, and we continue to work with you to provide documents that are responsive to your Congressional request.

Mr. BISHOP. Sir, these documents have been redacted so they are totally useless. And across the front you write, "Subject to FOIA Exemption Number Five." Congress is not covered under the FOIA exemption. You are supposed to supply us with information.

I have gone over, and I apologize. Yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentlelady from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair. And, Mr. Bishop, I would be glad to give you a copy of the high-priority EIS item that was submitted December 2011 redacted, and a copy that was actually sent to the Minority, received it from the Majority in May of this year, which was unredacted. And I would love to have some of these introduced into the record, because apparently there has been a number of pages that have been sent that were unredacted to show what was redacted.

Now, whether you have received them personally, the Committee may have received them, I don't know. I am just giving the information so that there is an ability for you to see what was on them, especially the first item that was up there. It is in here, unredacted, received by the Majority.

The Committee Majority charges that OSM has recklessly rushed the stream protection rulemaking, and that it has not provided opportunity for input from the outside agency. Yet, it has been evaluating this issue for 2 years, OSM has not even issued a proposed rule. Moreover, they have received more than 32,000 documents, comments, as mentioned, on the Advance Notice of Proposed Rulemaking, which the agency was under no requirement to publish, and has overseen unprecedented outreach sessions with coal companies and other stakeholders.

Director, is it true that OSM has already received more public comments than were received in the entire 2008 Stream Buffer Zone rulemaking, and is it also true that OSM will again seek and consider public comment once you issued a proposed rule?

And then, can you tell the Committee any other outreach you have done?

Mr. PIZARCHIK. Madam Napolitano, yes, that is true. We have received over 50,000 comments, well in excess of what was received on the 2008 rule. Once we have a proposed rule completed, and a draft EIS completed and published, we will receive additional comments on that, and we expect that to be far in the excess of what was previously provided.

We have also been more transparent by—after we conducted the ANPR, we did stakeholder outreach, where we met with industry. We met with the States and Tribes, where we met with the environmental community, the United Mine Workers. We conducted 15 outreach sessions for those and received comments. We also incorporated and included every State who volunteered to be part of the process to help draft the EIS and have received hundreds and hundreds of comments from them.

Mrs. NAPOLITANO. Would you be able to tell me and this Committee whether any of the coal company executives live in the area that they mine, where you are mining?

Mr. PIZARCHIK. I do not know the answer to that, ma'am. My understanding—

Mrs. NAPOLITANO. But there are companies who come in and utilize and mine and then ship it out.

Mr. PIZARCHIK. What is the typical situation is we have a lot of large companies who have many subsidiaries. And the people who are officials in those large companies typically do not live in the communities which are mined.

Mrs. NAPOLITANO. Thank you. And as the Ranking Member of the Subcommittee of Water and Power, my greatest concern is the viability of the streams to be able to carry potable water, drinking water, to the communities in the area. And the concern there is their public health, especially children, small children, and the elderly, who may have compromised immune systems. The resident protection, the public protection. And that is probably what we should be charged with.

And understanding that most of those people don't understand the political process, and blaming other people for what is happening—we need to continue to be able to fight for the people's right to have same access to good drinking water. And if they are polluting the streams, they should be made to clean them up.

Now, if we can prevent that, then that is a plus for us, as a country. But I don't know what circumstances there are that does not follow through to get these people to understand they need to protect the environment for the public's general health. Comment?

Mr. PIZARCHIK. Yes, I would agree with that. And that is the original reason why Congress created the Office of Surface Mining, was to protect people and the environment from the adverse effects of coal mining. And there were opportunities for all of us to do a better job to better protect streams, to better protect people, to better protect the water.

Mrs. NAPOLITANO. Thank you for your answer. And I hope that we continue to put the people ahead of the business community.

I yield to my colleague, Ranking Member Markey for any additional comments he may want to make. He does not. I yield my time.

Mr. MARKEY. No, I thank the gentlelady; I am fine.

Mrs. NAPOLITANO. Thank you. I yield back.

The CHAIRMAN. The gentlelady yields back her time. The Chair recognizes the gentleman from Colorado, Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman. Mr. Director, thanks for being here.

I have to start by saying I think the process of this investigation has been unsatisfactory to all of us, to the Administration as well as to Congress.

In your testimony you go to great lengths to explain that this is a deliberative process, and that Congress doesn't have any business intruding into your deliberation process. However, the oversight this Committee is charged with and is conducting is directly into your process. Everything we have uncovered shows that this process has been reckless, wasteful, and, frankly, sloppy on the part of OSM.

You hired a contractor on a no-bid basis, according to documents released by this Committee against the recommendations of other agencies. When the contractor produced work that you didn't find acceptable, you dismissed it, and significantly harmed their reputation by criticizing their work in front of this Committee.

While you make the excuse of intrusions into deliberative rule-making process as a reason for not complying, our investigation is also about the decision-making, the actual decisions already made as it is about the rulemaking.

So, Mr. Director, I want to start by getting answers about settled matters that are not part of the current deliberative process. Has the Department made a decision to rewrite the Stream Buffer Zone Rule? Yes or no.

Mr. PIZARCHIK. As I indicated in my opening statement, the Department has identified deficiencies with that rule, and we are working—

Mr. LAMBORN. Yes, sir. I have limited time. Yes or no.

Mr. PIZARCHIK. We are working to modernize our regulations, including the 2008 rule.

Mr. LAMBORN. Is that a yes?

Mr. PIZARCHIK. Yes, as well as yes on we are modernizing our regulations, sir.

Mr. LAMBORN. OK, thank you. Thank you. Has OSM provided the Committee with all unredacted documents related to the decision by OSM to rewrite the rule? Yes or no.

Mr. PIZARCHIK. Again, I believe we answered that repeatedly, that we are providing the documents that are responsive to the Committee—

Mr. LAMBORN. But you haven't given us unredacted documents. Yes or no.

Mr. PIZARCHIK. I do not know if any of the documents provided were unredacted.

Mr. LAMBORN. You saw one on the screen. It looked redacted to me.

Mr. PIZARCHIK. Well, that one clearly was. But I don't know if any other ones were unredacted, sir.

Mr. LAMBORN. So, while OSM claims that refusal to meet the Committee's—well, I will go on.

Has OSM reached a settlement agreement with outside entities in the courts to rewrite the rule on a specific timeline?

Mr. PIZARCHIK. No. What we reached was an agreement to make our best efforts to publish a proposed rule by a certain time, and to make our best efforts to publish a final rule. And, despite our best efforts, we were not able to meet that deadline.

Mr. LAMBORN. Again, an issue where there is no ongoing deliberative process, but—OK.

Mr. Director, has OSM reached a decision to fire or dismiss PKS as a contractor on the Stream Buffer Zone Rule rewrite?

Mr. PIZARCHIK. PKS and the Department reached a mutual agreement to end that contract 1 month ahead of when it was set to expire.

Mr. LAMBORN. Has OSM provided the Committee all unredacted documents related to the firing of or the decision to fire the contractor?

Mr. PIZARCHIK. Congressman, the contractor was not fired, so I do not believe there would have been any documents that would have been responsive to that question.

Mr. LAMBORN. OK. Let's say they were let go, mutually. Have you released all the documents regarding that decision to mutually let them go?

Mr. PIZARCHIK. Again, I have not personally reviewed all 13,500-plus documents provided, so I am not in a position to be able to answer that question.

Mr. LAMBORN. If there were documents pertaining to that, and that is a settled matter, then why haven't you produced those?

Mr. PIZARCHIK. I do not know that we have not produced those. It is my understanding—

Mr. LAMBORN. If there were some, would you agree that those should be produced immediately?

Mr. PIZARCHIK. We have been working with the Committee to provide documents that are responsive to the subpoena and your request, while respecting the separation of powers and the Administration's deliberative process.

Mr. LAMBORN. OK. I am going to put it all out on the table here. You have not produced documents regarding the—well, the mutually letting go of PKS. That is a settled matter. That is not part of your ongoing deliberations. You need to produce those. Do you have any excuse for not producing those?

Mr. PIZARCHIK. Congressman, we have been working with the Committee to provide documents that are responsive to your legitimate oversight interest, while protecting the Administration's deliberative process.

Mr. LAMBORN. That is a settled issue. That is in the past. It is not part of your ongoing deliberative process. It is a settled issue. Why haven't you produced the documents on this settled issue?

Mr. PIZARCHIK. It is my understanding that we have been providing all the documents and working with the Committee to provide those documents that are responsive to your legitimate oversight interests, and taking care to protect the deliberative process that we have, as far as this ongoing rulemaking process.

Mr. LAMBORN. Mr. Chairman, I think it is very clear that while the Department attempts to make this a discussion about ongoing deliberations, what they are refusing to produce in many cases has to do with settled decisions that have been made in the past that have nothing to do with ongoing deliberations. I yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman. Director Pizarchik, I would like to ask about another section of the audio recordings which is cited in the second accusation of the Majority's May press release. The Majority says this section indicates that the proposed rule is "atomic" for small businesses. Yet the small businesses aren't actually mentioned in the conversation. And it is actually one of the contractors who uses the word "atomic."

What is more, the contractor is not talking about an effect the rule would have. He is talking about the need to have a financial bond in place to ensure money is available to clean up a mine in the event that a company goes bankrupt, its mine operations go into forfeiture, and the mine is not reclaimed.

In other words, this discussion has nothing to do with the impact of the stream bed protection rule.

Am I interpreting this correctly? And what is this conversation about?

Mr. PIZARCHIK. Congressman Kildee, yes, you are interpreting that discussion correctly. What it is about is with—the OSM staff was trying to explain the free market mechanisms that Congress put into the law. Section 102 says that the purpose of the law is

to assure that the surface mining operations are not conducted where reclamation required is not feasible.

Section 509 requires the mining company to post a bond to assure the faithful performance of all the requirements of the law and the permit. Section 510 provides that the new permits cannot be issued to applicants who cannot demonstrate the reclamation required by the law can be accomplished, and that new permits cannot be issued to applicants who violate the law and have their reclamation bond forfeited.

