

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

INTERVIEW OF: CHARLES R. "CHIP" SMITH (PART 2)

Friday, February 19, 2016

Washington, D.C.

The interview in the above matter was held in Room 6410, O'Neill

House Office Building, commencing at 10:06 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

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Mr. Kerner. So, Mr. Chip Smith, thank you for returning. This is a continuation of a previously started transcribed interview, and we would like to thank you for coming back. As you know, the committee is investigating the development of the Waters of the United States rule. And so we appreciate you coming back here today.

Could you please state your name for the record one more time?

Mr. Smith. Yes. Charles R. Smith, and I go by "Chip."

Mr. Kerner. Thank you, sir.

And on behalf the Committee on Oversight and Government Reform, I want to thank you for coming. My name is Henry Kerner.

This might be a good time for everyone just to go through and to introduce ourselves officially, so we'll start on our side. I work for Chairman Chaffetz.

Ms. Aizcorbe. Christina Aizcorbe. I'm with Chairman Chaffetz.

Mr. Hambleton. Ryan Hambleton, majority staff.

Ms. Berroya. Meghan Berroya. I work with the ranking member.

Mrs. Bamiduro. Portia Bamiduro, also with the ranking member.

Ms. Fraser. Beverly Britton Fraser, for the ranking member.

Mr. Burns. And Sean Burns with the ranking member.

Mr. Kerner. Okay. Anybody else?

Ms. Weis. Megan Weis, Army Office of General Counsel.

Mr. Kerner. Okay.

You already know the rules. You know about the rounds and all that. So I'm not going to go over all that again since you've already been through this.

I would like to emphasize, one thing that is very important is we're trying to get as clean a record as possible. So to the extent that when, obviously, for the purpose of the reporter, if you're asking questions and you're responding, let's just try to make sure that, you know, only one person at a time is talking and we don't have a lot of crosstalk. That would be good.

I want to remind you that once again today -- the interview is not under oath, but, by law, you are required to answer questions from Congress truthfully, and that includes congressional staff. Do you understand that?

Mr. Smith. I understand.

Mr. Kerner. Okay. And witnesses that knowingly provide false testimony could be subject to criminal prosecution for perjury or for making false statements. Do you understand that, as well?

Mr. Smith. I understand.

Mr. Kerner. Is there any reason you are unable to provide truthful answers to today's questions?

Mr. Smith. No reason.

Mr. Kerner. No reason.

Okay. I think that ends anything on me. Do you guys have anything?

Ms. Weis. I just want to note for the record that the witness is here to testify to what he knows and not represent any official Army or DOD position.

Mr. Kerner. Very good.

Portia or Meghan, anything?

Mrs. Bamiduro. Nope.

Mr. Kerner. All right. For the record, it is 10:09. We will go to 11:09 and then take a 5-minute break. Christina will start for us.

EXAMINATION

BY MS. AIZCORBE:

Q Hi, Mr. Smith. The last time you were here, I did not get a chance to ask you questions regarding your involvement with the rule's NEPA analysis, so we'll begin there.

As you previously informed the committee, you drafted an environmental assessment for the final draft rule. Did you include a recommendation in the draft EA?

A Yes.

Q And what was that recommendation?

A To do an environmental impact statement.

Q You also provided that for a period of time you were unable to make progress on the EA because you were waiting on key documents from the EPA. Is that correct?

A That is correct.

Q And could you explain what those documents were?

A The economic analysis, which would have informed the environmental assessment in terms of benefits and costs; the results of any tribal consultation. Those are the key documents.

Q You also informed the committee that, unlike the proposed

rule, the final rule met the threshold for an EIS because of last-minute changes to the rule. Is that correct?

A That's correct.

Q Craig Schmauder informed the committee that your draft EA did not include any analysis or any recommendation for an EIS. Is that an accurate characterization of this EA?

A No.

Q And why would you say no?

A I specifically wrote, I recommend we do an environmental impact statement because the last-minute changes to the rule adversely affect the quality of the human environment.

Q So you would say that your EA that you drafted did include analysis?

A Yes.

Q He further provided that the reason that the Army needed to conduct a second EA was because you would not have finished your draft. Is that your understanding?

A No. That is not correct.

Q And why would you say that?

A I was prepared to finish the environmental assessment, but I was told that, since my answer was not what the Administrator of EPA wanted, I would not be allowed to finish it.

Q And who told you that?

A Let Mon Lee.

Q And Mr. Lee was holding what position with the Army?

A He's an Acting Deputy Assistant Secretary for Policy and Legislation.

Q And so you were given no opportunity to finish your draft?

A I was given no opportunity to finish the draft. I was given no opportunity to brief either Mr. Schmauder or Assistant Secretary Darcy to explain my conclusions and discuss the results.

Q So after Mr. Lee informed you that your recommendation did not comport with the EPA Administrator's wishes, you took no other action or no further action with respect to the EA?

A Correct.

Q Mr. Schmauder went on to say that you told your boss, Mr. Lee, that you could not recommend a FONSI, as you mentioned, because of the Peabody Memoranda, not because of changes made to the rule. Was your decision based on the memoranda or because of those changes that you refer to?

A My decision to recommend an environmental impact statement was based solely and entirely on my personal assessment of the final changes made to the rule, not on the Peabody Memorandum, although I did read them and I did consider them.

Q And what was Mr. Lee's reaction when you went to speak to him about your recommendation?

A He thanked me for doing the job and said he would report to Assistant Secretary Darcy. And then several days later I was told that I would no longer be working on it.

Q Mr. Schmauder also informed the committee that the decision

to conduct an EA FONSI was predetermined because the EA made a FONSI in the proposed rule. Who conducted the draft EA for the proposed rule?

A Could you repeat that question?

Q Sure. Mr. Schmauder also informed the committee that the decision to conduct an EA FONSI was predetermined because the EA made a FONSI in the proposed rule. So the analysis that was included in the proposed rule gave Mr. Schmauder some belief that the EA at the final rule stage would make a FONSI.

Mrs. Bamiduro. Excuse me. I don't think that's what Mr. Schmauder said.

Ms. Aizcorbe. You can address that in your hour. Thank you.

Mrs. Bamiduro. I want to be clear for the record that that's your characterization of Mr. --

Ms. Aizcorbe. Thank you.

Mrs. Bamiduro. -- Schmauder's testimony.

Ms. Aizcorbe. Thank you.

Mr. Smith. Rather than get wrapped up on the controversial statement by Mr. Schmauder, under the law, the National Environmental Policy Act, you do not pre-decide the outcome of a FONSI or an EIS. You do your environmental assessment, and, based on your assessment, you can make the choice. So it would not be correct, in accordance with the law and regulations, to predetermine an outcome to an environmental assessment.

BY MS. AIZCORBE:

Q You mentioned when you were last here that Mr. Schmauder

referred to the EA as the EA FONSI. Is that correct?

A Correct.

Q Did he ever respond as to why he was using that terminology?

A I would correct him at every chance I got in meetings, and he would simply say, "It's my expectation this will result in a FONSI."

Q Was anybody else from the Army involved in drafting the EA before Mr. Owen was brought on board?

A I was the principal author. And as I think I previously testified, I get two detailees for 5 months every year, so I get two a year. For the last 4 years, all the detailees helped me with the environmental assessment as we moved it along apace with the rulemaking process.

So there were 10 people there. And I also coordinated it with Corps headquarters staff -- the chief, Jennifer Moyer; her principal person, technical person, Stacey Jensen. And so, in total, I would say there were probably a dozen people who had input or reviewed and commented, and then I adjusted accordingly.

Q Is it fair to say, as the principal author, you had an intimate knowledge of what data the analysis depended on in order to substantiate the FONSI or recommend an EIS?

A Yes.

Q Was Mr. Schmauder involved in the development of the EA?

A No.

Q Mr. Schmauder informed the committee that he was involved in the rulemaking from a legal and policy perspective but not from a

technical or scientific perspective. In your opinion, would he have enough familiarity with the science to determine the accuracy of your recommendation to pursue an EIS?

A No.

Q We understand that Gib Owen, a gentleman who had no prior experience with the rulemaking, was then brought on to complete the second EA. Is that correct?

A Correct.

Q To your knowledge, had Mr. Owen ever executed an EA or other NEPA compliance documents?

A I do not know.

Q Do you know whether Mr. Owen was trained or coached on how to execute this EA?

A I do not know.

Q To your knowledge, was he ever told to make a FONSI?

A I did not hear anybody tell him to do a FONSI.

Q Mr. Owen was brought on after you were supposed to turn your EA in around April 27, 2015. Is that correct?

A Please restate that date.

Q Sure. We understand that you were supposed to deliver or submit your EA around April 27, 2015, and that Mr. Owen was brought on after that date. Is that your understanding?

A That's correct.

Q The rule was submitted to OMB for interagency review on April 6, 2015. Can you explain why it was submitted to OMB before the

EA was completed?

A I can't explain it.

Q Is that typical procedure in a rulemaking?

A No.

Q Are you aware of whether OIRA expressed concern about not having the completed EA or EIS at this time?

A No OMB staff member said anything to me one way or the other.

Q And you're not aware if those conversations were happening anywhere else?

A I do not know.

Q At that time, were you still engaging with OIRA or OMB in any way?

A Up until the 27th, when I turned in my draft, I had contact with OIRA staff to make sure I was not doing anything they thought might be faulty. And my last conversation was that things seemed reasonable.

Q Did you have any communication after you turned in your EA?

