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

May 10, 2012

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Mary Kendall
Acting Inspector General
U.S. Department of the Interior
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Dear Ms. Kendall:

Thank you for meeting with me recently to discuss your response to the April 12, 2012 subpoena for documents related to the Office of Inspector General's ("IG") investigation into the May 27, 2010 Department of the Interior ("Department") report entitled, "Increased Safety Measures for Energy Development on the Outer Continental Shelf" ("Drilling Moratorium Report").

The moratorium – inserted into a technical safety report by political appointees during the middle of the night without any scientific justification – has caused significant economic hardship and decreased oil and gas production from the Gulf of Mexico region for which no one has been held to account.

Members of the House Committee on Natural Resources called upon your office in July 2010 to conduct a thorough and independent review of circumstances surrounding the Drilling Moratorium Report and how it was drafted and then edited in a manner that misrepresented independent engineers had peer reviewed and supported the drilling moratorium when in fact they did not.

Documents recently obtained from your office raise serious questions about the thoroughness and independence of the IG's investigation, including whether the lead investigators were able to obtain, or were directed not to obtain, all internal Department documents necessary to independently confirm witness statements and other facts at issue in the investigation, as opposed to only a select few documents provided by the same senior Department officials subject to the investigation or publicly available documents. This approach seems in direct contrast to how the IG handled similar high-profile investigations of alleged scientific misconduct in the previous Administration.

Secretary of the Interior Ken Salazar stated in a November 9, 2010 letter to you that the report "confirms there was no wrongdoing or intent to mislead the public." However, the IG's November 2010 report confirmed that White House officials were involved in editing the report

and were responsible for the incorrect peer review language but did not address the central question of whether the peer reviewer's role was intentionally misconstrued to mislead the public and provide cover for the moratorium.

Notwithstanding its apparent shortcomings, the IG's November 2010 report has been used by the Department to justify its refusal to provide documents that would allow Congress to evaluate for itself the circumstances surrounding the editing of the Drilling Moratorium Report and the imposition of the moratorium.

After more than a year of trying to obtain documents from the Department, much is still unknown about these events. The Department has consistently refused to release drafts of the Drilling Moratorium Report or internal documents between the senior Department and White House political appointees who were involved in editing the Drilling Moratorium Report. The Department has never disclosed – either to the IG or to Congress – the internal Department emails surrounding the edits to the Drilling Moratorium Report.

Although the IG has provided internal documents from the lead investigators, and is expected to soon provide additional documents concerning its November 2010 investigation, the IG has not provided the Committee with certain documents obtained by the IG during its investigation, including copies of emails with White House officials and drafts of the Drilling Moratorium Report, pursuant to a vague claim of confidentiality by the Department's Solicitor's Office.

This lack of responsiveness and transparency about what really led to the moratorium and the incorrect peer review language necessitated the issuance of subpoenas to both the Department and the IG. I am deeply frustrated by the Department's – and now the IG's – reliance on vague and unsubstantiated claims of confidentiality as justification to refuse to comply with these duly issued and authorized subpoenas.

Your April 18, 2012 letter states that the IG and the Department have developed a protocol whereby the IG consults with the Department before releasing any Departmental information and the IG will agree not to disclose information that the Department has claimed as confidential or privileged.

Your letter states this arrangement helps to ensure Departmental cooperation with IG investigations, notwithstanding your authority under the Inspector General Act ("IG Act") "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available" to the Department. However, documents obtained from your office suggest the IG's lead investigators were unable to access all Department documents and officials they felt necessary to pursue a thorough and independent investigation, even with this agreement.

As explained at our meeting, this arrangement has significant potential for abuse without any apparent institutional controls and could be used by the Department to shield wrong doing from public disclosure and transparency.

According to information provided by your office, the IG apparently has not received from the Department a specific assertion of Executive Privilege for the documents at issue –

either before or since the subpoenas were issued – just a generalized claim from the Department’s Solicitor’s Office in September 2010 that it would assert common law “privileges and withhold these documents from disclosure under Exemption 5 of the Freedom of Information Act [(“FOIA”)] as well in response to discovery requests in litigation.” I am troubled that, out of deference to vague and unsubstantiated confidentiality claims by the Department from 2010, and absent a valid claim of Executive Privilege, the IG will not provide certain documents even after receiving a Congressional subpoena.

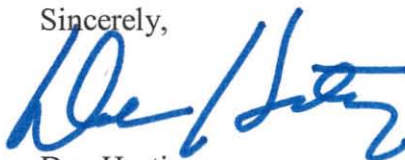
This arrangement also appears to undermine the IG’s independence as envisioned by Congress with the Inspector General Act. I understand, based on our meeting, that your staff negotiated with the Department to obtain access to certain documents as part of the IG’s investigation and the Department provided documents with the expectation that the information was to be kept confidential.

Your April 18 letter claims that nothing in the IG Act authorizes an IG to waive any privileges asserted by a department of the Executive Branch. However, nothing in the IG Act allows an IG to withhold information from Congress. In fact, this arrangement directly contradicts with the IG Act, which states, “nothing in this section or in any other provision of this Act shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof.” Further, the FOIA prohibits withholding exempt information from Congress, see 5 U.S.C. § 552(d), and you agreed at our meeting that the IG regularly provides FOIA-exempt information to Congress and would do so in the future.

Finally, any suggestion that the IG cannot provide this information to Congress because to do so would waive privileges asserted by the Department is unpersuasive and not a valid legal basis to refuse to comply with a Congressional subpoena. First, a formal assertion of privilege has not been made for these documents. Second, the disclosure of privileged, FOIA-exempt information to Congress is not a waiver of such privileges or exemptions and would not prevent an agency from withholding the documents in response to future FOIA requests. See *Murphy v. Department of the Army*, 613 F.2d 1151 (D.C. Cir. 1979).

Absent a legitimate assertion of Executive Privilege, I see no justification for the Department or the IG to refuse to comply with a duly issued and authorized subpoena based solely on the confidentiality claims articulated to date. Given the significance of the harm caused by the moratorium and of the questions raised by the IG’s investigation, it is important that Congress and the American public have a full accounting from the IG and the Department into the circumstances surrounding the Drilling Moratorium Report.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doc Hastings", written over a white background.

Doc Hastings
Chairman