What we were trying to do is explain to the contractor that the regulations that have always been in the law and that we are trying to improve here allow for the contractor—the mine operator—to make a business decision. Can I mine that site and reclaim it, as required by the law? And if I can't, then they make the business decision not to do that. If they make the wrong business decision, then, as required by the law, their bond would be forfeited.

Mr. KILDEE. I thank you. I thank you for the clarity of your answer.

Another question. In describing a section of the recordings, the Majority claims that the rule being considered by OSM would save just 15 miles of streams. Yet 2,000 miles of streams already have been destroyed by mountaintop removal mining under current practice. Isn't it true that we can expect more of the same if we don't change what we are doing? And don't you expect that a new stream protection rule would save more than 15 miles of streams?

Mr. PIZARCHIK. Yes, sir. And that 2,000 mile number was the miles of streams that had been buried by excess fills. It does not count the countless miles of streams that have been mined through and have not been restored, so that when the mining is done, that there is a free-flowing stream on the site the way there was prior to mining, notwithstanding the statutory provision that requires the land to be restored to its use and its productivity that it was prior to mining.

We do have a need for improving our regulations. We have the expertise to do it right. We have the knowledge and the ingenuity in the industry and in academia to do a better job to more completely implement the law.

Mr. KILDEE. I really appreciate, again, the clarity of your answer. This is something I have been working on for my 36 years in Congress, and will probably be working on it for many, many years to come, as we learn more about the problems caused by this and how to ameliorate those problems. And I appreciate your role in that. And I yield back.

The CHAIRMAN. The gentleman yields back his time. The Chair recognizes the gentleman from California, Mr. McClintock.

Mr. MCCLINTOCK. Thank you, Mr. Chairman. When the Ranking Member and his colleagues boast that coal is being replaced with alternatives like wind and solar, I think the American people need to understand precisely what they mean by that. Coal is one of the cheapest forms of electricity that we have available to us, and one of the most abundant resources of our Nation. Wind is one of the most expensive ways of producing electricity. Solar is the most expensive way of producing electricity. It is absolutely no coincidence that, as the cheapest forms of electricity like coal are being re-

placed under these lunatic policies with the most expensive forms of electricity, that Americans' electricity rates are skyrocketing and the economy is imploding under the weight.

The future that these policies are taking us is one in which families are required to stretch and ration every precious watt of electricity in their dimly lit and sweltering homes, and scrimp and save every penny to meet their spiraling electricity and tax bills to support this ideologically driven lunacy. These policies have dire implications to our prosperity, to our quality of life, and to the energy independence of our Nation. Your agency is imposing these policies.

And let me get now to the fine point of the matter, and I think the central purpose of this hearing. Congress and Congress alone has the constitutional authority to legislate. That prerogative is deliberately reserved to the legislative branch, reserved to elected representatives of the people, who develop these laws in open and public debate, followed by recorded roll call votes where every elected Member is directly accountable to the people for the votes that they have cast. That process is subject to the constitutional checks and balances that divide the executive and the legislative and the judicial functions.

When executive agencies like yours write laws, execute those laws, and adjudicate those laws, they are short-circuiting all of these checks and balances that protect the freedom of our Nation. Instead of open debate, these rules are written in secrecy, despite the specific intention of the constitutional framers. Instead of accountability, of recorded roll call votes by elected representatives directly accountable and answerable to the people—again, as envisioned by the framers—you rulemakers are unelected. You are often anonymous. And you are totally unaccountable to the people for the policies that you are imposing.

Now, when the executive branch exercises this dubious power, which is only loaned to it by the legislative branch, it follows, it seems to me, that it should fully and completely respond to the legislative branch when it is exercising those legislative powers loaned to it by the legislative branch. It doesn't appear you are doing that.

And I would begin with simply asking. Why has the Secretary refused to appear before us today to answer these questions?

Mr. PIZARCHIK. Congressman, I agree with you that the Constitution provides the legislative power exclusively to Congress. But it also provides express powers to the President. It provides that all executive power is with the President, and it goes on to provide that the President's duty is to take care that the laws be faithfully executed.

Mr. MCCLINTOCK. I wish, by the way, that you would offer that lecture to him on a wide range of subjects, starting with immigration law. But please continue.

Mr. PIZARCHIK. The rules that we are attempting to develop is to faithfully execute the Surface Mining Control and Reclamation Act that was passed by Congress—

Mr. MCCLINTOCK. But you are not executing. You are legislating. You are developing and imposing rules, and you are enforcing those rules. The executive branch is to execute the decisions of Congress. Congress has loaned you certain legislative prerogatives, in my view, rather dubiously. But it seems to me that when you are exer-

cising those legislative prerogatives, you are morally, legally, and constitutionally bound to fully respond to Congressional inquiries on these subjects.

You know, Louis Brandeis once said sunlight is the best of disinfectants. And it seems to me that this Administration, which has become the most secretive in our history, is in desperate need of such disinfection.

Mr. PIZARCHIK. We have been very responsive—

Mr. MCCLINTOCK. I yield back.

Mr. PIZARCHIK [continuing]. And more transparent.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentlelady from Hawaii, Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chair. Mr. Director, in reviewing the issue before us, it seems to be on two levels. One is the rule-making process that you are engaged in. And the second is an issue regarding the Environmental Impact Statement, and the preparation thereof.

Now, can you tell me how the two are related, in your mind, if they are related at all?

Mr. PIZARCHIK. They are very well related, because there are statutes that govern the rulemaking process, how we develop it. There are statutes under the National Environmental Policy Act, Administrative Procedures Act. They set up a process that requires us to go through a matter of developing potential changes and then assessing the potential impacts of those changes under the National Environmental Policy Act, and use that information that we gain from that in order to make informed decisions as to what should be in the proposed rule.

We are in the middle of that complicated process of exploring potential improvements to modernize our regulations, evaluating and analyzing those potential impacts in order to be able to make the best informed decision possible, as the laws require.

Ms. HANABUSA. So, at this point in time you haven't—in your mind you are still in the rulemaking process, which involves, of course, soliciting information. And the Environmental Impact Statement is going to be used to help you finalize that rule that you intend to publish at some point in time. Is that correct?

Mr. PIZARCHIK. Yes, ma'am.

Ms. HANABUSA. OK. I happen to be familiar with FOIA because I have litigated it myself, in my prior life. And I have before me, for example, subject to FOIA exemption number five, which is some email with a name Gardner, Linda, "Contractor" at the top. And the only redaction that I see is a mobile number. So is that an example of what redactions have taken place and been produced?

Mr. PIZARCHIK. I would believe so, because it is my understanding the documents that were provided on FOIA were FOIA requests that were submitted asking us, the Department, to provide documents that we had provided to this Committee.

Ms. HANABUSA. One of the—in my experience, whenever there is an issue regarding what is redacted by an administrative body, it is an exercise of your administrative process, if you believe that it is somehow deliberative, I think that is one of the laws that—the law is pretty well established that if it is in your deliberative process, you can, of course, withhold the document, or you can redact

it, accordingly. Is that what you are saying has been exercised here, in terms of the redactions of a certain percentage—and it seems like a small number, because 13,000 documents have been produced?

Mr. PIZARCHIK. Yes, ma'am.

Ms. HANABUSA. So, of the documents that haven't been produced—I went through the testimony, I couldn't see an exact number—what is the number that was withheld or redacted?

Mr. PIZARCHIK. We have provided about—over 13,500 pages of documents. And I have not personally reviewed those, so I do not know what percentage or—have been redacted or not redacted.

Ms. HANABUSA. So, the total number of production has been 13,000, a portion of which were redacted like this FOIA exemption number five.

Mr. PIZARCHIK. Yes, ma'am.

Ms. HANABUSA. So, at the present time, in the development of your rule, where would you say you are in the process? Have you, for example, published a proposed rule at this point in time?

Mr. PIZARCHIK. No. We have not published a proposed rule. We are still in the process of developing the proposed rule, exploring potential changes to make to modernize our regulation, and evaluating those costs and benefits and potential impacts.

Ms. HANABUSA. So, my understanding—and I have done some administrative work, as well—is that you are not even at the point where you even are saying, "OK, this is our proposed rule, give us your feedback, and then we may accept or not accept portions of what you may say, and then we may come up with a final rule."

So, how far away are you from the proposed rule?

Mr. PIZARCHIK. We are still—

Ms. HANABUSA. Or proposed rule—

Mr. PIZARCHIK [continuing]. In the process of analyzing options and alternatives. And as soon as we complete that, we will make—publish that proposed document. Based on my previous experience of thinking I could get it done by June of this year, I have learned my lesson. I cannot predict when we are going to get it finished.

Ms. HANABUSA. So how long have you been in this process of looking at a proposed rule?

Mr. PIZARCHIK. The Department started the process in the summer of 2009 with drafting of an Advance Notice of Proposed Rulemaking. It has been about 3 years now that we have been working on this to try to develop a proposed rulemaking.

Ms. HANABUSA. And, of course, part of your problem is the fact that you terminated the contractor who was doing the EIS. And I assume that you started all over again with someone else.

Mr. PIZARCHIK. Part of the problem was the contractor we retained through the competitive process did not provide contract NEPA-compliant terms, and we mutually ended that working relationship and had to retrench and regroup to complete the job.

Ms. HANABUSA. So, in essence, this was somewhat premature because we don't even have a proposed rule before us. Correct?

Mr. PIZARCHIK. It is absolutely premature.

Ms. HANABUSA. Thank you, Mr. Chairman.

The CHAIRMAN. The time of the gentlelady has expired. The Chair recognizes the gentleman from Pennsylvania, Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman, and thank you, Director, for being here. Director, there are documents and audio recordings that confirm that several members of your team from both DOI and OSM, as well as the cooperating agencies, including OMB, Army Corps, EPA, and the contractors, had significant concerns with the timeline and process of this rulemaking. Specifically, there were concerns about the pace of the rulemaking, the method in which you were doing the work, the travel consultation process, and the results that you were getting. But most of these documents were so redacted—I know the gentlelady had one with just one small area, but that information about what the specific problems were or how you intend to solve them is completely blacked out.

My first question is, has OSM completed the Environmental Impact Statement, the EIS, and the Regulatory Impact Analysis, the RIA, for the new rule that you will be proposing?