A I did not.

Q In fact, this timeline means that Mr. Owen had less than a month to complete his EA before OMB finished its review on May 26, 2015. You previously informed the committee that you believed it took Mr. Owen only 1 week or 2 to complete the EA. In your experience, how long does the execution of a NEPA analysis usually take?

A That's a pretty broad question because it depends on if it's a permit or -- a small permit, large permit, or a project. But the quickest is usually 3 or 4 months, and the longest can be a year or

2 years. So for something of this scope, it would not be unusual for it to take a year.

Q And that would be for someone who has experience or expertise in the rulemaking or the permit itself?

A Correct.

Q To your knowledge, did the Corps have any deadlines to produce or deliver the EA?

A I personally had a deadline to get it done before the end of April so that the final rule could be promulgated in -- I believe May was the goal, which I met by turning my draft in on the 27th to obtain guidance on how to proceed.

Q And who set that timeline or that goal?

A The Administrator of EPA is what I was told by Craig Schmauder and Greg Peck from EPA.

Q Mr. Schmauder told the committee that at no time did you ask to return the draft EA to the Corps. You previously stated that you had a discussion with Major General Peabody around March of 2015 to return the draft assessment since the Corps typically conducts the assessment, but that Mr. Schmauder instructed you to keep it.

Can you elaborate on your conversation with Mr. Schmauder about returning the EA?

A In fact, I have several emails in my files, which were turned over to Army General Counsel as part of probably your FOIA here, specifically to General Peabody saying, now that I'm busy and you're done with the other rulemakings you were working on, could you, because

you have more staff, take this back? It's more appropriate that the action agency do it. I was doing it as a courtesy to help out.

General Peabody wrote back an email and said, absolutely, happy to do it, thanks for taking it this far.

So, before I could do that, I had to tell Let Mon and Craig Schmauder and make sure they were comfortable with that. And Craig's response back in writing was, Chip, keep -- to Let Mon was to recommend Chip keep it. He did not really give a reason, as I recall, but, again, the email is in the file, in the record. But he specifically communicated to keep it.

Q Do you have any suspicion of what that reason might have been even though none was communicated to you?

A "Suspicion." That's a speculation.

Q It is. It is. So if you don't have any opinion or thoughts on it, don't feel like you have to fabricate one. But if you did --

A Well, I'm not fabricating an opinion. It's consistent with the pattern of all of my testimony to this point. It was a way of controlling the process and the outcome.

Q And by "controlling the process and the outcome," you mean that that decision and analysis stay housed with the Army instead of the Army Corps?

A Correct.

Q You mentioned in your discussion with the committee earlier that there had been a counsel change in the course of deciding who would draft the EA. Do you recall what that reference was to or whom it was

to?

A Please restate that. What change?

Q Sure. When we were discussing earlier the change of your drafting the EA to Mr. Owen drafting the EA and whether you were going to return it, you mentioned there was a counsel change. And I was just wondering if you can recall what you were maybe referring to.

A Boy, I don't. I'm sorry. I don't remember a counsel change.

Q That's fine. It was just a clarification question.

A Yeah. I'm sorry.

Q How did you learn that an EIS would not be pursued?

A I turned my EA in about 3 days later. I was told I'd no longer be working on it. I said: Okay. I would be happy to provide you, Let Mon Lee, a list of qualified regulators, and if my opinion is a problem, you could ask the chief of regulatory, because I think it's critical that if another NEPA document is done that a regulator do it.

And I was not taken up on the offer. Fine. And then I learned that Gib Owen was going to take it over. And the way I learned that is he came and got the box of my files and took my files to his office. And then that was my signal I was done.

Q Would you have included Mr. Owen on your list of recommendations to Mr. Lee of qualified regulators to complete the NEPA analysis?

A No. He's a planner with no regulatory experience, to my

knowledge.

Q Do you know whether Mr. Owen relied on or used your analysis in his?

A I have no idea, and I have not read his document.

Q Okay.

Did you discuss the decision not to pursue an EIS with Mr. Schmauder?

A Yes.

Q And what was the nature of that conversation?

A I recommended preliminarily a couple times, I believe in email and verbally, that that's where I was headed. And there really wasn't much discussion.

Q He didn't have any reaction when you told him that --

A I think the expectation was I would find a way to get to a FONSI. And I think there was probably some surprise that I recommended an environmental impact statement.

Q Had you previously recommended a FONSI?

A To what?

Q With respect to the rulemaking in any way?

A I did not previously recommend either a FONSI or an EIS up until about the 27th of April when I turned my draft in. Before that time, I still had both options on the table.

Early on in the process, when the rule looked like there would be no adverse affects on the quality of the human environment, I was leaning towards a FONSI. But then, as things changed -- I then had

two paragraphs. I had one for EIS and one for FONSI, which is not uncommon when you're drafting. And while I watched the state of play, I made adjustments.

And then, in the run-up to the final rule, I took the FONSI option out of my draft and moved forward with the EIS recommendation based on changes made within the last 6 weeks.

Q So when you say you were leaning towards a FONSI, was that before you received the key documents from the EPA?

A Yes.

Q Did you discuss the decision not to pursue an EIS with Ms. Darcy?

A No. One thing I will say that's unusual, typically for something as important as this and a generational rule, as it's been characterized, senior policy staff brief the Assistant Secretary, state their case, receive their guidance, and then you march. In this case, I was not asked to brief the Assistant Secretary or Mr. Schmauder and explain my findings. I was simply removed.

Q And would you say that that's an important part of the typical rulemaking process because it involved a key policy decision? Or because it would extend the timeline of the rulemaking and that would have implications? Or why would you consider briefing the Assistant Secretary on something like this to be an important part of the rulemaking?

A Well, this is the most important rulemaking we've done in 20 years, according to both the Corps and the Army and testimony that

I've heard the Administrator and Assistant Secretary make to Congress. And so it would, in my mind -- I mean, it's very unusual that a senior policy person would not brief that to the political appointee leading the agency. I routinely brief on NEPA documents for projects, permits, impacts of an acre, a tenth of an acre. And here we have implications for millions of acres, and there was no opportunity to brief. So that was unusual.

Q Do you know whether Mr. Owen briefed the Assistant Secretary on his recommendation?

A I do not know.

Q Based on the decision not to pursue an EIS and the process engaged with making the FONSI determination, do you believe that the agency's complied with NEPA in this rulemaking?

A I think that's a legal question I'm not sure I can answer. I believe I complied with NEPA, followed the law, the regulations, the guidelines and policies and prepared a draft that I still stand behind today.

Q Were you ever told in any way or feel pressured to avoid the completion of an EIS or the recommendation to complete an EIS?

A We were reminded -- "we" -- I was reminded by both Mr. Schmauder and Mr. Peck in our gang-of-eight meetings that a FONSI was expected; it was important that we keep things moving. And it was sort of unspoken that a recommendation for an EIS would adversely affect the schedule because that would take a couple of years.

Q Was it also discussed as to whether an EIS or not doing an

EIS would affect the substantive portions of the rule or justification for the rule? Or was their concern simply timing?

A My concern was timing and substance. Because when you do an EIS, you do robust predecisional public consultation, you do scientific studies as necessary, you evaluate data, you consult with tribes, and you do a more robust economic analysis and collect information to inform development of options and alternatives, selection of an option, which would be different kinds of rules, and then inform the final rule.

So, in my mind, it was very important because of the uncertainties about data, in my view, the lack of the science we needed to support all of the aspects of rule, the fact that we did no tribal consultation, I thought an environmental impact statement was the correct, under NEPA, finding.

Q You've stated on several occasions that you understood that the administration's goal was to do an environmental assessment and make a FONSI. How did you come to this understanding besides these team-of-eight meetings? Was it discussed to you with anybody else?

A Throughout the 6-year process that I was involved in, discussions generally with as many as 30 people were that, because the goal of the rule was to expand jurisdiction to the maximum extent allowable by law and Supreme Court decision, it would be a benefit to the aquatic environment, and, therefore, it was likely that a FONSI would be appropriate.

Q We previously spoke about your change in duties during the

course of the rulemaking, specifically that Ms. Darcy removed you from working on the rule and clean water issues. You mentioned that part of her reasoning for your removal was your recommendation of an EIS instead of a FONSI. How did Ms. Darcy communicate this specific justification to you?

A She told me in a face-to-face meeting in July -- the date escapes me. Maybe it was early August. It might be in my earlier testimony. It was the second face-to-face I had -- that she was disappointed in my recommendation and she had lost confidence in my ability to support her position on the rule and that the rest of my portfolio would remain the same but I would not work on the rule or its implementation.

Q You also said that part of her reasoning was because you raised issues of science and economics in the run-up to promulgation of the final rule. What gave you that impression?

A The four times we were given the opportunity to brief the Assistant Secretary, we would bring up issues and we would not receive guidance or follow-on support to have the issues addressed. And we would hear primarily, though, from Mr. Schmauder, who would say that he and EPA had discussed the issues and made the decisions and we need not worry further about our science or economic concerns.

Q So a lot of this, it sounds like, is coming from your observation that your recommendations were not being taken into consideration. Would that be a fair characterization?

A Yes.

Q You informed the committee that after Ms. Darcy took this action your salary level and grade level did not change. Did you experience any other type of change after Ms. Darcy took the action?

A Performance rating.

