



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240  
FEB - 9 2012

RECEIVED  
COMMITTEE ON RESOURCES  
2012 FEB -9 PM 6:37

The Honorable Doc Hastings  
Chairman, Committee on Natural Resources  
House of Representatives  
Washington, DC 20515

Dear Mr. Chairman,

With this letter we are continuing our response to the Committee's general oversight inquiry into the Department of the Interior's ("Department's") ongoing Stream Protection Rulemaking and to the specific requests made in the Committee's January 25, 2012, letter. This letter provides the Committee documents, information and offers of accommodation responsive to those specific requests.

We take this opportunity to respectfully disagree with the Committee that all the requests made in the January 25 letter fall within the scope of previous requests for documents. The January 25 letter indicated for the first time the Committee's specific interest in the decision to initiate the Stream Protection Rulemaking and included the first formal request for documents regarding the March 2010 settlement agreement for litigation challenging the 2008 Stream Buffer Zone Rule, documents related to attorney fee agreements, documents related to the November 2009 Advanced Notice of Proposed Rulemaking (ANPR), documents related to the decision to conduct a new Environmental Impact Statement (EIS), and documents related to the decision to expand scoping opportunities for the rulemaking effort. In addition, while the Department collected some documents responsive to the request regarding baseline parameters for EIS and Regulatory Impact Analysis (RIA) in response to previous requests in the Committee's April 1, 2011, letter regarding concerns about the contractors work and the Department's preliminary economic analysis, much of this request also goes beyond the scope of those previous requests made by the Committee. Because this request is outside the scope of previous requests, the Department has initiated a new search for responsive documents and is still in the process of identifying, collecting, processing and reviewing this material.

We believe that a briefing for Committee staff is the quickest and most efficient way for the Department to address the Committee's generalized concern in the manner in which the Department initiated the Stream Protection Rulemaking. In addition, in order to be responsive to the Committee's request, we are enclosing two *Federal Register* notices as well as two briefing memos the Office of Surface Mining Reclamation and Enforcement prepared for Department officials that explain the decisions to publish the November 2009 ANPR and to initiate a new EIS. We have redacted from the EIS memo a paragraph identifying the rule changes being considered. Those documents are on the enclosed CD, entitled "00035236\_Hastings\_002". We look forward to working with the Committee staff to schedule a time for this briefing and to

begin a focused process of accommodation based on the Committee's specific oversight interests and information needs.

Regarding the Committee's request about the settlement agreement, on January 13, in response to a January 5 email request, the Department provided Committee staff with the March 2010 settlement agreement regarding a challenge to the 2008 Stream Buffer Zone Rule and the two subsequent agreements for attorney's fees. As discussed with Committee staff in a telephone conversation on January 13, there have been no amendments to these agreements.

Communications with the plaintiffs regarding the Department's obligations under the March 2010 agreement took place primarily through approximately six oral status updates to the plaintiffs arranged by counsel at the Department of Justice, with participation by DOJ, DOI, and representatives of the plaintiff groups. Those updates occurred mostly by phone but do include two in-person meetings that took place on February 4, 2011, and April 18, 2011.

With regard to requests for baseline parameters for the RIA and EIS, the Committee is requesting pre-decisional, deliberative material regarding the development of the Stream Protection Rule and supporting documents and, as such, this request implicates the heightened Executive Branch confidentiality interests the Department has articulated at length in earlier letters including our letter of February 2, 2012, and in telephonic discussions with Committee staff. As described in that letter, to the extent such deliberative material was articulated, in the form of concerns about the contractors' work, in the preliminary draft EIS chapters that were disclosed without authorization, the Department has provided that material with surgical redactions in order to in order to accommodate as fully as possible the Committee's legitimate oversight interests and has requested the Committee not disclose this material outside the Congress. We continue to review and will provide additional documents that fall into this category but, as we do so, we will continue to surgically redact information that protects the heightened Executive Branch confidentiality interests. To the extent those deliberations are not linked to concerns with the contractor's work, as stated in the Department's February 2, 2012, communication to the Committee, the Department believes the request may inappropriately intrude upon the Executive Branch's constitutional authority to execute the law through this ongoing rulemaking process.

We also take this opportunity to more fully describe the categories of materials the Department has not provided to the Committee and the interests the Department believes are implicated by those materials. As we have articulated now in several previous communications, the Executive Branch has well-established confidentiality interests regarding its internal deliberations which 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. The Department has not provided the Committee with documents in the following four categories because they implicate these interests with respect to the ongoing rulemaking process: preliminary drafts of the EIS beyond those disclosed without authorization nor drafts of the proposed rule; inter and intra-agency communications regarding work on the ongoing development of the Stream Protection Rule; and documents related to preliminary economic analysis.

While the Department has provided to the Committee deliberative material regarding its concerns with the contractor's work on preliminary draft chapters of the EIS, because of implications for the same Executive Branch confidentiality interests, it has not provided material in those documents that reveal the scope or content of the draft rule itself or the scope or content of the RIA, as both documents are not yet complete and have not been disclosed. In addition, the Department has not produced to the Committee documents that reveal the scope or content of the RIA. The Department has not produced to the Committee documents that contain material regarding concerns about the legal adequacy of the contractor's work on preliminary draft chapters of the EIS or material regarding the Department's rights under its contract with the company that conducted this work because, in addition to containing deliberative material, those documents also contain attorney work-product and/or attorney-client privileged material.

Although we have not produced to the Committee high-level deliberative documents regarding the decision-making regarding the contractor, we have twice offered the Committee staff the opportunity to review those documents *in camera* and look forward to a response regarding that offer. The Department believes the material provided and offered for review should meet the needs of the Committee to understand the substantive concerns with the contractors' work as well as the Department's position that ending the contract early was in its best interest.

It is our intention to continue to work to satisfy the Committee's information needs in a manner that respects the Department's confidentiality interests in its deliberations. The Department looks forward to continued communication and cooperation with the Committee.

If you have any questions or need additional assistance, please do not hesitate to contact me at (202) 208-7693.

Sincerely yours,



Christopher J. Mansour,  
Director, Office of Congressional  
and Legislative Affairs  
U.S. Department of the Interior

cc: The Honorable Edward Markey  
Ranking Member

The Honorable Doug Lamborn  
Chairman, Subcommittee on Energy  
and Mineral Resources

The Honorable Rush Holt  
Ranking Member, Subcommittee on Energy  
and Mineral Resources