Mr. PIZARCHIK. No. We are still in the process of analyzing alternatives and developing a proposed—

Mr. THOMPSON. Well, when can we expect to see OSM complete those documents? And will you give us a timeline for presentation to the Committee of those documents?

Mr. PIZARCHIK. I cannot and I won't speculate on when we can do that. We have to complete the analysis and follow the rules to make sure we properly follow the Administrative Procedures Act—NEPA on that, and I am not going to hazard a guess as to when we will be able to do that.

Mr. THOMPSON. Well, let me reflect back, then. You know, more than 18 months ago the drafts of the EIS and the RIA showed an expected devastating impact on small business, economic harm in 22 States, and a loss of at least 7,000 jobs. However, you previously testified that those numbers were fabricated, and this is your quote: “fabricated based on placeholder numbers and have no basis in fact.”

Now, documents released by this Committee show that those numbers were not placeholders, but instead, the result of extensive analysis by the contractors and real consternation by your agency. Clearly, the audio tapes and the documents released by this Committee show that these were the real impacts, and that OSM was attempting to find ways to mitigate both the public perception—the release of those numbers and change the underlying assumptions used to reach those numbers.

Now, do you continue to assert that those were “placeholder numbers,” or do you want to revise your previous testimony?

Mr. PIZARCHIK. 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. That was my understanding at the time.

Mr. THOMPSON. But today, do you still claim that those are placeholders or not?

Mr. PIZARCHIK. My understanding that it was a placeholder number is I believe I have seen an email that indicated from one of the contractors it was a placeholder numbers. But I have since learned that their definition of placeholder was different than was my understanding.

Mr. THOMPSON. OK. So today you don't believe that they were placeholder numbers. So if those numbers published more than 18 months ago, frankly, were placeholders, based on your understanding, with no basis in fact, why were they included in the draft document sent at that time to the cooperating agencies to review under OSM's name and letterhead?

And how can you expect cooperating agencies to review documents with what you have described at that point in time that you believed were placeholder numbers?

Mr. PIZARCHIK. That was part of our effort to be more open and transparent, by including these States as cooperating agencies. And as part of our process of being more open and transparent, the States received the contractor's first working draft at the same time that we did. So the States got to see it the same time we did, and we had no basis and didn't have the understanding, we did not have an opportunity beforehand—

Mr. THOMPSON. Well, I am concerned with the fact that, you know, that you have come to this illumination that that wasn't a placeholder, they were—but we are proceeding with what you see are credible, a loss of 7,000 jobs in this proposal.

The 2008 Stream Buffer Zone Rule reportedly took 5 years of analysis, millions of dollars of scientific and environmental studies, and were published with the concurrence of the EPA. You have already spent millions of dollars on the new rule on contracts alone, not including thousands of man hours and salaries of your own agency personnel, and there is no rule in place.

Now, at this point can you provide the total amount of money that the stream protection rule will cost the taxpayers when it is completed?

Mr. PIZARCHIK. I believe that we have spent about \$7.7 million to date on that. As far as what the total value would be, that is not possible for me to predict, because once we have the proposed rule out, one of the things that will have an impact on what those ultimate costs would be is the number of comments that we receive, the quality and the substance of the comments, and how much time it takes to review and assess and evaluate those and decide what appropriate changes to make in response to those comments.

Mr. THOMPSON. Thank you, Chairman. My time has expired.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Arizona, Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman. Thank you, Director, for being here. I know there is no other place you would rather be today.

[Laughter.]

Mr. GRIJALVA. Just a couple of quick questions, and then a lengthier one. I want to go through some of these, if I may.

First, OSM has produced all the significant information that has been requested. Is that a correct—is that yes? It is kind of yes or no questions.

Mr. PIZARCHIK. It is my understanding the Department is continuing to work to provide all the responsive documents.

Mr. GRIJALVA. OK. And that—you continue to go back through the documentation in order to produce additional information, if that is what is required at some point.

Mr. PIZARCHIK. I believe that is still ongoing, sir.

Mr. GRIJALVA. The other—the second one, OSM has yet—it has come out a couple of times—has yet to even make a decision. Am I correct in that?

Mr. PIZARCHIK. Yes, sir, that is correct.

Mr. GRIJALVA. So all this today is about an unproposed, unwritten rule.

Mr. PIZARCHIK. Yes, sir.

Mr. GRIJALVA. Neither—the third point. Neither the Bush or Reagan Administration ever made available information about decisions that they have not yet made. Is that correct?

Mr. PIZARCHIK. That is my understanding.

Mr. GRIJALVA. So at this point I think it is important to note that—to summarize a little bit—OSM is being consistent, acting in accordance with what the Reagan and Bush Administrations did under their prerogative at that point.

Mr. PIZARCHIK. Yes, sir. I believe that to be the case.

Mr. GRIJALVA. OK. In one of the—in the final section of the—as highlighted by my colleagues on the other side, “an OSM official suggests the contractor’s numbers aren’t explained. The official makes clear that he is not asking the contractors to change, just to justify and support that analysis.”

Isn’t it true that the contractor turned in shoddy analysis that was strongly criticized, not just by OSM, but by other mining State officials?

And let me quote some of them. The Deputy Director of Virginia Department of Mines, Minerals, Energy, November 1, 2010: “I certainly hope that an EIS is not going to be developed based on the inaccurate and incomplete information contained in this document.” From the Geological Supervisor, Wyoming Department of Environmental Quality, January 26, 2011: “The analysis is insufficient for a document of this importance.” “The document displays very little depth of understanding of technical issues,” and this is from the West Virginia Department of Environmental Protection on that same date, the 26th of January, 2011.

So, I quote those so that the criticism about the work product is not just OSM’s, but also involving these agencies who simultaneously got the draft. Correct?

Mr. PIZARCHIK. Yes, sir. We had to take actions to try to address the concerns, because those were legitimate concerns that the States were expressing, as well.

Mr. GRIJALVA. And I note that these are all major coal-producing States.

Oh, and so the question, the final question, Director, should we be relying on the numbers from the contractors’ drafts that are being highlighted today by the Majority?

Mr. PIZARCHIK. No, we should not be relying on them.

Mr. GRIJALVA. So, as I listen to your testimony—and I appreciate it—this is—this whole meeting is—it seems to be an exercise of a conspiracy to look for a conspiracy. And I think the search is going nowhere. I think that it is unwritten and unproposed, the rule.

Some of us that have looked at that, the draft, feel that more stringent protections should be part of the discussion, not just obliterating any protections, which seems to be the intent of the discussion today.

But like I said, this is a conspiracy in search of a conspiracy. I appreciate your time, and I yield back.

The CHAIRMAN. The gentleman yields back his time. The Chair recognizes the gentleman from Florida, Mr. Southerland.

Mr. SOUTHERLAND. Thank you, Mr. Chairman. Mr. Director, thank you for being here today. Are you familiar with the statement, "We will bankrupt any new coal plants."

Mr. PIZARCHIK. No, sir, I am not.

Mr. SOUTHERLAND. Are you sure?

Mr. PIZARCHIK. Perhaps you could refresh my memory.

Mr. SOUTHERLAND. I would—that is what I am here to do.

That was the statement made by the now-President of the United States, who—you are obviously here today to protect the Administration. Those were his words, loud and clear. And so, I want to ask you some questions.

With that being his statement, and that being his clear intent regarding coal, and I don't know how you could accomplish what he stated without adversarially pushing policies and pushing the Administration in a way to accomplish that, I think we all can agree that the President has certainly accomplished more than any of us thought imaginable. Are there any current laws that would accomplish this—I mean to force plants into bankruptcy?

Mr. PIZARCHIK. I don't believe that—I don't know the answer to that. There is none that I am aware of. And this Administration, this President, has put \$3.4 billion into clean coal technology—

Mr. SOUTHERLAND. OK, sir. Now, let me ask you this. If you don't think there is any laws that would force plants into bankruptcy, then for the President to get his way, the President would have to do what I think we have seen over and over and over again. Rather than executing existing law that would not force plants into bankruptcy, he would then have to circumvent that, creating rules from offices and departments such as the one that you represent in order to accomplish that goal. Would he not?

Mr. PIZARCHIK. I disagree with that entirely.

Mr. SOUTHERLAND. So if there are rules—

Mr. PIZARCHIK. Because that would be contrary to the statutes.

Mr. SOUTHERLAND. If there are no laws on the books that would force plants into bankruptcy, and the President said, "We will bankrupt new coal plants," then the only way to do that would be through rulemaking authority. Would it not?

Mr. PIZARCHIK. I don't agree with that—

Mr. SOUTHERLAND. Well then, how else would you accomplish that goal of the President's statement, if there are no current laws on the books to bankrupt plants?

Mr. PIZARCHIK. Well, I have no idea of the context you have that, and I don't agree that that is this Administration's or this President's perspective on that.

Mr. SOUTHERLAND. But do you agree with the President's statement?

Mr. PIZARCHIK. The President and the Administration have put more money—

Mr. SOUTHERLAND. Answer my—that is a yes or no.

Mr. PIZARCHIK [continuing]. Into clean coal technology—

Mr. SOUTHERLAND. Do you agree that the President made the statement. Do you agree with his goal?

Mr. PIZARCHIK. I don't know the basis of that. And my job—

Mr. SOUTHERLAND. OK. Look. "We will bankrupt any new coal plants." Do you agree with that, or do you not?

Mr. PIZARCHIK. My job is to execute the Surface Mining Act. I have to strike a balance between meeting this country's energy needs with coal and protecting the environment and the people from the adverse affects of coal. That is what I will do. That is the charge Congress gave me. And I am here to carry out the law. And that is what we are trying to do with modernizing our regulations, to more completely carry out the law.

Mr. SOUTHERLAND. At any point in time in your job responsibility, are you given a pass on acknowledging self-evident truths and ignoring common sense?

Mr. PIZARCHIK. I try to follow the science and common sense to implement the law, sir.

Mr. SOUTHERLAND. Does any—as a part of your job responsibility, are you to ignore common sense?

Mr. PIZARCHIK. I don't see that in my job description.