Q And --

A I've been in the Assistant Secretary's office since 1996, so I've been rated -- however many times that would be. Nineteen? Nineteen times. Somebody can do the math. And all of my ratings but two have been the highest possible. We have a scale of 1 to 5, 5 being exceptional. And all but two were exceptional. And the two that were not exceptional, down to a 4, pertained to this rule.

One was 3 years ago when EPA -- Nancy Stoner and Greg Peck complained to Principal Deputy Rock Salt that the Corps and myself were too difficult to work with because we asked questions of science and economics. And so I got dinged for not being as collegial as I could be with EPA. And then this last rating period, Ms. Darcy dropped me down one, and I asked Let Mon, why did this happen? And the response was, because of the EIS recommendation.

Q That's what Mr. Lee told you?

A Yes.

Q Did he tell you that --

A I wasn't allowed to discuss it with her.

Q Did he tell you that in a face-to-face meeting?

A Face-to-face, standing in the hall, yes.

Q Did you speak to anyone else about your ratings?

A By "anyone else," who do you mean?

Q You didn't take any followup action to have the ratings reviewed or otherwise discuss them with leadership at the Army or any other entity?

A I did talk to EEO. I talked to a whistleblower counselor. I talked to two private attorney firms in Alexandria. And after consulting with those people and senior leaders whose opinion I respected, I decided to let it go because the common advice is you may win the battle but you'll lose the war, they'll rip you to shreds.

Q I'm sorry to hear that.

Would you consider Ms. Darcy's action to be retaliatory for the work you did on this rulemaking?

A Yes.

Q When were you notified of your relief of duties? You mentioned a few meetings face-to-face that you had with Ms. Darcy. Were there any other occasions?

A Two meetings. The first was right before I went on vacation, which was over the Fourth of July holiday, and I took about 10 or 11 days. So I met with her just before vacation, and I thought the meeting went well. As I previously testified, I said: Ma'am, the rule is done. It's history. I stand ready to support it, do everything I can to implement it, improve relations with EPA and get this job done. I went off on vacation -- oh, and we shook hands.

I went off on vacation and then came back and was called in this time -- first meeting I requested -- I was called in for the second

meeting, probably in the 20s in July, I'm not sure the exact date, and was basically told that I was being taken off the Clean Water Rule. I would not be the senior policy person. All the rest of my duties would remain the same.

And the reason was she lost confidence and that she felt betrayed. And while she may not have specifically said -- I don't recall -- because of the EIS, it was clear that's what she was talking about.

Q Was any of this in writing?

A Yes. I asked her to put it in writing. And about 5, 6 weeks later, I'm sure with advice of counsel, a memo was generated. I have that in my file. I have not turned it over for FOIA because it hasn't been asked for and it's a personnel matter. It's not part of the rulemaking process, but it is in writing.

Q Have you resumed work on clean water issues and the implementation of this rule?

A Yes.

Q And when were you allowed to resume your normal portfolio?

A Well, with the rule being in court and stayed, there really isn't anything happening. So I have worked with the Corps independently to make sure that all of the things we need to do to tee up success if and when the court lifts the stay are in place. And that's training, reviewing Q&A's, talking about key issues and how we might resolve them.

So I have not been formally told by anybody to get back in, but once this rule goes final, if it does, if the court lifts its stay,

I need to be in a position to serve. So I'm keeping myself engaged, informed, educated, and doing everything I can to tee up the Army for success.

Q Was it your understanding from your communications with Ms. Darcy that you would be able to resume your normal portfolio after the rule's promulgation?

A It was my understanding after my first meeting before the Fourth of July holiday I would. And then 2 weeks later, I was told, no, you're removed.

But then over the last few months there's just been very little attention on it in our office because it's stayed, so I've just done my usual thing with the Corps. We work as a team and do everything we can to make sure we're ready to promulgate if and when it gets out of the court.

Q Are you aware of any duty or personnel changes made of other staff involved in the rulemaking?

A I'm aware of none.

Q In our last interview and today, you've spoken a bit about your involvement in tribal affairs and experience and expertise with conducting tribal consultations for the Army and the Corps.

You also stated that you agree that the agencies did not fulfill their tribal consultation obligations for WOTUS under Executive Order 13175. Is that correct?

A Correct.

Q You are the tribal liaison for the Army, correct?

A Army Civil Works.

Q Could you remind the committee approximately how many tribal meetings you would normally conduct or delegate in the course of a consultation for a rulemaking?

A I might meet with several dozen tribes personally. I would make sure that all 38 districts, all 8 divisions reached out to the 567 federally recognized tribes in their area of responsibility geographically and offer coordination and consultation meetings. And we would typically provide read-aheads, talking points, consultation protocol tips. And that's how that would occur. It did not occur in this case.

Q So, at some level, some communication would be made to every tribe is what you're saying.

A Correct.

Q You informed the committee that it is your opinion that this rule would have an impact on tribes. When you made this statement, were you referring to the type of impact contemplated under that Executive order?

A Yes.

Q Mr. Schmauder informed the committee that he believes some tribes were contacted during the rulemaking through general outreach meetings, webinars, and the like. Are you aware of whether any of those tribes indicated that the rule would not have an impact, as that specified under Executive Order 13175?

A No, I'm not aware.

Q Would you consider informal outreach meetings and webinars or other group meetings to satisfy the type of meaningful predecisional consultation that would satisfy the Executive order and other legal obligations of the rulemaking agencies?

A No. The Army course we teach specifies face-to-face, government-to-government consultation between district engineer and chairman, chief, Governor, or President. Informal communications, letters, Webinars, are not consultations; they are education tools. And all of this needs to be predecisional, not after rules are promulgated.

Q In your experience with these tribal consultations, would you say that it would be an acceptable or typical practice of any other agencies to engage in these types of group meetings or informal activities to satisfy their obligations under the Executive order?

A Yes.

Q Which agencies would typically do that?

A I've written -- I'm sorry. I have read policies from EPA, Department of Energy, Department of Transportation, HUD, BIA, and U.S. Fish and Wildlife Service.

Q And just so I understand your answer, you would say that those consultation guidance or their policies would allow these agencies to engage in broader general meetings instead of one-on-one like the Army --

A Oh, I'm sorry. No. I misunderstood your question. All of those policies that I have read for those agencies stipulate

predecisional consultation or at least the offer. And if a tribe declines, that's fine, but you at least ask the question. And if a tribe says, yes, I'd like to consult, then you have a consultation meeting. I misunderstood what you asked and --

Q It's okay. Let me clarify again just to make sure we're clear.

A Yeah.

Q So you would not say that the type of process that it sounds like EPA may have engaged in would be typical or normal of any agency conducting consultations under the Executive order.

A Right. Nor is it consistent with our own written policy.

Q Would you have any reason to believe that OIRA would consider that to be satisfactory of the Executive order or the analysis required in a proper rulemaking?

A I don't want to answer for OIRA and the administration.

Q Have you spoken with or heard from any tribes about this rulemaking since promulgation?

A Yes.

Q And what has been their input?

A Ms. Darcy and I traveled to the Navajo Nation 2 weeks ago. We spent 3 days there. We attended a council meeting. We prepared talking points for her generally on the Corps of Engineers and things we do for the Navajo Nation.

It was a full council meeting. So it's kind of like one of your Senate rooms with all those chairs or House -- you know. So there were

probably 50 tribal members there.

And one council member stood up and said that the WOTUS rule adversely affected tribal sovereignty, it adversely affected tribal resources, that they had not been consulted with, and that the Navajo Nation viewed it as an abrogation of their sovereignty. And he spoke for about 15 minutes.

Q And these council members, just so we understand, do they represent individual tribes within the Nation? Or how large of a group would he be speaking for or she be speaking for?

A The Navajo Nation has an elected president, and they have, I think, 121 -- think of them like parishes in the South. I forget the actual name for them, but they're like clans. They're all elected. They're all part of the federally recognized government. And this fellow represented one of the districts as part of the Navajo Nation government.

Q Did you speak with or hear from any tribes about this rulemaking before the rule's promulgation?

A I did not speak with any as a coordination consultation as we ordinarily would. And the reason, I think I previously testified, is we did not write the rule and we didn't have the pen, and so we really had no reliable or sound basis for consulting. We had a moving target that we didn't control. And I wasn't going to put the Army's reputation on the line to try to consult on a rule that we, frankly, didn't know what the content was from day to day.

Q What was the purpose of your trip to the Navajo Nation?

A It was to celebrate the success of a flood control project for, believe it or not, the Navajo Zoo. It's a zoo for injured and orphaned and damaged animals. They bring them back to health and then they return them to nature, so it's not the typical zoo that you would think of.

We provided some design work for them. We wanted to talk to them about how we might partner in the future under cooperative agreements and contracts. We talked about intern programs for Navajo children and other general issues. It was a collegial meeting full of partnership, other than the one incident at the council meeting that I spoke of.

Q And was there anything that precipitated this council member's comments?

A None. The president asked if members of council wished to speak, and I would say 15 took the opportunity to say one thing or another. And this particular individual decided to talk about the WOTUS rule.

Q You informed the committee previously that the Army and Corps have a large network of district offices who typically engage in consultations on the local level in certain rulemakings and that those staff have relationships with their local tribes.

Would you expect that, in the course of this rulemaking, these district staffs would have been notified or at least aware of such consultations if conducted by the EPA or Corps?

A Absolutely. They would have done it. And it was not done.

Q And, in this case, district staff did not conduct them and you were not notified that any of these were being conducted?

A Correct.

Q Do you know the name of the EPA's tribal liaison?

A I don't.

Q Okay.