Mr. SOUTHERLAND. OK. I don't think it is in your job description, and I don't think it is our founding fathers' intent that you would ignore self-evident truths. And if the President clearly states that it is his goal to bankrupt coal plants, and I ask you if that is his goal, and if there is no laws in place then the only other way he could do that was through the promulgation of rules, I think it is a self-evident truth, it is common sense, to connect those dots. And I think that it is very clear that this Administration has practiced a willful disregard for our branch.

And you stated earlier that it is the responsibility of the executive to execute the laws. And he has proven over and over and over again—and most recently, last Thursday, when he claimed that we will now ignore the work requirements of TANF, DOMA—it goes on. Immigration—it goes on and on again. And I think what we have seen here today is an incredibly consistent nature. And today you have proven to fall exactly into lock step with this Administration, not executing the laws on the books, but yet circumventing the balance of power.

And I tell you what. You are literally doing no credit to the great government that I—or the great Constitution we have. And it bothers me greatly. And you are all over the map, sir. You are all over the map.

And with that, I yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from New Jersey, Mr. Holt.

Dr. HOLT. Thank you, Mr. Chairman. Mr. Pizarchik, are you familiar with the statement that the gentleman was just saying, that supposedly the President said we will bankrupt coal plants, new coal plants, or destroy the industry? Or have you received any di-

rection through the Department of the Interior that that is an operating principle?

Mr. PIZARCHIK. No, sir. I am not familiar with that statement he is attributing to the President, and there has not been any direction from the President, from anyone in the Department of the Interior, or from anyone in the Administration telling me to do anything of that sort. I have been here, trying to do the best job to implement the statute that is on the books.

Dr. HOLT. Thank you. I was struck by the phrasing of my colleague from Arizona, that this seems to be a conspiracy looking for a conspiracy. I guess, more to the point, I would like to ask whether this is an investigation for the sake of investigation, or whether it is an investigation to get at facts that are—that the public should know about, and that Congress should act on.

In the course of this now 14-month-old investigation, has the Majority communicated with you the purpose of the investigation?

Mr. PIZARCHIK. Sir, we have—as I understand it, the Department has repeatedly asked to understand what the purpose was, and what they have been trying to get and what they are looking for. And I do not believe that we have had a response that explains that.

Dr. HOLT. Have you had a single or consistent story over those 14 months of why these questions are being asked?

Mr. PIZARCHIK. I am not familiar—

Dr. HOLT. Or why the material has been subpoenaed?

Mr. PIZARCHIK. We haven't gotten a consistent explanation. We haven't received an explanation that lays out those legitimate interests.

Dr. HOLT. It certainly suggests to me that this is an investigation for the sake of an investigation, rather than to get at facts.

Now, let's get back to the reason that you conduct the work that your office conducts, which is to try to make sure that the work that is done is consistent with public health and environmental interests, as well as to allow the industry to move forward.

I wanted to ask if you are familiar with several studies. There is one in the Journal of Environmental Research called "The Association Between Mountaintop Mining and Birth Defects in Central Appalachian in 1986 to 2003." The study examined the relationship between the exposure of pregnant mothers in mountaintop removal mining areas and looking at the prevalence of birth defects. This study found that prevalence of birth defects was significantly higher in mountaintop mining areas compared to non-mining areas for six of seven types of birth defects: circulatory, respiratory, central nervous, musculoskeletal, gastrointestinal, urogenital, and others.

Another study in Public Health Reports: "Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost." This study examined elevated mortality rates in Appalachian coal mining areas from 1979 to 2005. So, a considerable period. And looked at the value of statistical life lost relative to the economic benefits. Results indicate that previously documented health-related quality of life disparities in Appalachian coal mining areas are concentrated in mountaintop mining zones.

And "The Human Cost of Appalachian Coal Mining Economy Outweighs the Economic Benefits." According to this study, which

was a peer-reviewed study in Public Health Reports in the Journal EcoHealth, ecological integrity of streams related to human cancer mortality rates. And it found that coal mining was significantly associated with ecological disintegration and higher cancer mortality.

Are these the sort of things that should be included in studies of how the work is conducted?

Mr. PIZARCHIK. I believe all relevant peer-reviewed information about adverse impacts of mining ought to be considered.

Dr. HOLT. Thank you. My time has expired.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Ohio, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. And I want to thank you again, Mr. Chairman, for calling this important oversight hearing. As I have said from the beginning of this Congress on this issue, I am after the truth. Because this boils down to one thing and one thing only for my district and many Americans throughout America where coal mining is such an important industry, and that is jobs.

It now seems that the President and OSM are playing a shell game of hide the ball with this rule, because we are in an election year. The President and his political advisors know that if they go forward with this rule, they will destroy tens of thousands of jobs in States that are critical for him to be re-elected.

So, instead of being honest with their intentions and their planned rule, Director Pizarchik has testified that when they are done with their deliberative process—whatever that means—they will make public the proposed rule. I have a sneaking suspicion that Director Pizarchik will say they will magically be done with their deliberative process some time after November 6th. The American taxpayers deserve better, and I hope that today, though I am not optimistic based on what I have seen thus far, would begin to shed some light for the American people on this job-killing plan.

Mr. Director, since OSM has decided to completely disregard the 2008 rule that was proposed by the last Administration, and has yet to complete the current rulemaking process as agreed to in the court settlement, are the primacy States administering regulations under SMCRA still using the Reagan-era 1983 Stream Buffer Zone Rule?

Mr. PIZARCHIK. OSM and the primacy States are using the applicable regulations. The primacy States are using their programs that were based on the 1983 rule—

Mr. JOHNSON. Are the primacy States using—

Mr. PIZARCHIK [continuing]. And OSM is using the regulation where it is the regulator.

Mr. JOHNSON. Are the primacy States, Mr. Director, still using the Reagan-era 1983 Stream Buffer Zone Rule?

Mr. PIZARCHIK. That is my understanding. Yes, sir.

Mr. JOHNSON. Because the 2008 rule by the Bush Administration never went into effect. So are they using the 1983 rule?

Mr. PIZARCHIK. Sir—

Mr. JOHNSON. Yes or no, Mr. Pizarchik.

Mr. PIZARCHIK [continuing]. That is my understanding. That is my understanding, yes.

Mr. JOHNSON. OK, great. How many States administer State programs under SMCRA?

Mr. PIZARCHIK. I believe there are 24.

Mr. JOHNSON. All right. Is it fair to say that the current lack of clarity in the regulations have caused confusion for OSM, the States, and the industry?

Mr. PIZARCHIK. I am not aware of anybody being confused out there, sir.

Mr. JOHNSON. So you are saying no, that there is no—

Mr. PIZARCHIK. I am not aware of them being confused. I believe we have been clear—

Mr. JOHNSON. Well, how is that possible, given that one of the stated goals of both the 2008 Stream Buffer Zone Rule and the proposed stream protection rule was to clear up inconsistency in the application of SMCRA?

Mr. PIZARCHIK. We do not have a stream protection rulemaking just yet, and the 2008 rule, because it was going to be changed, we were looking at the efficiencies and not requiring the States to make changes to their programs and then turn around and make changes again. It was a matter of recognizing—

Mr. JOHNSON. Well, some have argued—Mr. Director, some have argued that the 2008 Stream Buffer Zone Rule would have loosened the 1983 rule, including the 100-foot rule, and broadened the previous rule to allow spoil and perennial and intermittent streams. However, wouldn't the 2008 Stream Buffer Zone Rule actually have cleared up discrepancies and definitions and common practices, such as the practice of allowing spoil to be placed in perennial and intermittent streams?

Mr. PIZARCHIK. That was a pretty long question. I am not quite sure what you were heading at. I believe OSM made its best efforts at that time. But there are a number of things that were not included in the rule. There were a number of things that were not addressed, notwithstanding the knowledge that some companies—

Mr. JOHNSON. No, that is not what I asked you. I didn't ask you what your Department has done. I said some have argued that the 2008 Stream Buffer Zone Rule would have loosened the 1983 rule, including the 100-foot rule. But I am asking you wouldn't the 2008 Stream Buffer Zone Rule actually have cleared up discrepancies and definitions in common practices?

Mr. PIZARCHIK. I don't believe the 2008 rule included a definition for material damage to the hydrological balance, and that—

Mr. JOHNSON. Well, can you please show Exhibit Number 6, please?

[Slide.]

Mr. JOHNSON. The Federal Register, which I will submit for the record, in the 2008 rule said, "We have revised the Stream Buffer Zone Rule to more closely reflect the underlying provisions of the Surface Mining Control and Reclamation Act of 1977," SMCRA, "to adopt related permit application requirements to require that disturbance of perennial and intermittent streams and their buffer zones generally be avoided, to identify exceptions to the requirement to maintain an undisturbed buffer zone for perennial and

intermittent streams, and to clarify the relationship between SMCRA and the Clean Water Act.”

And my time has expired, Mr. Chairman. I got an awful lot to cover, but clearly I am not going to get to it. I have just got to say this. You know, I have counted here about 20 different times that our witness, Mr. Pizarchik, has said, “I don’t know.”

The CHAIRMAN. The time of the gentleman has expired.

Mr. JOHNSON. “Best efforts.” If that is the best efforts of this Department, Mr. Chairman, it leaves the American—

The CHAIRMAN. Yes—

Mr. JOHNSON [continuing]. People sorely lacking.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from California, Mr. Costa.

Mr. COSTA. Thank you very much, Mr. Chairman. This is an issue, obviously, that has been with the Committee for a number of years under different leadership. And I appreciate an opportunity to focus on the challenges dealing with the impacts of this type of energy extraction. I would like to yield, though, the balance of my time to my colleague, Mr. Holt, who would like to continue along his line of questioning.

Dr. HOLT. Thank you, Mr. Costa. Mr. Pizarchik, you have said that there has been no articulated policy, nothing that you have seen that suggests that this Administration is trying to bankrupt coal companies or hurt the coal industry. I would point out that, as the Ranking Member of the Committee has previously pointed out, international competition and market forces and cleaner technology have, indeed, put a burden on the economics of coal in America. But as for any effort to bankrupt the coal industry, the facts just don’t support it, and your own testimony has said so.