In our last interview, we touched on the statistic that 117 million Americans will be without clean water without the WOTUS rule. You informed us that the number was not derived from the Corps but that the EPA and a couple of key environmental stakeholder groups were involved. Do you recall the name of any of these groups?

A I remember the name of Jan Goldman-Carter, and I don't know what group -- I can't remember if it's -- I can't remember which group she's part of, but that's one of the groups. Also, I think Earthjustice. Those are the two I remember.

And I think the important point is, even if the number is correct -- and we didn't think it was because there was no basis or data for it that we were given -- those waters are already protected today under the existing rules. It's just how we protect them changes.

So the way it was spun is incorrect. It's not true to say that without WOTUS 117 million Americans or any number of Americans would not have clean water. They're all protected today. What the rule does is it changes how we regulate ephemeral streams, intermittent streams, and isolated water bodies.

Q So you're saying that the statistic, in your opinion, is

misleading?

A Yes.

Q Did you discuss your concerns that you just expressed, about it not being true that these Americans had previously been without clean water, with anybody at the Army Corps or EPA?

A Yes. I did. The Corps did. Every time we got a draft that said that, we deleted it. And every time that happened, Craig and EPA put it back in. That was the message.

Q And did you receive any response as to how your recommendations for deleting that statistic were not adopted or why they weren't included?

A All we were told was that that's the message EPA needed to put out there to justify the rule, gain support, and make sure it didn't not get promulgated.

Q So, to your knowledge, the EPA nor anyone else followed your recommendation to strike that statistic from literature?

A Correct. And the entire Corps of Engineers. So there was several dozen of us. It wasn't just me that made that observation, edit, and recommendation.

Q You mentioned you saw the statistic in literature for the EPA and these groups. Do you remember the type of literature you were referring to?

A Web sites, talking points, PowerPoint briefings, congressional testimony, and their social media video that was produced a couple years ago are examples.

Q When you previously discussed the EPA's social media efforts, you said that it was communicated to you that these were educational in nature, or that was the purpose of a lot of these efforts. So you're telling us that in these media, you know, efforts, that this statistic was included in those so-called educational materials?

A Yes.

Q Okay.

In 2014, the EPA and Corps promulgated an interpretive rule pertaining to agricultural exemptions in Waters of the United States under the Clean Water Act but withdrew the rule shortly thereafter.

Do you know why the agencies decided to pursue this interpretive rule?

A EPA told us -- and by that, I mean Greg Peck, and there were probably other staff; I think Ken Kopocis might have been there at the time -- that we needed to do something to get support of ag or we'd never get the rule out and that they thought one idea would be to come up with this interpretive rule and declare that National Resource Conservation Service conservation practices were exempt from 404 permitting.

My response is, you know, you're in charge of exemptions, EPA. Fine. Are we going to do some studies on these and find out what the effects are on the landscape? Because the conservation practices are conservation of farmland, not conservation of aquatic resources. That's a huge difference.

The Corps and I pointed out and showed data and maps that at least

a dozen of the 56 practices that were ultimately determined exempt by EPA we've been regulating for 20 years, and we require extensive compensatory mitigation because they have adverse effects on the aquatic environment.

And we briefed Ms. Darcy on that, we briefed Craig Schmauder on that, and ultimately we were told the decision was made that we were going to promulgate the interpretive rule, that was EPA's authority and responsibility, and that we would implement it. And we did. We did the best we could to implement it.

Q Did you also share these data and maps and concerns with EPA?

A Many times.

Q Okay. And what was their response?

A We would argue about the maps or where the lines were. They would question whether they were correct. We would explain they came straight from our districts and that, frankly, we presented them examples where our districts had wavered as to not assert jurisdiction over some of these lands, only to have EPA staff locally come in and say, of course you are, and you're going to require mitigation.

So the entire interpretive rule, not only was it not science-based, it flew in the face of 20 years of regulatory practice.

Q Do you know what science it was based on?

A There isn't any.

Q Because it doesn't exist or because it was not used?

A It doesn't exist for purposes of 404 permitting. USDA and

NRCS may have done some science on what I call the conservation practice of farmland, but that's not the same as impacts to the aquatic environment. That's entirely different.

That would entail going out, collecting data on projects we've authorized, say, over the last 5 years, seeing what the impacts are, and deciding whether we really should exempt them or not. But we did not do that.

Q So you're saying that a different set of scientific data was applied to justify this rulemaking than what the Corps and you believed would have been appropriate?

A Right.

Q And you did provide comments or recommendations on this interpretive rule. And you don't know whether they were considered or addressed?

A They were considered. We were told it was going to happen.

Q While originally intended to be a part of the WOTUS rulemaking, was any of this language included in the final rule, to your knowledge?

A Not to my knowledge.

Q Were any of your concerns memorialized in writing with respect to this interpretive rule?

A Yes. I have a file about this thick of comments, memos, maps, data, and then of course the usual stuff, the rule itself and talking points and that sort of thing.

Q And that reflects the information that was shared with the

EPA?

A Yes, or generated by them, or generated by NRCS. It came from Jordan Leonard or Patty Lawrence.

Q Did you ever meet with or speak to anyone at the USDA regarding the interpretive rule?

A Yes.

Q Who did you meet with? Do you recall?

A Jordan Leonard and Patty Lawrence were the two. And Terrell Erickson.

Q And what office are they with?

A Terrell is, I believe, an SES at NRCS. Jordan and Patty are, I think, USDA. But it's all part of, you know, the same agency.

Q Was anybody else present in these meetings?

A Yes. These meetings typically had 15, 16 people in them -- EPA, Army Corps, myself, Craig Schmauder. And we had broad discussions about this half a dozen times.

Q Were any action items or recommendations made as a result of these meetings?

A Most of the action was EPA's. We just waited to see what they wrote up and what they proposed. And then we did get to review things. Our fundamental issue, that a number of these conservation practices adversely affected aquatic resources and therefore should not be on the list and considered exempt, were not adopted. But EPA is the ultimate authority on exemptions.

Q Did you discuss its withdrawal with anybody at the Army?

A That decision was made at a level above me.

Q Did you hear any concerns about its withdrawal?

A No.

Q You previously mentioned that changes were made late in the rulemaking to appeal to concerns of the USDA and DOT but that the Army and Corps did not study those concerns, establish potential solutions, propose options, or brief principals on those changes. Are these all things that you would consider a necessary part of the rulemaking process?

A Yes.

Q Can you explain why this didn't happen with respect to these changes?

A We would have needed to stop and do some science and evaluate why for decades we had regulated certain ephemeral and intermittent ditches and other water bodies adjacent to farmlands and then suddenly pulled them out of the final rule without any scientific justification whatsoever. It was entirely a policy call.

Q And it was a policy call not because science wasn't required to move forward with it, or was there some other reason why you say it was a policy call?

A It was a policy call so the EPA could offer USDA something to reduce the burden of regulation on farmers, real or perceived, so that USDA would chop and let OIRA move the rule forward.

Q And it was EPA's belief that this effort to appeal to the farmers or ag community would allow the agencies to move forward with

WOTUS generally?

A Yes.

Q Okay. Was it also a matter of timing?

A It was tied up with the schedule and the desire to get this done in May. As I think I previously testified, there were a whole suite of regulations, I think many of which are now out on the street. And we were told they had a queue set up and they needed to keep the order going so that one didn't tromp on the other. And so schedule did play a factor.

Q So schedule played a factor in not conducting the science that --

A Absolutely.

Q Okay.

You previously informed the committee that you had a phone call with Greg Peck and Mr. Schmauder where Mr. Peck expressed concerns about Jim Laity's participation in the rulemaking and that you discussed not inviting him anymore. Do you recall approximately when this phone call took place?

A I can't. But it was in Mr. Schmauder's office at his round conference table.

Q Do you recall whether it was during the development of the guidance or the rulemaking?

A I believe it was early in the second round of trying to do the rulemaking. Recall, I testified we started out with guidance for a year, then rule for a year, then guidance for a year, and then we

went to rule. That second time we were starting to launch into the rule, I believe that's when that conversation occurred.

Q Mr. Schmauder informed the committee that he did not recall this phone call taking place or ever discussing uninviting OIRA from participating in discussions regarding the guidance or the rule.

Would you say that your testimony or statements here are an accurate characterization of this phone call?

A My statements accurately portray my recollection of the phone call.

Q Was Mr. Laity or anyone else from OIRA subsequently invited to participate in meetings before interagency review?

A No.

Q To your knowledge, was Mr. Laity or anyone else from OIRA contacted regarding the rulemaking before it entered interagency review?

A I can't say. I did not contact them.

Q You mentioned that within 30 days of the first meeting you had on the guidance in 2009 the EPA had already drafted the guidance and provided it to you. Do you recall who at the EPA shared the guidance with Army?

A Greg Peck.

Q And who Greg sent it to at the Army?

A Back then, I suspect he sent it to the Chief of Regulatory, Meg Gaffney-Smith; myself; probably Craig Schmauder; Patricia Morris, an attorney that worked for Craig back then. It was a fairly large

group at that point in time.

Q Were you aware at the time of that first meeting that EPA had been drafting a draft of the guidance?

A No.

Q Do you know when EPA began drafting that guidance?

A I don't.

Q Was anyone else from the Army or Corps present at that first meeting about the guidance in 2009?

A Is this the meeting with the Administrator that I talked about? I was the only one. We didn't have appointees, so I was sent as a surrogate appointee. And I brought no staff.

Q Mr. Schmauder was not in attendance?