The Committee has heard testimony that coal mining jobs have increased by more than 7 percent since 2009, when this Administration took office. Coal mining jobs have increased in West Virginia since 2009. The coal industry includes leasing more than 5 billion tons of coal in Wyoming’s Powder River Basin, which is overseen by your agency, is it not? These facts just are not consistent with any claim that there is an effort to shut down or bankrupt the coal industry. Would you agree?

Mr. PIZARCHIK. Yes, sir.

Dr. HOLT. The Committee Majority put out a press release in May that makes some accusations about audio recordings of conversations between the Office of Surface Mining officials and the contractor hired to do the Environmental Impact Statement. I wanted to ask you about an accusation they make.

They say that one conversation between OSM and the contractor showed “an OSM official discussing how a benefit of the Obama Administration’s new proposed rule is no coal mining.” The Majority doesn’t actually provide a quote to support this statement, so it is hard to know exactly what they are talking about. But looking at the transcript, it appears that this discussion was really about the contractor’s failure to analyze all the potential benefits of a stream protection rule, such as improved access to clean water supplies.

Is it true that OSM was concerned that the contractors were failing to analyze all the potential benefits of rulemaking, which—is it also not true—they were hired to do?

Mr. PIZARCHIK. Yes, sir. That is correct. Because under the National Environmental Policy Act they have to assess all the costs and benefits of potential changes. And our staff was trying to understand the rationale and the methodology used by the contractor. And their methodology was very limited. It was focusing only on the benefit that would come from if there was no coal mining. They were disregarding all the other costs and benefits.

Dr. HOLT. And to pursue this discussion of whether there is a concerted effort to interfere with coal mining and bankrupt coal companies, would you say in your agency there is an interest in seeing coal mined, so long as it is done in a manner consistent with public health and environmental protection?

Mr. PIZARCHIK. Yes, sir. For example, in the past 3 years the Bureau of Land Management has issued Federal coal leases for more than 1.4 million acres, and nearly 1.4 billion tons of coal has been produced from those lands under 300 Federal coal leases.

Dr. HOLT. And if there were a policy to stymie the coal industry, there probably would have been foot dragging on issuing those leases.

Mr. PIZARCHIK. One would think so. And—

Dr. HOLT. Was there any foot dragging on issuing those leases?

Mr. PIZARCHIK. Not to my knowledge, sir. And then, if you look at the Administration's approach, it has put more money in clean coal technology—\$3.4 billion—more money than any President and more money than any country in the world has put into that. You don't make that kind of investment in coal and in the future of coal if you are trying to bankrupt the industry.

Dr. HOLT. And in the process, have you observed good public health and environmental standards?

Mr. PIZARCHIK. Yes, sir. I have. And that is what we are trying to do, is modernize our regulation to be able to do a better job of protecting people and the environment, while helping meet this country's energy needs.

Dr. HOLT. Thank you, sir.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Michigan, Mr. Benishek.

Dr. BENISHEK. Thank you, Mr. Chairman. Thanks a lot for being here. I know it has been a long morning for you. Let me just ask you this. Would you consider a rule that takes over 5 years and multiple scientific studies to complete, receives over 40,000 comments, and over 5,000 pages of environmental analysis from 5 different agencies, and is published with the concurrence of the EPA and the U.S. Army Corps of Engineers as a midnight rule, or some kind of a parting gift from the previous Administration, simply because it is published at the end of the term?

Mr. PIZARCHIK. I really don't have an opinion on that. OSM, I am sure, was doing the best it could at the time to get the rulemaking out, as are we trying right now to do our best to get a rule out timely.

Dr. BENISHEK. Well, wouldn't your stream protection rule deserve equal criticism, you know, because it is taking—in this period of time?

Mr. PIZARCHIK. Well, that is an interesting question, Congressman, because we have been criticized that we are going too fast, and now we are being criticized for going too slow.

Dr. BENISHEK. I see.

Mr. PIZARCHIK. And I am just trying to do the best job in accordance with the laws that are applicable.

Dr. BENISHEK. Your Department's press officer stated that it is inappropriate and premature for Congress to inquire into the details of the agency's ongoing deliberations in rulemaking activity.

Mr. Pizarchik, do you agree that Congress has a legitimate oversight role regarding how the OSM uses the rulemaking authority vested in it by Congress?

Mr. PIZARCHIK. I agree that Congress has a legitimate oversight role. But I also agree that there are separations of powers between our deliberative process and the execution of the laws, and that is why we have been trying to work with the Committee to accommodate that legitimate oversight interest while protecting our legitimate executive branch authority.

Dr. BENISHEK. If there are indications perhaps that a process isn't being followed properly, do you think the Congress should wait until the end of an improper procedure is finished before asking for some answers?

Mr. PIZARCHIK. We are doing our best to provide documents that are responsive to the Committee's requests and subpoenas. And I believe we have done so and will continue to do so in regards to that.

And I believe all the documents and indications out there right now indicate that there is nothing out there, there is no problem, and that we have been acting responsibly to address the concerns that we had, to address the concerns that were raised by the State cooperators, as well, regarding the quality of the previous contractor's work.

Dr. BENISHEK. I guess I just don't understand why there are so many redacted areas in the pages. Is there a problem with—like I saw one of the answers was—one of the proposed ideas is this, and then the rest of it is all blanked out. You know? What is the purpose of that redaction?

Mr. PIZARCHIK. My understanding, sir, the purpose is to protect the deliberative process that we are engaged in as deciding what potential changes we need to make to modernize our regulations in order to allow us to carry out the executive powers of the President.

Dr. BENISHEK. Well, how does the fact that we know what you are talking about make it more difficult for you to do it?

Mr. PIZARCHIK. I am not sure I understand—

Dr. BENISHEK. Well, if you don't want to tell us what you are talking about, as far as the plan, if we knew about it, how does it make it more difficult for you to do it?

Mr. PIZARCHIK. I believe what we are trying to do is be consistent with past Administrations, where we do not have the legislative branch involved in the executive branch's decision-making process.

The legislative branch has a legitimate oversight interest. It has exclusive authority over legislation. We have exclusive authority over the implementation of it. And I believe there potentially may be some gray areas, which is why we have been trying to work to accommodate the Committee on its legitimate oversight interests.

Dr. BENISHEK. Mr. Chairman, I will yield back the remainder of my time.

The CHAIRMAN. Mr.—

Dr. BENISHEK. Thank you, sir.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Arizona, Mr. Gosar.

Dr. GOSAR. Being from Arizona, there is a war on coal. You know, I hope you understand, NGS, and the predicament that is up there for the Navajo Generating Station when we are using faulty science.

You know, I am really abhorred. As a business owner, when we have questions asked of us, as the owner, we go find out those answers. And I find it very inexplicable that you don't know the answers to the questions. Just like Mr. Johnson asked you over and over again. You knew these were recurring questions that were going to come up, and yet you still defy in not having an answer. You should have been able to look at the 13,000 documents in our office. We do. There is no exception for you.

So, my question is to you is if—we do the same thing to the business owners out there. We fine them. We actually do that. We don't give them any leeway. We just go ahead and fine them. So maybe—let me ask you this. Should we fine you? Should we fine your agency for not coming up with the proper protocol? Because I am not here to reward bad behavior, because that is what you are eliciting here. And I have proof.

There is a substantial—and your poor, pitiful heart, I understand that you are taking orders. It is the same type of disrespect to the legislative branch that we are seeing in the DOJ, all the way across the board, with the same type of trying to get documents all the way across. For transparency, I am abhorred, absolutely abhorred about what I am seeing here. So, let me ask you a question. I want to be a little bit more specific.

The documents provided by the Committee—by other sources, not the OSM, has shown that the OSM staff has expressed extreme dismay that the proposed rulemaking had already cost more than \$5 million to the taxpayers, and would result in \$200 million a year in new costs to implement, and is only going to protect about 15 miles of stream. Do you believe—yes or no—if this is an efficient and effective way to use taxpayer dollars?

Mr. PIZARCHIK. The rulemaking process that is specified by the statute is a complicated process, and it is costly. I do—I recognize that. And we are doing our best to manage the cost—

Dr. GOSAR. Well, once again, there is a broken system. You know I have a limited amount of time, so it is a yes or no.

The Committee also released audio tapes of your own career staff questioning the benefits of this rule, compared to its cost. Do you believe that the cost benefit analysis of this rulemaking will benefit the American people?

Mr. PIZARCHIK. When we have a cost benefit analysis completed, when we have a draft proposed rule completed, I believe the numbers will clarify that and they will speak for themselves. And you, as well as every member of the public, will be able to see the—those numbers, and understand the methodology—

Dr. GOSAR. Is this based on faulty science or real science?

Mr. PIZARCHIK. We are going through the extraordinary process of having the analysis peer reviewed by outside experts—

Dr. GOSAR. Did you do the same thing in the particulates in Northern Arizona with NGS? This is the same type of science.

Once again, I am a science-based guy. And when you don't use science to base your decision off of, that is what our oversight is all about.

Mr. PIZARCHIK. Then I agree with you that we are using science and we are doing our best to use the best science available to modernize our regulations. And when we have that proposed rule completed and the analysis completed, you will be able to see the science, the methodology, and understand the cost and benefits.

Dr. GOSAR. OK. I would like to have Exhibit Number 4 up, please.

[Slide.]

Dr. GOSAR. Is it your goal to force coal mining companies out of business through forfeiture after expanding the definition of a stream, so that no coal mining company can ever be compliant, and instead would simply choose not to mine?

Mr. PIZARCHIK. No, sir, it is not.

Dr. GOSAR. Would you say that the audio tapes mimic what has been redacted there in the documents provided?

Mr. PIZARCHIK. If you look at the entire context of the—

Dr. GOSAR. Yes or no. Is the audio, stenography of the audio, what is missing in the redacted form?

Mr. PIZARCHIK. I am sorry, sir. I cannot read that from here.

Dr. GOSAR. Wow.

The CHAIRMAN. Would the gentleman yield real quick?

Dr. GOSAR. Yes, I will.

The CHAIRMAN. Would you answer that question in writing after this, and do it immediately? Because it wouldn't take very long to do it. You know what that document is, you know what has been redacted. Could you do that?

[No response.]

The CHAIRMAN. Could you do that, Director Pizarchik?

Mr. PIZARCHIK. I will—

The CHAIRMAN. It is a direct question that came from the gentleman from Arizona.

Mr. PIZARCHIK. I will take a look at that and do my best to respond as well as I can.

Dr. GOSAR. I think it is a yes or no. A yes or no, sir, that you can look at the right hand and the left hand and compare them to say that that is exactly what—a stenography of an audio tape and the provided document. Yes or no?

Mr. PIZARCHIK. I cannot see it from here, so I can't say—

Dr. GOSAR. But you will make the comparison—you don't have to see it. The comparison between the two documents, you will give us that answer. Yes or no?

Mr. PIZARCHIK. I think I can—

Dr. GOSAR. Thank you. I will take that as a yes.

Mr. PIZARCHIK [continuing]. Determination of that.

Dr. GOSAR. The President made it clear that his goal was to increase costs for people who work and mine coal. It certainly looks like you are doing your best to make the President's promises a reality, and that the ongoing effect to do this in the dark of night without sharing your efforts with the Committee or complying with our oversight efforts is completely unacceptable. I have seen this over and over again. I see this in Arizona. Here we have the Navajo Generating Station. We see this particulate rule that has no inference on the Grand Canyon, and still being—trying to be utilized. And I find it despicable.

The CHAIRMAN. The time of the gentleman—

Dr. GOSAR. I yield back my time.

The CHAIRMAN [continuing]. Has expired. The Chair recognizes the gentleman from Maryland, Dr. Harris.

Dr. HARRIS. Thank you very much. And thank you very much for taking the time to appear before us.

Now, a couple of times, I think in response, you used the term you are trying to be “more open and transparent.” More open and transparent than what? I mean the Politburo? I mean this is open and transparent.

I have to ask you a question. Exactly what is the Administration trying to hide from the American people? Again, remember the Administration has promised the most open and transparent—now, your testimony was, well, those last two Administrations, they didn't—no. You used the word “more.” More open and transparent than what?

Mr. PIZARCHIK. Well, for example, if you compare what we have done on the development of the stream protection rulemaking to the last rulemaking, we have conducted more open input, we have solicited the public, provided them alternatives, received their comments. We conducted outreach—

Dr. HARRIS. I am not talking about—excuse me, I am going to interrupt you. I am not talking about providing input. I am letting the public see what is going on behind closed doors in the most open and transparent Administration. This is going on behind closed doors.

I got to tell you I am getting, you know, a lesson, I guess, in executive privilege or something. What do you have to hide? Why wouldn't you want to show the American people what you use in your deliberations? It is a rhetorical question, because I know I am not going to get a responsive answer.

I am going to ask one science question, then I am going to go on. You promised that you are going to use scientific evidence of the harmful effects of coal dust. You are aware that joblessness and unemployment increase morbidity and mortality among people. You are aware of that. Is that right? Or is the Bureau taking that into consideration, that in fact coal dust is not the only thing that kills people? Unemployment and joblessness do. Are you aware of that?

Mr. PIZARCHIK. I am not a medical doctor or science—I don't have a basis to—

Dr. HARRIS. So you are going to look at the environmental and ecohealth journal, not at medical studies that show that joblessness and unemployment adversely affect morbidity and mortality. You are unaware—is that your testimony?

You are going to make rules that impact thousands and thousands of jobs, destroying them. Your testimony in front of this Committee is that you are unaware that has adverse health impacts. Is that your testimony today?

Mr. PIZARCHIK. My testimony is I am not a medical doctor. I don't understand—

Dr. HARRIS. Is your testimony that you are unaware of those studies as you prepare to make this proposed rule?

Mr. PIZARCHIK. My testimony is we are going to follow the National Environmental Policy Act utilizing the science that is available, assessing—

Dr. HARRIS. Sir, are you aware or unaware that unemployment and joblessness adversely affect morbidity and mortality in America?

Mr. PIZARCHIK. Sir, I am not a doctor. I don't—

Dr. HARRIS. I think that is as responsive as I would expect from the most transparent Administration. I yield the balance of my time to Mr. Johnson.

Mr. JOHNSON. I thank my colleague for yielding. Mr. Director, when I ended my questions earlier we were talking about the 2008 rule, and whether or not it would have added clarity and specification and avoided some inconsistencies.

Didn't the 2008 Stream Buffer Zone Rule also emphasize the need to get a permit through both SMCRA and Clean Water Act through the EPA and the Corps? In other words, the 2008 Stream Buffer Zone Rule was more restrictive than the 1983 rule. Right?

Mr. PIZARCHIK. I believe what you were reading from the Federal Register was accurate. I don't profess to know all of that by heart.

Mr. JOHNSON. I don't know. OK. I got it.

Is the 2008 Stream Buffer Zone Rule currently enforced across the country? And have all of the economic impacts of those rules been imposed on States and industries that mine and produce coal?

Mr. PIZARCHIK. Two parts on that. No, it is not being enforced across the country. And, as I recall, there were no economic impacts from that rule.

Mr. JOHNSON. OK. How can you defend OSM's insistence on pretending that the 2008 Stream Buffer Zone Rule was in place for the purpose of determining the economic impact of OSM's new rule?

I mean if the rule isn't being enforced, as you just stated, then why should that be the baseline for determining coal production and job losses, unless it is the purpose of the agency, as shown in this slide? And let's go to Exhibit Number 5.

[Slide.]

Mr. JOHNSON. To pretend that this isn't the real world, this is just rulemaking that will cost thousands of jobs, massive economic impacts, and increase energy costs—let's go to that. "This isn't the real world. That is pretending."

Mr. PIZARCHIK. As I understand it, you look at the context, it was the contractor who said he was going to pretend.

And in regards to your first question, the 2008 rule is the—

Mr. JOHNSON. Who said it is not the real world, that is rule-making. Who said that, Mr. Pizarchik? Was that someone from your Department?

Mr. PIZARCHIK. I believe that wasn't an OSM employee.

Mr. JOHNSON. Yes, it was. Under your direction. Some have also argued that the fundamental issue that the——

The CHAIRMAN. The time of the gentleman has——

Mr. JOHNSON. I apologize, Mr. Chairman. I yield back.

The CHAIRMAN. The time of the gentleman has expired, and I understand that. The Chair recognizes the gentleman from Georgia, Dr. Broun.

Dr. BROUN. Thank you, Mr. Chairman. Director, I want to remind you. Even though you are not under oath, you are still subject to criminal prosecution and jail time, as well as a big fine, if you answer something that is not the truth, the whole truth, and nothing but the truth. And that goes not only for my questions, but the questions from all the members of the Committee.

Director, has anyone in the Department of the Interior, anybody in the White House, in the Obama campaign, in the Administration, throughout the Administration, anyone associated with the Democratic Party or any supporters of this Administration asked, suggested, hinted, or in any manner encouraged OSM to delay the proposed rule on stream buffer to after the November election?

Mr. PIZARCHIK. No, sir. No one has made any such representations of any sort like you have described to me.

Dr. BROUN. No one?

Mr. PIZARCHIK. Not that I am aware of, sir, no.

Dr. BROUN. How about just to delay the proposed rule for any purpose?

Mr. PIZARCHIK. No, sir, not to delay the rulemaking on that. There has been no instructions, hints, or directions to delay the rulemaking.

Dr. BROUN. Have there been any emails, texts, letters, conversations, grunts, winks, nods, or any means of communication to encourage a delay on these proposed rules?

Mr. PIZARCHIK. None that I am aware of that I can recall, sir. No, sir.

Dr. BROUN. None whatsoever?

Mr. PIZARCHIK. Not that I can recall, sir. Not that I am aware of.

Dr. BROUN. What are the impediments to publishing the proposed rule?

Mr. PIZARCHIK. We have not yet completed all of the analysis of alternatives. And as far—and also, if possible, changes to the rules, to update them. We need to complete that analysis——

Dr. BROUN. Why aren't you completing the analysis, then?

Mr. PIZARCHIK. Pardon?

Dr. BROUN. Why aren't you completing that analysis, then?

Mr. PIZARCHIK. We are in the process of completing that analysis, and using that information in accordance with the National Environmental Policy Act to be able to make informed decisions. We are not——

Dr. BROUN. You work 8 hours a day to do this, or 10 hours a day, or any amount of time? Can you tell me how much time you all

are spending to try to get this proposed rule out as quickly as possible? Because you already passed the date that you agreed to in court.

Mr. PIZARCHIK. Staff has been working on it, other folks. We have contractor—I cannot give you a number as to how many hours a day people have put in on it. The rulemaking process is very complex. We are trying our best to get it out as quickly as possible, but we just haven't completed that yet.

The CHAIRMAN. Would the gentleman yield real quick?

Dr. BROUN. Certainly.

The CHAIRMAN. I want to go back to the line of questioning Dr. Broun had just a moment ago on whether there is any wink and a nod. And your response was, "I don't recall." That means there could have been that communication. Is that correct? Yes or no.

Mr. PIZARCHIK. No. That is not correct. My response was I do not know of any of it, and I do not recall any of that. I do—

The CHAIRMAN. But once you say you do not recall, that implies that there may be. And I am asking you very directly. Was there anything at all in the line of questioning that Dr. Broun had about communication of delaying this? Yes or no?

Mr. PIZARCHIK. There was not any direct communication, any winks and nods, anything telling me—

The CHAIRMAN. Well, OK, was there indirect—when you say "direct communication" or—it implies wiggle room here. We are trying to find out if there is any wiggle room at all. That was the line of questioning. Yes or no?

Mr. PIZARCHIK. No. There were no such directions indirect, direct, wink, nod, nothing.

The CHAIRMAN. OK.

Mr. PIZARCHIK. Nada.

The CHAIRMAN. I yield back to the gentleman.

Dr. BROUN. OK. Thank you, Chairman. How is OSM proceeding to develop the proposed rule, and what is OSM doing to get past whatever obstacle is in place for developing this rule?