A No.

Ms. Aizcorbe. Okay. We'll go off the record.

[Recess.]

[11:16 a.m.]

Mr. Kerner. It is now 11:16, and we are ready to commence. Our friends from the minority have till 12:16.

Portia, you're up.

EXAMINATION

BY MRS BAMIDURO:

Q Good morning, Mr. Smith.

I want to revisit the topics that were discussed in the last hour, starting with your work on the environmental assessment.

I think it was said in the last hour that there was a second environmental assessment. To your knowledge, how many environmental assessments were completed and submitted by the Army?

A May I ask a question?

Q Sure.

A Do you mean for the WOTUS rule?

Q For the WOTUS rule, yes.

A Two.

Q Two were actually submitted for the docket?

A Oh, I thought you meant completed and submitted to Ms. Darcy. Only one was submitted to the docket.

Q So there's only one environmental assessment applicable to the WOTUS rule?

A There's one submitted to the docket.

BY MS. BERROYA:

Q So your statement here today is that the environmental

assessment that you drafted was complete. Is that correct?

A It was a final draft.

Q When you say "final draft," can you explain what that means?

A I usually -- we always turn in final drafts for review to counsel and leadership before it's published final to make sure other people can check it and just make sure it's okay.

Q As far as you're concerned, have you done all of the analysis and reviewed all of the information that was required for that environmental assessment to be complete?

A Yes.

Mrs. Bamiduro. There was mention in the last hour as to Mr. Schmauder's qualifications to assess the conclusions reached in the environmental assessment. Did Mr. Schmauder say that he assessed the accuracy of your draft?

Mr. Smith. Not to me personally.

BY MS. BERROYA:

Q Do you have reason to believe that he said it to someone else?

A That would be speculation. I'm not going to answer that further.

Q We certainly don't want you to speculate.

A Yeah, I know.

Q On what date did you complete your final draft of the environmental assessment for the WOTUS rule?

A I turned it in on or about April 27th, so I would have

completed it a couple of days before that. And one of my detailees that I mentioned before, Ms. Tammy Turley, and I went, spent the next couple days just going through it and correcting typos and making sure that it was ready to turn in as a final draft.

Q So the April 27th final draft EA is a complete EA, as far as you're concerned?

A Yes.

BY MRS. BAMIDURO:

Q It was mentioned in the last hour that the rule was submitted prior to the completion of the environmental assessment. Do I have that right?

A I think --

Q Do you recall saying in the last hour that the rule was submitted for review prior to the environmental assessment being completed?

A I recall being asked if the rule was submitted to OIRA for review before completion of the environmental assessment, and that's correct.

Q To your knowledge, is there a requirement that a rule cannot be submitted to OIRA for review before an environmental assessment is completed?

A To my knowledge, there is not a requirement.

Q It was also mentioned in the last hour about the length of time that Gib Owen took to complete the environmental assessment. You mentioned in the last hour that when Gib Owen was assigned to that task

he took your files. Is that correct?

A That's correct.

Q And you also said that it could take several months, up to a year, to complete an environmental assessment, depending on the type of rule that it's being done for. Is that correct?

A That's correct.

Q When Gib Owen was assigned to that task of completing the environmental assessment, is it possible that he was using some of your analysis when he completed the environmental assessment?

A I don't know what he used or did not use. When I got the box back, it looked to me like it had not been touched.

Q Is it possible that since he had your files that he was not starting from scratch when he took on the assignment of completing the environmental assessment?

A That's a speculation. I don't want to try to speculate on that.

Q Were you aware that additional regulators were brought on to assist Mr. Owen in completing the environmental assessment?

A No.

Q You mentioned in the last hour that earlier on in the process you had been leaning toward a FONSI. Had you been updating Mr. Schmauder on your status in the environmental assessment?

A Yes.

Q Did he know that you were leaning towards a FONSI?

A He was kept apprised every step of the way, including when

I began to lean the other direction, towards recommending an EIS.

Ms. Berroya. But he did know for a period of time that you were leaning towards a FONSI, correct?

Mr. Smith. Yes.

BY MRS. BAMIDURO:

Q I want to now focus on the answers that you gave in the last hour regarding your alleged retaliation in the workplace. Can you explain for us what actions you believe constitute retaliation?

A Being removed from a key aspect of my job without proper justification. Being downgraded for not turning in a recommendation that Secretary Darcy wanted based on politics, not on science. And a general atmosphere of tension and -- I'm forgetting my terms. Just an atmosphere of -- it's just like an EEO complaint, where you feel like you're not one of the team anymore, and it's a sort of subversive climate where you feel like you're walking on eggshells.

Q You said you were downgraded. What do you mean by that?

A Every year, we get performance appraisals, a standard form. All government employees get them. In ours, you can be rated 1 to 5, 1 being lowest, 5 being highest. And, as I explained previously, all the ratings I've had since 1996 in this office have been 5's, except for twice, and both were related to this rule.

But, most recently, the one Ms. Darcy signed, she downgraded me from the 5's I usually get, even though my performance was as good as any other year and maybe better, frankly. And the reason was because I didn't recommend the FONSI, she felt betrayed, and that she couldn't

trust me to implement the rule.

Q That was actually written in your performance appraisal?

A It was written in a memo relieving me of duties. And then my written performance appraisal marks 4 instead of 5, and she removed a bullet which she had drafted herself several years previously that says "Chip's word is his bond" or something like that. So she edited it and then downgraded the number from 5 to 4.

Q So let me be clear. Every year, you get a written performance appraisal. Is that correct?

A That's correct.

Q And you are saying for 2 years you were downgraded, to use your word. Is that right?

A That's correct.

Q In those two performance appraisals, was there specific language in there that said certain actions were being taken because of the result that you reached in the environmental analysis?

A No.

BY MS. BERROYA:

Q You said that for 2 years you had been downgraded from a 5 to a 4, correct?

A Uh-huh.

Q What was the first year that you were downgraded to a 4?

A I'm guessing it's about 4 years ago when Rock Salt was Principal Deputy. And, as I explained previously, Nancy Stoner, a political appointee at EPA, and Greg Peck, EPA, complained that the

Corps and I were too difficult to work with because we questioned science, economics, tribal consultation. And so Principal Deputy Salt called me in, talked to me and said, "Try to work more collaboratively with EPA in the future. I'm going to down you from a 5 to a 4."

BY MRS. BAMIDURO:

Q That was approximately 2012, if I'm doing the math?

A Yeah, right in there. I would have to look it up. If you ask for it, I'll give you the appraisal. I can't remember off the top of my head, but that's about when it happened.

Q And I just want to make sure I'm following the chronology. So you turned in your draft, your final draft, of the environmental assessment in 2015. Is that right?

A Correct. And my -- may I?

Q Sure.

A My downgrade by Ms. Darcy occurred in -- we start doing appraisals between June and August, and mine was probably signed in August. So it was after she relieved me of duties and after I was removed from working on the NEPA document.

BY MS. BERROYA:

Q I'd like to step back to the first downgrade from a 5 to a 4 for a second. And that was in 2012 approximately, correct?

A Approximately. Yes, ma'am.

Q So that was 3 years prior to your decision that an EIS should be completed, correct?

A Yes.

Q But you believe that -- what do you attribute that downgrade to?

A Principal Deputy Salt, who actually is a friend of mine and I have the highest regard for, just said, "Chip, we've got to work more collegially with the EPA. I've had some complaints from Nancy Stoner, who is a political appointee, and Greg Peck that you can be difficult. So try harder to get along with those two EPA staff, and I'm downgrading you from a 5 to a 4 this time." Face-to-face meeting.

Q Was there anything in your written evaluation identifying the reason for your downgrade?

A I would have to read it again to say, but what usually happens is -- and this I can testify to -- we do two things. We have an evaluation form, and then we do an advance form, which is our guide to what we're supposed to do the next year.

In the guide, what we're supposed to do the next year, he changed the language that we typically use in my performance plan, for lack of a better word, to put specifically in there "Be collegial with EPA" so that the next year he could point to that and tell me whether or not I was collegial with EPA.

So that's how he dealt with it. He dealt with it by not actually putting critical things in my appraisal, but he put goals, to be more collegial with EPA, in my next year's performance plan.

Mrs. Bamiduro. Is it uncommon to have goals in your next year's performance plan?

Mr. Smith. We always have goals. That's the point of the

performance plan.

BY MS. BERROYA:

Q Is there something that is unfavorable about being collegial with EPA or other agencies that you deal with on a regular basis?

A Absolutely not. That's a fundamental principle of being a civil servant.

Q Being downgraded from a 5 to a 4 seems to me, sitting here right now, like a somewhat small downgrade, but can you explain to me the significance of that to you?

A There's a couple. If we had a reduction in force, your evaluations play into who loses their job and who stays. When you apply for jobs, people look for 5's. If you have a 4, then when you're compared to somebody else, all things being equal, the person with the 5 has a better chance of getting the position than the person with the 4. So those are two I can think of right off the top of my head.

Q And the person with the 4 has a better chance than the person with a 3 and so on and so forth, correct?

A Correct.

Q Did you file any complaints when you were downgraded to a 4 in 2012?

A I did write up a draft complaint. And then I met with Rock, we discussed it, and we decided that the two of us would do everything we could to return to our former relationship, which was very positive, and it had been for a decade, and I would set aside my angst and he

would set aside his and we would, together, do everything we could to work together on the rule. And so we did not have to take the step of filing a formal -- and resolving a complaint.

BY MRS. BAMIDURO:

Q You mentioned earlier when you were explaining what you believed the retaliation to be a feeling of walking on egg shells, things of that nature. Did you suffer a pay loss?

A I did not.

Q Did your grade change?

A No.

Q Did your title change?

A No.

Ms. Berroya. You mentioned that you were removed from key aspects of your job. Can you describe what key aspects of your job you were removed from?

Mr. Smith. Yes, ma'am. I was removed from working on finalizing guidance and talking points and technical resources to implement the final WOTUS rule. And why it's key is, as my own boss has testified, it's a generational rule, it's the most significant rule the Army Civil Works has done in the last 30 years, and I teach it. I teach it to the Corps, I teach it to attorneys --

Mrs. Bamiduro. Sorry. You teach what?

Mr. Smith. The wetlands program and regulations. So for me to not be involved in what has been a key aspect of my job for the last 19 years is, to me, a significant loss of responsibility.

I stayed connected with the Corps. I talked to them, if not daily, weekly. I kept up to speed. I kept educated so if and when the dust settled down and I was back doing my full job I would be ready to go.

But I was removed at a key time. I think I could have been very helpful, but, more importantly, to not be part of the team for a major action like that, I thought, was an adverse action that really was unwarranted.

BY MS. BERROYA:

Q Were you removed from involvement in any other rulemakings or development of guidance for any other rules?

A No.

Q So you were only asked to step back from WOTUS. Is that correct?

A Correct.

Q And I believe my colleague just asked you whether your pay was reduced, correct?

A Correct.

Q And was it?

A It was not.

Q Was your position title changed?

A No.

Q Was your GS scale changed?

A No.

Q Were you asked to take unpaid leave?

A No.

Q So the change that occurred was that you were asked to not participate in WOTUS any longer. Is that correct?

A Correct.

Mrs. Bamiduro. In the course of the nearly 40 years that you've worked for the Army, have you seen reassignments done among staff members?

Mr. Smith. Yes.

Ms. Berroya. Were all of those other reassignments retaliatory in nature?

Mr. Smith. No.

Ms. Berroya. What makes this reassignment retaliatory?

Mr. Smith. Because it was made clear to me that my recommendation for an EIS did not comport with the expectations of the Assistant Secretary and the Administrator of EPA and because of, I guess, a longstanding pattern on my part of raising the issues of science, economics, and tribal consultation.

Ms. Fraser. And none of this is in writing. Is that right?

Mr. Smith. What is in writing?

Ms. Fraser. You just mentioned --

Ms. Berroya. Have you filed a complaint of retaliation?

Mr. Smith. I explained last hour I wrote up a complaint of retaliation. I shared it with an EEO officer at Fort Belvoir. I talked to the whistleblower program and two attorney firms, legal firms in Alexandria. And based on all of their advice, although I was told

I had a great case, I decided that it was not worth it at 39 years of career to me and my family to go through it.

And so I set it aside, and I decided to focus on just doing my job as best I can every day and not think about WOTUS ever again unless I'm back on it.

Mrs. Bamiduro. Did you ever ask to be reassigned to a different office?

Mr. Smith. I have applied for a couple jobs, but I have not asked to be reassigned. I'm at the point of the pyramid where there is almost no place to go unless I go to a different agency. And I did apply for one job in Housing and Urban Development affairs and did not get it.

BY MS. BERROYA:

Q You mentioned that the Assistant Secretary wrote in a memo the reason that you were being reassigned from WOTUS, correct?

A Uh-huh.

Q In that memo, does she state that the reason for your reassignment is because you did not recommend a FONSI?

A No.

Q Is it written anywhere from anyone in the Army, Army Corps, EPA, that your reassignment was because you did not recommend a FONSI?

A I have not seen anything in writing. It was all verbal. What's in writing is -- I think I testified last time I was here about two emails where I, based on my conversation with Ms. Darcy before I went on vacation July 2015 that I was back as the senior policy adviser that I sent out, and then she used those as the reason for removing

me in writing, saying that I had overstepped the understanding.

So that's what's in the memo. And if you want it, I'm happy to share it.

Q You mentioned in conversation with my colleagues in the majority in the last hour that Let Mon Lee said, because the answer that you were coming up with in the course of your EA analysis wouldn't be what the Administrator wanted, you couldn't finish it. Is that an accurate summary of your statement?

A Uh-huh.

Q Is that a "yes"?

A Yes.

Q Thank you.

So Let Mon Lee never said that in writing; that was an oral statement?

A Correct.

Q Had that ever happened to you before, that somebody in the Army or Army Corps told you you couldn't finish an analysis because you weren't coming to the determination that was desired?

A No, it has never happened to me before.

Q Were you surprised or upset to hear that information?

A I was surprised.

Q Did you tell anyone?

A I'm not sure I know who you mean by "anyone."

Q So you received an instruction not to complete an EA that you had been working on for -- how many years?

A Six.

Q Six years -- on a rulemaking that you have described as generational, correct?

A Ms. Darcy described it as generational in her testimony, and I agree.

Q And you received this instruction to stop, and you've never received an instruction like that before, correct?

A Correct.

Q And that surprised you, right?

A Correct.

Q Did you tell anyone about this?

A I told Tammy Turley, the detailee and regulatory chief from Nashville district who was with me for 5 months at that period of time, that we were done because we were working on it together. And I told the chief for regulatory, Jennifer Moyer, that I was done and that she need no longer contact me about it because I wouldn't be working on it. And then, to the best of my knowledge, that's it.

Q Did you tell Ms. Moyer why you were done?

A I don't recall. No, I don't recall exactly. I just said I was done.

Q Did you express concern to Ms. Moyer or Let Mon Lee or anyone else about the direction you had been given?

A Only to Let Mon Lee, and all I said to him was I'd be happy to provide a list of highly qualified regulators from all across the country from which he could select someone or a team to carry this

further. That's it. That's all I said.

Q So you didn't tell Let Mon Lee that you thought it was inappropriate that you were being asked not to finish because you weren't coming to the conclusion that the Assistant Secretary wanted you to have?

A I did say I thought it was inappropriate, incorrect, and violated NEPA procedures, but I understood, and that's the decision that had been made, and if you want a list of names, I'll give you a list of names.

Mrs. Bamiduro. Just so that I'm clear, is it your testimony that your reassignment violated NEPA procedures or that the decision to go to a FONSI violated NEPA procedures?

Mr. Smith. I think there are two answers to that question. The first is, typically, if there is an issue with the conclusion of an environmental assessment, we wouldn't ordinarily just cease and start a new one. We would work very hard to understand why in this case I recommended an EIS. We would vet it with the Assistant Secretary, with Army General Counsel, with legal staff from the Corps headquarters, regulatory staff from the headquarters. We'd talk it through, and if there was an understanding that I was incorrect and there was information that I hadn't considered that I should have, we could have made adjustments, or we could have ratified that my recommendation was okay or the right one.

But that did not happen, so, in my mind, that is a violation of the process.

Mrs. Bamiduro. Can you point to anything in the statute that says that that's a violation of the process?

Mr. Smith. No.

BY MS. BERROYA:

Q You mentioned the gang of eight in the last hour. Who was part of the gang of eight? I know we talked about this last time, but my memory is short.

A Can I close my eyes and imagine the table? I'm serious. This will help me.

Q Feel free.

A Let's see, we had Jim Hannon, chief of operations, SES at the Corps headquarters. We had Jennifer Moyer, chief of regulatory, Corps headquarters. We had myself. We had Lance Wood, counsel, Corps headquarters. We had David Cooper, chief counsel, Corps headquarters. We had Craig Schmauder, Greg Peck.

And I think I failed on this last time. I can't remember who Greg brought with him to some of these meetings. It probably was John Goodin because of his position. And there may have been others, but I don't recall any of the other names.

Q In the last hour, you said that you were reminded in meetings of the gang of eight by Mr. Schmauder and Mr. Peck that a FONSI should be expected. Is that an accurate statement?

A That's correct.

Q So you would expect that the other members of the gang of eight, including Ms. Moyer, would also have recalled that, correct?

A I can't speculate on what they might or might not recall. But if you're asking for my opinion, it was fully vetted and spoken at a meeting just like this with everybody around a table, so I would expect so.

Q A better question would be: The members of the gang of eight would have heard Mr. Schmauder and Mr. Peck say that a FONSI was expected. Is that correct?

A I believe so.

BY MRS. BAMIDURO:

Q Now we will shift gears.

A Okay.

Q When you were here the last time, you spoke about your attendance at what you believed to be the first meeting of principals for the WOTUS rule. Do you recall that?

A I recall that.

Q And I will ask my colleague to pass out a copy of your transcript, and I'll mark it as exhibit 1.

[Smith Exhibit No. 1

Was marked for identification.]

Mrs. Bamiduro. And I apologize. For the sake of trees, we did not make enough copies for the room, but we have one for the witness and counsel and two for the majority.

Ms. Weis. Now, is this his entire transcript from the first --

Mrs. Bamiduro. Yes.

Ms. Weis. Okay. Thank you.

Mrs. Bamiduro. Here you go.

BY MRS. BAMIDURO:

Q If you can turn to page 11, on the very bottom, it starts, quote, "Well, I mostly listened while Administrator Jackson and her senior attorney, Bob Sussman, announced that they wanted to do a rule on the Clean Water Act and that they intended to move ahead, that it was their opinion that the Clean Water Act was their act, and that while it was a joint regulation we were replacing, they fully expected EPA would fully control the rulemaking and the process."