Mr. PIZARCHIK. We have been looking at potential changes. And then we, in accordance with the National Environmental Policy Act, we try to assess what those cost and benefits would be, to use that information to help inform the decision-making as to whether—

Dr. BROUN. In other words, you don't know. I mean you are just—

Mr. PIZARCHIK. That is not what I am saying at all, sir.

Dr. BROUN. You are just obfuscating in your answers here.

Mr. PIZARCHIK. No, I—

Dr. BROUN. How many staff are at the start of this proposed rulemaking process that you put in place, and how many are there today?

Mr. PIZARCHIK. We had a whole team of folks put in. I do not remember the numbers.

Dr. BROUN. Can you supply the numbers for that question?

Mr. PIZARCHIK. I believe we can try to determine our best on what those numbers are—

Dr. BROUN. OK. Please do. Do you support coal as a source of energy? And have you made any statements in any manner that

could be interpreted as being against coal as an energy source in America?

Mr. PIZARCHIK. I support coal as an energy mechanism to help meet our country energy needs as required, and that is laid out in the statute. That is what we are trying to do, is balance that—

Dr. BROUN. No, I am not asking about the statute. I am asking about you. Have you made any statements that are anti-coal? Have you ever expressed anything in any manner—in writing, in any manner—that could be interpreted as being against coal, or was blatantly against coal as an energy source in America?

Mr. PIZARCHIK. I don't recall of ever making such statements.

Dr. BROUN. My time has expired. Thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Nevada, Mr. Amodei.

Mr. AMODEI. Thank you, Mr. Chairman. Mr. Director, are you aware of any inclusion of the Office of Surface Mining in the Constitution of the United States?

Mr. PIZARCHIK. It is not.

Mr. AMODEI. OK. So that means you were probably created how?

Mr. PIZARCHIK. By Congress.

Mr. AMODEI. OK. And so, I was pleased to hear your discussion with Mr. Benishek regarding oversight. How is it that you perform oversight with your base creation statute and other things—for instance, this topic—without knowing what you are doing in the rule-making process?

Mr. PIZARCHIK. You will have an opportunity to, once we have made a decision as to what ought to be in the proposed rule. And I believe you will be able to use that information in order to decide whether you need to take legislative action, one way or the other, or not. I think—

Mr. AMODEI. How long is allowed in the existing regulations to comment on a proposed rule?

Mr. PIZARCHIK. The decision on how much—the length of the comment period would be made at the time the rule is published. I believe there is a minimum provision, I think, of maybe 50 or 60 days, I believe.

Mr. AMODEI. OK. So we are talking 50 or 60 days is the floor, and the ceiling can be set, under your discretion, at whatever you think is appropriate.

Mr. PIZARCHIK. As I understand it, 60 days at minimum, and there is no statutorily prescribed maximum.

Mr. AMODEI. Do you have any knowledge of what the longest statutorily prescribed maximum for a rule that you have done has been, historically?

Mr. PIZARCHIK. I am thinking back to my Pennsylvania days, and I don't recall whether the statutes there had a maximum time period on it, sir.

Mr. AMODEI. What would your response be to the hypothetical of, well, the time for public comment on the proposed rule ought to be at least as long as it took to come up with the proposed rule? Ever heard of a concept like that before? Or you think that would be longer, shorter, out of line?

Mr. PIZARCHIK. I have not heard that concept come up before.

Mr. AMODEI. Your personal reaction off the top of your head. That a good idea or a bad idea? And let me tell you why I am asking it, so—because when I hear about deliberations, which I want to talk to you about in a second, proposed rule, you are working on it, robust peer review, all that sort of stuff, and it is like that is all great. So you are going to take how long? From 2008, 2009 to some time? And then you are saying, “Hey, by the way, those of you folks with oversight, you go ahead and get it done in 60 days, you get it done in 12 months.” I mean, you know, there is a phrase that can go with oversight, which is “meaningful.”

Mr. PIZARCHIK. Yes, I know. And in regards to your question on how much time, there—a different process is—you are saying once we have the proposed rule completed, have the draft EIS completed, you will have the benefit of all that work that lays out the methodology that was used—

Mr. AMODEI. Well, and I understand, Mr. Director. But, quite frankly, this is a robust process, which means having the “benefit of that work” is in the eyes of the beholder.

And you know what? It is tough to give you the benefit of that doubt when the eyes of the beholder, at least in the instance of this Committee, have a blindfold over them.

And so, no disrespect, I just have one more thing. Are you aware of any authority anywhere in your regulations for OSM that gives you privilege for deliberation on proposed rulemaking?

Mr. PIZARCHIK. No, sir, I am not.

Mr. AMODEI. Thank you very much. Mr. Chairman, I would like to cede the rest of my time to the gentleman from Utah, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Amodei. I will probably come back to you, if I could. I just want a point of clarification. I was talking earlier with the gentlelady from California, and we were both be-moaning the fact that this is not the first time we have received documents that were redacted. And, unfortunately, it will probably be not the last time we will see documents that are redacted. Certain documents are going to be put into the record.

I want the record to clearly state when documents are coming to us from the Administration they are stamped with the date and the time and the document number on the bottom of the page, and that some of the information given to us of what the redacted material was is not coming from the Administration. They are coming from the contractors. And one must only wonder why we are getting information from a secondary source, but not from the Administration. They are still giving us the redacted, blacked-out material. I wanted that clarification in the record with those—with that data.

And I will yield back. I have 30 seconds, Mark, if you still want some time for one last question.

Mr. AMODEI. Mr. Chairman, I yield back.

The CHAIRMAN. I yield to the gentleman from Ohio.

Mr. JOHNSON. Mr. Chairman, I have about 3 or 4 more questions with only 18 seconds left. I don’t think I can get into them. So I will yield back at this point.

The CHAIRMAN. The gentleman yields back the time. The Chair recognizes the gentleman from Colorado, Mr. Coffman.

Mr. COFFMAN. Thank you, Mr. Chairman. I would like to yield some of my time to Mr. Thompson of Pennsylvania.

Mr. THOMPSON. I thank my good friend from Colorado for yielding.

Director, I want to come back. I want to confirm your earlier statement when we had our last conversation that the now 18-month-old EIS and RIA drafts that showed an expected devastating impact on small businesses, economic harm in 22 States, and a loss of at least 7,000 jobs were accurate, since these were sent to cooperating agencies for review.

Mr. PIZARCHIK. Well, I am sorry, what is your question on that?

Mr. THOMPSON. My question is that the report that came out, the specific report that came out from your agency on the—through the EIS and the RIA that you sent out to cooperating agencies that outlined that this would be an economic devastating impact, specifically harm in 22 States and a loss of 7,000 jobs, that that was accurate, since that was set out under your letterhead to these cooperating agencies in this process.

Mr. PIZARCHIK. That was the first working draft of the contractor. And the way the law has required the process to work is for us to get feedback and analysis of what the potential impacts might be, and for us to also understand the methodology, so that we can make informed decisions—

Mr. THOMPSON. Well, I understand that. But in my previous conversation—I was just confirming, because you said—I asked you whether those were placeholder numbers, meaning until something else comes in, and you said they were until the point where more information came in. And what you expressed was confidence that those were sent out.

OSM has been working on the stream protection rule for almost 3 years, and nothing has been completed. Do you still maintain that the settlement agreement that committed DOI and OSM to publish a final rule in just over 2 years was a prudent use of taxpayer dollars?

Mr. PIZARCHIK. Yes, sir. I do believe it was a prudent use of taxpayer dollars.

Mr. THOMPSON. Well, based on what OSM and the Interior Department has been willing to share with this Committee, it appears that you have really nothing to show for the last 2 years of work. Furthermore, additional promises of, “You can see what we did after it is complete” sounds remarkably similar to another infamous promise of, “We will have to pass this bill before we find out what is in it.”

Frankly, this is unacceptable and very disappointing from the Administration, that promised unprecedented levels of transparency—you know, one of my colleagues here talked about—used the word “obliterating.” And this is. This has been obliterating, I think, to the Congress’s oversight responsibility and, frankly, to jobs and affordable energy in this country.

So, I thank my good friend for yielding, and I yield back to him.

Mr. COFFMAN. Thank you, Mr. Chairman. I yield the balance of my time to Mr. Johnson of Ohio.

Mr. JOHNSON. I thank the gentleman for yielding.

Mr. Director, is your team that is working on the Stream Buffer Zone Rule, are they working full time on this rule?

Mr. PIZARCHIK. At the current moment they are not.

Mr. JOHNSON. They are not. Are they on hiatus? What are they working on, if they are not working on this?

Mr. PIZARCHIK. They are working on their regular full-time jobs, and participating in working on this rule as necessary.

Mr. JOHNSON. OK. So there is really no attempt at best efforts. That is what is meant by best efforts to comply with the court settlement, is to send your people on hiatus and suspend operations? That is best effort? That is what the American people deserve?

Mr. PIZARCHIK. No, sir that is not—

Mr. JOHNSON. I didn't think so.

Mr. PIZARCHIK [continuing]. What is occurring. What is occurring, they—

Mr. JOHNSON. Some have—

Mr. PIZARCHIK [continuing]. Are working on the rule—

Mr. JOHNSON. Mr. Pizarchik, some have argued that the fundamental issue is that the 2008 Stream Buffer Zone Rule does not adequately protect streams from mining waste, or spoil. But isn't it true that SMCRA fully considered spoil being placed in valleys and streams, but to do it with as little environmental damage as possible? Certainly the former Chairman of this Committee, Mr. Rahall, as well as many others, believe this to be the case. Is that your understanding, as well?

Mr. PIZARCHIK. It is my understanding that it does recognize that—

Mr. JOHNSON. OK. That—

Mr. PIZARCHIK [continuing]. And it requires that spoil be transported—

Mr. JOHNSON. I will take that as a yes.

Mr. PIZARCHIK [continuing]. And placed in a controlled—

Mr. JOHNSON. Thank you.

Mr. PIZARCHIK [continuing]. Fashion, not dumped—

Mr. JOHNSON. You testified back in November, Mr. Pizarchik, that SMCRA is not a law to promote the development of coal. Let's take a look at the exhibit.

[Slide.]