Do you recall that?

A I recall that.

Q Was that an accurate representation of your recollection?

A Yes, ma'am.

Q Did you take issue with that when you heard that?

A No.

Q Is that how you thought the process should go?

A No.

Q Are you familiar with the Civiletti Memorandum?

A Yes.

Q Let me give you a copy of that, and I'll mark that as exhibit

2.

[Smith Exhibit No. 2

Was marked for identification.]

BY MRS. BAMIDURO:

Q If you could, under the title, could you read the first two

paragraphs, please, out loud?

A "The Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe the jurisdictional term 'navigable waters' under 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1344.

"Similarly, the Administrator of the Environmental Protection Agency rather than the Secretary of the Army has ultimate administrative authority to construe 404(f) of that Act, 33 U.S.C. 1344(f)."

Q And just so we're clear, the Federal Water Pollution Control Act is what we now refer to as the Clean Water Act. Is that right?

A Correct.

Q This Civiletti Memorandum responds directly to the question that's referenced in the first paragraph as to whether the act gave the Army, acting through the Chief of Engineers, or the Administrator of the EPA, quote, "ultimate authority to determine the reach of the term 'navigable waters' for purposes of section 404."

Do you see that in the first full paragraph?

A Yes.

Q On this same page, then-Attorney General Civiletti concluded, quote, "I am convinced after careful consideration of the Act as a whole that the Congress intended to confer upon the administrator of the Environmental Protection Agency the final administrative authority to make those determinations."

Do you see that?

A Yes.

Q If you flip to page 201, the memorandum further notes, quote, "It is therefore logical to conclude Congress intended that there be only a single judgment as to whether and to what extent any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority," end quote.

Do you see that?

A Yes.

Q Former Attorney General Civiletti determined that, quote, "It is the Administrator who has the overall responsibility for administering the Act's provisions, except as otherwise expressly provided," end quote.

Mr. Smith, what does that mean to you in the context of EPA's role in joint rulemaking under the Clean Water Act?

A What this means to me and the way the agencies have interpreted it since the opinion was written is that, if you have a water body on the landscape, it is up to EPA to determine where the jurisdiction --

Q Sorry, I'd ask that you not mark on the exhibit.

A Oh, God, sorry, sorry -- where the jurisdiction line is. It does not opine on rulemaking or the WOTUS rule. It is simply -- the way we have interpreted and applied this decision is, when there is a question out on the land if a particular water body or wetland is jurisdictional or not, EPA, if there's a dispute, makes the final call.

So the way that it works out is the Corps makes probably 98 percent of the calls, and then maybe 2 percent EPA will make.

If there is a question, a gray area -- because we're talking about nature, which moves -- we'll defer to EPA, they'll make the call, and then the Corps regulates accordingly. It has nothing to do with the rulemaking authority.

Q Was that a legal analysis that you made?

A I am making I guess what I would call the practical regulator -- how we've done it since 1979. I am not an attorney, so I can't give you the legal analysis. But we have never, in my knowledge, interpreted this as meaning only EPA can do rules. When we do a joint rule, it's a joint rule.

BY MS. BERROYA:

Q So, by your assessment, what this means, what exhibit 2 means, the Civiletti Memorandum, is that when there is a dispute between the Army Corps and EPA about these matters the EPA makes the final call. Is that accurate?

A About the specific jurisdictional limits of a particular water body.

Q And is that the subject of the WOTUS rule, establishing the definition of the water bodies contained within?

A They're different.

Q Can you explain the difference to me?

A The way the Civiletti opinion works is, if this whole table is a wetland area that's in dispute, we don't know if we regulate it

or not and the Corps says we're going to regulate this part of the table up to the line in the middle of the table and no more, EPA can come in and say, well, we think you should regulate the whole table, and their determination prevails because of the Civiletti opinion.

So it only applies in the field. It doesn't have -- I guess I don't understand. It doesn't have anything to do, really, with the rulemaking process.

Q I'm just trying to understand here. So my understanding of what this latest rulemaking was for WOTUS was trying to define the scope of the water bodies that would be regulated. Is that correct?

A That is true. That is true.

Q Isn't that essentially what you're saying EPA would be making the final call about?

A No.

Q Only when there was a dispute?

A There's a difference between overarching rulemaking and implementation in the field. They're not the same thing.

Q So you're saying the Civiletti Memorandum only applies to implementation in the field and does not apply to the rulemaking process?

A Correct. Based on what I heard in that first meeting with Administrator Jackson, if the Civiletti opinion had been interpreted the way you're suggesting, there was no point in Army being there the last 6 years. We have never interpreted it that way in my entire career, so I guess I --

Q This opinion, this memorandum, only refers to instances when there's a dispute, correct? It's not saying that Army should not be involved. Is that correct?

A Oh, that's correct.

Q Can you show me where in this memorandum it states that it only applies to decisions in the field?

A No.

Q So what is that based on? What is your opinion based on?

A The way we've applied this opinion in the field and at the policy level in D.C. since 1979 when it was written.

Q My understanding from our conversation last time is that WOTUS was your second joint rulemaking, correct?

A Correct.

Q And the Civiletti Memorandum applies to joint rulemakings. Is that right?

A I believe it applies only to the geographical scope of jurisdiction. And we have signed memorandums of agreement with EPA that specifically say that, that when it comes to a disagreement about where to draw the line, as in my table example, EPA has the final authority. We do not discuss rulemaking in that MOA.

Q But just to make sure I'm correct, the Civiletti Memorandum would apply to joint rulemakings with EPA, correct?

A I don't believe so. I think it's a field matter only, not a rulemaking matter. If you look at the history of the opinion, it derives out of the fact that we found ourselves early in the program

having disputes where the Army would want a smaller area for 404 permitting purposes and EPA would want a larger area. And we had some cases where EPA would say one thing and the Army would say another thing, and that doesn't serve the public very well. So Mr. Civiletti prepared his opinion and said that, whenever you have that dispute on where to draw the line, EPA gets the final call.

Ms. Fraser. Mr. Smith, let me draw your attention to the third full paragraph of the Civiletti opinion. The title starts, "The Secretary of the Army." I direct you to the second full sentence. Can you please read the sentence that begins after section 1344, beginning with "You asked whether"?

Ms. Weis. Can you say that again?

Mr. Smith. Say that again, please. I've got to find the place here.

BY MS. FRASER:

Q On page 197, the first page of the Civiletti opinion, the second full sentence that begins, "You asked whether," please read that out loud.

A Okay.

"You asked whether the Act gives the ultimate administrative authority to determine the reach of the term 'navigable waters' for purposes of section 404 to you, acting through the Chief of Engineers, or to the Administrator of the Environmental Protection Agency; and similarly you ask whether the Act gives the ultimate administrative authority to determine the meaning of section 404(f) to you or to the

Administrator."

Q You mentioned you're not an attorney, right?

A No, I am not an attorney.

Q You have no legal training, right?

A I have no legal training.

Q This is a document that was written by an attorney. Is that right?

A Correct.

Q In fact, it was the Attorney General at the time, right?

A Correct.

Q Of the United States?

A Correct.

Q And so this opinion dealt with a Cabinet-level agency, two Cabinet-level agencies, for that matter, the Army and the EPA, about work that is critical to their function. Is that right?

A That's correct.

Q And so this letter is directed to people who are making legal interpretations of what the law means with respect to these two agencies. Isn't that right?

A Correct.

Q Now, is there anything in the paragraph, in the sentence that you just read, that says anything about determining disputes?

A As a nonattorney, I would say that I believe it does. It does not use those words, but by saying "gives the ultimate administrative authority," to me, that means whenever there's a

disagreement EPA's opinion prevails.

Q And as a technical person and not an attorney, this is just your personal interpretation of that?

A Yes, ma'am.

Q And it should not surprise you that lawyers look at this in a slightly different manner because of their legal training and background, would it?

A No.

Mrs. Bamiduro. Mr. Smith, in that same portion of language that you just read, it focuses on the authority, the ultimate administrative authority to determine the reach of the term 'navigable waters.' Do you see that?

Mr. Smith. I do.

Mrs. Bamiduro. Isn't that exactly what the purpose of the WOTUS rule was, to come to a definition of what waters of the United States are?

Mr. Smith. Navigable waters and waters of the United States are two different things. Waters of the United States includes navigable waters. So the purpose was to clarify the definition of those waters that are, in fact, navigable, could be made navigable with reasonable improvements, as well as tributary systems and adjacent wetlands, which is how you get to waters of the United States.

I don't know if that's a yes or a no, but that's how I interpret that.

Ms. Berroya. So it's talking about terms. In other words, it's

talking about language here, correct?

Mr. Smith. Yes, ma'am.

Ms. Berroya. And not just application in the field. Is that fair?

Mr. Smith. Correct.

Mrs. Bamiduro. You mentioned the memorandum of agreement between the EPA and the Army. So you're familiar with that document?

Mr. Smith. Yes, ma'am.

Mrs. Bamiduro. I'll show you a copy of it and mark it as exhibit 3.

[Smith Exhibit No. 3

Was marked for identification.]

BY MRS. BAMIDURO:

Q I'll direct your attention to page 1, under "I. Purpose and Scope," paragraph 2. And it reads, "The Attorney General of the United States issued an opinion on September 5, 1979, that the Administrator of the EPA (Administrator) has the ultimate authority under the CWA to determine the geographical jurisdictional scope of section 404, waters of the United States, and the application of section 404(f) exemptions."