Mr. JOHNSON. You said that SMCRA is not a law to promote the development of coal. But if you look—however, SMCRA was created to balance the need for coal production with environmental concerns.

So, did you testify that one of the several purposes was to assure that coal supply essential to the Nation's energy requirements is provided, and to strike a balance between protection of the environment and an agricultural productivity in the Nation's need for coal?

Mr. PIZARCHIK. I believe I have consistently testified that one of the purposes is to balance the needs and help—to meet this country's energy needs for power, yes.

Mr. JOHNSON. But back in November you said that SMCRA is not a law to promote the development of coal. So how do we balance that?

You say one thing one day, Mr. Pizarchik, and another thing the next day.

Mr. PIZARCHIK. I believe if we were to go back and look at that testimony in my written statement, we will find that the primary purpose was to protect people and the environment, while helping meet this country's energy needs.

Mr. JOHNSON. I yield back, Mr. Chairman.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Colorado, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. I would like to yield my time back to the Chairman of the Natural Resources Committee.

The CHAIRMAN. I thank the gentleman for yielding. Mr. Pizarchik, are there any limits to the Department's claim to be able to withhold documents on the basis that it is pre-decisional in an ongoing rulemaking process?

Mr. PIZARCHIK. Mr. Chairman, the Department is not withholding documents—

The CHAIRMAN. No, I didn't ask you that. I said are there any limits to the claim that you can say you are—don't want to provide documents. Are there any limits to that?

Mr. PIZARCHIK. I am not a constitutional law expert on that—

The CHAIRMAN. Let me just pose a few things. What if there is some illegal activity that had occurred? Wouldn't that raise a red flag, perhaps, to you?

Mr. PIZARCHIK. I believe, yes, illegal activity would raise a red flag.

The CHAIRMAN. OK. What if the process was being conducted improperly? Wouldn't that raise the red flag to you?

Mr. PIZARCHIK. Yes.

The CHAIRMAN. Yes? So, on this rule there are serious questions regarding exactly both of those actions. There are serious questions. So to withhold, you know, that information, to me, is simply not valid.

Now, what would be valid, however, is a formal assertion of executive privilege by the President. So, has the President asserted executive privilege on any documents that are covered under the two subpoenas that we sent to you?

Mr. PIZARCHIK. Not to my knowledge, sir.

The CHAIRMAN. OK. Has the Department communicated with the White House about the possibility of asserting executive privilege?

Mr. PIZARCHIK. I don't—I haven't been involved in it. I don't know whether the—I don't know the answer to that. I don't think so, but I do not know.

The CHAIRMAN. Has the White House consulted or been involved in the decision to refuse to comply with the subpoenas?

Mr. PIZARCHIK. The Department has not refused to comply with the subpoenas. We have been working with the—

The CHAIRMAN. Well, I guess that is a subjective answer.

Let me ask this. Has the Department identified documents that would be covered by the category specified in the subpoenas, but they haven't been provided to the Committee?

Mr. PIZARCHIK. Mr. Chairman, we have been working to provide the documents that are responsive. I am not familiar with the exact status of all the documents. As you can imagine, having received 13,500 pages of documents, there are a lot of documents involved in this matter.

The CHAIRMAN. Well, I have to take that as a no, which I find very interesting, because we have asked for something and it appears that you are not trying to comply.

I will yield the balance of my time to Mr. Lamborn from Colorado.

Mr. LAMBORN. Thank you, Mr. Chairman. Mr. Director, as you know, there was an out-of-court settlement in effect with you, your organization, and the litigants. Although documents regarding the settlement have been requested, none have been produced to date. What communications have you had with the litigants in the case regarding the missed deadlines?

Mr. PIZARCHIK. As I understand it, we had had a status conference with them to apprise them of the fact that we had missed the deadline, and some of the explanation as to why, and I believe you understand as to why our best efforts weren't successful with the first contractor on that.

The specifics of the discussion, as I understand it, are covered by provisions as far as, I guess, settlement negotiations. I believe that is covered by it, but I am not an expert in that area.

Mr. LAMBORN. Has your office had any communications with the plaintiffs about not scheduling—or not seeking a scheduling order?

Mr. PIZARCHIK. Not to my knowledge, sir. I have not had any such discussions.

Mr. LAMBORN. So, this rule that was thrown out, it took 5 years and \$5 million and it was thrown out. And now there are deadlines that have come and gone. And the Department of the Interior and the Office of Surface Mining haven't communicated with the plaintiffs about scheduling—seeking a scheduling order?

Mr. PIZARCHIK. The rule has not been thrown out. It is the law of the land. And just recently it is my understanding the court has asked for a status report from the parties in the litigation. I believe I had heard that a little bit earlier this week from one of our attorneys.

Mr. LAMBORN. Have the plaintiffs asked the court to lift the stay and establish a schedule for further proceedings?

Mr. PIZARCHIK. Not to my knowledge, sir.

Mr. LAMBORN. And have you been in touch with them about when the rulemaking is going to be completed?

Mr. PIZARCHIK. No, sir, I have not.

Mr. LAMBORN. The Congressional Budget Office said that they thought the regulations wouldn't come out until the end of 2013. Do you know anything about that?

Mr. PIZARCHIK. No, sir. I do not.

Mr. LAMBORN. So you have no idea when this will be, when the rule will be issued?

Mr. PIZARCHIK. As I indicated earlier, I attempted to make a best judgment of when we could complete it. That has proven not to be something we could accomplish. And I would not hazard a guess as to when we were going to be able to complete the work, when we can get the proposed out, nor how much time it will take you to go from proposed to final. I am—I can't predict that.

Mr. LAMBORN. OK. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. The time of the gentleman has expired.

And, Director Pizarchik, I appreciate your being here. I know it has been a long morning. And if you have sensed a bit of frustration on this side, it is there, and you can see that.

Let me just review, as I see this whole issue. It took 5 years to put a plan in place that was promulgated in the end of 2008. Immediately after the new Administration came in, they threw out that rule that cost millions of dollars, and then announced that they were going to write a new rule, and 3 months later entered into a court decision in which they said, in a prescribed time period under the court, that they would have a new rule. That deadline has been missed. Under repeated questioning from me, from Mr. Lamborn, virtually everybody, and even questions on the other side, you can't tell us when that is going to be done. That is just—that is incomprehensible.

But I have to tell you that what is probably more appalling to me, since I am the Chairman of the Committee, was your response to the gentleman from New Jersey, Mr. Holt, in asking that you don't know what we are asking. I think we have been very, very clear in what we are asking of you with the subpoenas and information, because it is true that you have asked us. And we responded in a letter last January, January 25th. I assume you got the letter.

And I will quote what it says, so there will be no confusion on what we are asking. And I will quote. "When the decision to undertake—we want to understand—"the decision to undertake this sweeping, rush rewrite of the rule"—pretty straightforward—"Two, the economic impact it would cause." And then also, to further go on, "whether the political implications of the rule are having under the influence of this process," whatever political implications. Now, those are the three things that we are asking. It is pretty clear.

So, when you go back and look at what we are asking in subpoenas, I would just reference you to the giant January 25th letter. Now, if something is—you know, I can't imagine that we can't be more clear than that. So I was appalled at your response to the gentleman from New Jersey's question in that regard.

Now, Director Pizarchik, there, I am sure, are further questions that will come up, which typically does when we have hearings like this. And there will be written questions that will be sent to you from individual Members. I would ask you to respond in a timely manner to those questions. Would you do that?

Mr. PIZARCHIK. I will do my best, sir.

The CHAIRMAN. OK. Now, a timely manner, to me, because you now have been in front of this Committee and you know the tone of what is being asked, a timely manner to me would be within 2 weeks. Would that sound reasonable to you?

Mr. PIZARCHIK. And when you are talking the 2 weeks, you are regarding the questions that were asked here today?

The CHAIRMAN. Yes, 2 weeks in receipt of the questions, if there are further questions. There may not be any further questions. But there may be further questions.

Mr. PIZARCHIK. Well, if there are further questions, you know, I—obviously, we will give it our best to respond as timely and as quickly as we can. Not knowing what they may be, I cannot commit

to a specific time period. But we will do our very best to accommodate—

The CHAIRMAN. OK. Now—and the reason I ask that was because, again, going back to what I said in conclusion, there is a 5-year time period to put a rule in place. That was thrown out immediately when the new Administration came in place. You announced that you are going to do a new rulemaking process. Three months later you enter into a court decision.

Now, you know, the timeliness and the scope of what that is being done there, to me, is very, very large. And all I am asking here, and all we are asking is that if we ask you questions, respond in a timely manner, that I would interpret to be 2 weeks. And you say you will do your best. OK, I guess that is the best I can get out of you. I can't get any more than that.

So, I want to ask before I close, I ask unanimous consent that the exhibits provided by the Majority be placed in the hearing record.

[No response.]

The CHAIRMAN. And without objection, so ordered. And, before I conclude, I will recognize the gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you very much, Mr. Chairman. I appreciate the time.

The Natural Resources Committee Majority has raised questions regarding a need for a new stream protection rule, and is pursuing an aggressive investigation, apparently based on the premise that promulgation of such a rule is somehow inappropriate. In order to assist members of the Committee to fully understand the need for a new stream protection rule, we requested that representatives of the communities and families who live and work in the regions harmed by the destructive practice of mountaintop removal mining be invited to testify at today's oversight hearing. Testimony from these witnesses would illustrate the enormous cost being paid by these communities in terms of environmental and human health.

Unfortunately, our request was refused. As a result, pursuant to Rule 11 of the Rules of the House and Rule 4 of the Rules of the Committee on Natural Resources, 13 members of the Committee have requested a further hearing on the status of Obama Administration's rewrite of the Stream Buffer Zone Rule, and compliance with Committee subpoenas, during which witnesses selected by the Minority shall be allowed to testify.

Mr. Chairman, we look forward to a second day of hearings on this topic, so that we can hear from the people who actually live in the impact of mountaintop mining each and every day. And I appreciate—

The CHAIRMAN. And the Chair is aware of that request, and it will be respected.

And if there is no further business to come before the Committee, the Committee stands in recess, subject to the call of the Chair.

[Whereupon, at 12:24 p.m., the Committee was adjourned.]