Do you see that?

A I do.

Q If you turn to page 2, the first full paragraph, beginning with "Case-specific," do you see that?

A I do.

Q It mentions in that paragraph that, while the Corps will continue to perform much of the jurisdictional determinations and determinations of exemptions, quote, "all future programmatic guidance, interpretations, and exemptions shall be developed by EPA with input from the Corps; however, EPA will be considered the lead agency and will make the final decision if the agencies disagree."

Do you see that?

A I do.

Q And is it your position that that ruling has no impact on -- excuse me, not ruling -- that language in this memorandum of agreement has no impact on EPA's role as the lead agency in joint rulemakings?

A I do. And the reason I do is it does not say "rulemaking." The intent was the kind of guidance that we regularly send out. It could be weekly, monthly, annual basis, what we used to call regulatory guidance letters. That was the intent at the time. And it has never been interpreted, in my knowledge, to mean rulemaking.

Q You mentioned that it did not say "rulemaking." You're familiar with this document, correct?

A Yes, I am.

Q You've read it thoroughly before?

A Yes, I have.

Q Does it exclude rulemaking?

A It does not state that it excludes rulemaking.

Ms. Berroya. You talked about the intent of this document. Were

you involved in the creation of this document?

Mr. Smith. I was not.

Ms. Berroya. So what is your basis for speaking to the intent of this document?

Mr. Smith. Beginning in 1981, I was involved in the regulatory program and its implementation of this document once it was issued, and I have been operating under this memorandum of agreement since that time. At no time during my experience have we ever interpreted this to mean anything other than routine, technical guidance about where to draw the line. We have never, in any conversation or meeting, talked about it in the context of rulemaking.

Ms. Fraser. You mentioned "we never interpreted it as anything but." Who is "we"?

Mr. Smith. "We" is Army, the Corps, and EPA.

Ms. Berroya. So you know how everyone within Army, everyone within the Army Corps, and everyone at EPA have interpreted this document for the last over 20 years?

Mr. Smith. I can't say that, no.

Ms. Berroya. In what circumstances does this MOU apply?

Mrs. Bamiduro. MOA.

Ms. Berroya. Thank you.

Mr. Smith. We used to write periodic guidances on how to delineate wetlands in certain kinds of soils, for example. If the Corps were to write the guidance, we would run it by EPA, coordinate it, make sure we agreed and we weren't changing the line in any way

that the EPA was concerned with. They would chop, and we would send it out.

The exemptions are entirely EPA's, we have nothing to do with the exemptions other than implement them. There is other written guidance, which I don't have memorized off the top of my head, but all 404(f) exemptions are entirely the authority of EPA, and we simply implement what they say.

So let me find that sentence again.

If there are disagreements, typically our appointees collegially work them out, but if we get some issue that we can't work out, then deference goes to EPA. That's rare, frankly. Setting WOTUS aside, that rarely happens. We almost always find a way to work it out.

That's why that final sentence is in there, so we wouldn't continue fighting forever, so one agency would have the final decisionmaking authority to begin. This is the kind of guidance that's, you know, "paint the car red, put in four cylinders instead of six." It's technical stuff on how you implement the program in the field.

Ms. Berroya. So it's important to have potentially a tie breaker in situations when more than one agency is going to be involved in making a decision. Is that fair?

Mr. Smith. Yes, it is very fair and a very good idea, in my opinion.

Mr. Kerner. We'll go off the record for a second.

[Discussion off the record.]

Mr. Kerner. Let's go back on the record. Ten more minutes. It's 12:08. We'll go until 12:18. Please resume.

BY MS. BERROYA:

Q So we were just saying that it is important to have a tiebreaker in situations when more than one agency is going to be involved in making a decision, correct?

A Correct.

Q In the WOTUS rule, who did you understand to have the tie breaking vote?

A There wasn't a vote in this case. EPA drove the rulemaking for the entire process.

Q I understand that that is your opinion, but who did you understand to rightfully have the tiebreaking vote?

A In a joint rulemaking, nobody. It should have been a consensus process, and then our appointees would make decisions that were unresolvable at the staff level. For a joint rule, there is not a tiebreaker.

Q Because the appointees, in this case Assistant Secretary Darcy and Administrator McCarthy, would agree and make the ultimate decision. Is that correct?

A Yes.

BY MRS. BAMIDURO:

Q I just want to make sure I follow. If I'm looking at the language in the first full paragraph on page 2 of the MOA, does "lead agency" have no meaning to you in terms of EPA's role in joint

rulemaking?

A For this piece of guidance, yes, this has to do with guidance and how we execute the program in the field. It doesn't have, in my opinion as a nonattorney, anything to do with joint rulemaking.

Q So it's your opinion as a nonattorney that the memorandum of agreement between the EPA and the Army that the EPA would be the lead agency means nothing in terms of joint rulemaking?

A Correct.

Q And just to be clear, as you've read the document before and you've worked under it for the last however many decades, you don't read the document to exclude joint rulemaking. Is that correct? There's no specific text in the document that says this does not apply to joint rulemaking. Is that correct?

A That's correct.

Mrs. Bamiduro. Why don't we end 5 minutes early before we go into our next topic.

Mr. Kerner. Very good. So it's now 12:11. Do you want to take about 45 minutes for lunch? All right. One o'clock, please.

[Recess.]

[1:02 p.m.]

Mr. Kerner. All right. Everybody good? So let's go on the record, if we may. It is 1:02, and we will start our hour round. Christina, you're up.

Ms. Aizcorbe. Thank you.

BY MS. AIZCORBE:

Q Mr. Smith, when we previously discussed the comment period for the rule, you mentioned that despite continually meeting and preparing with the Corps, you did not attend a single interagency meeting to discuss the comments or potential changes as you would have in a typical rulemaking.

Were you or the Corps informed that anyone else in the Army was engaging in such interagency meetings?

A No.

Q Were you aware that they were taking place?

A It was our understanding that only Craig Schmauder was meeting with EPA.

Q Do you know how frequently they were meeting?

A No idea, but I presume regularly, because we would get new drafts or new guidance periodically, and it always came through Craig.

Q And that's how you knew that these meetings were taking place?

A Yes, ma'am.

Q The last time we spoke, I asked if you were aware of whether Mr. Schmauder made any technical or policy decisions in the rulemaking,

and you responded that he had. Can you elaborate on your statement?

A Yes. When we just had discussions about significant nexus, which means how a water body will affect downstream waters in terms of physical, biological, and chemical integrity, he would opine on that. When we talked about isolated waters, whether or not they affected the integrity downstream waters, he opined on that. When we talked about data we had showing significant loss of waters under eleventh hour changes to the rule, he opined that he didn't see that as a problem.

When we presented the evidence on the interpretive rule, maps and data and information on adverse effects of the 56 conservation practices and the mitigation we required, he opined that he -- that was EPA's call and that he would -- he didn't see any problem with it.

Q When Mr. Schmauder opined on policy issues or scientific issues, such as significant nexus determinations and isolated waters, were his opinions about whether certain decisions were going to be made or about the basis of those decisions? I'm trying to get at what the nature of his opinions were.

A Both.

Q Do you know if any of those decisions or recommendations were inconsistent with the Corps or your recommendations throughout the rulemaking?

A Yes.

Q Would you say that the majority of them were inconsistent?

A I would say a majority of key concerns. Editorial and

grammatical and minor concerns were accommodated, but key -- what we thought concerns about science, economics, and policy were typically not considered and adopted.

Q Mr. Schmauder informed the committee that he had previously participated in only two other rulemakings and in a much less involved capacity than his role in WOTUS, and has no specific subject matter expertise in clean water and environmental compliance.

Is it your opinion that he had the background necessary to interpret the science underlying the Corps' or your comments regarding the rule?

A No.

Q You mentioned that when you and the Corps made recommendations about the final -- the draft final rule, that most of these recommendations were not incorporated and that you were given no justification or reason why. Did you ask anyone why these changes were not accepted or adopted?

A We asked in our Gang of Eight meetings the -- I asked Craig personally, and I know the Corps of Engineers, because they discussed it with me, asked through their chain of command, not only Craig Schmauder, but EPA's staff, primarily Greg Peck, Ken Kopocis, and the decision that was -- what was communicated back to us was that they disagreed and that EPA had made the decision, and that's the way the rule was going to go.

Q Did they discuss the nature of the disagreement?

A What I heard repeatedly in meetings was Greg Peck saying:

I have other theories, I have other beliefs, I have other information, but that information was never shared. It was characterized as his opinion, but it prevailed.

Q And those other theories or opinions, you're saying you had no insight into what those were besides what was ultimately included in the final rule. Is that correct?

A That is correct.

Q When we discussed the option papers that you and the Team of Eight developed, you mentioned that none of them were fully discussed, vetted, or briefed before Mr. Schmauder, and the EPA made decisions as to how to move forward. How were you aware that Mr. Schmauder and the EPA made those decisions?

A We worked in -- starting in the end of November and in December, we, I think, had two Gang of Eight meetings in early January where we shuttled drafts back and forth. We had a series of topics that we divvied up amongst the agencies, and to my knowledge, none of them actually were completed, although we made progress on several of them. A couple of them weren't even started.

And then as I probably previously testified, the communication broke off towards the end of January. From then on, it was mostly between Army general counsel Craig Schmauder, Greg Peck from EPA, who did the discussions, and what they did with the papers, I obviously can't say, but my understanding, they were never finalized. I never saw final versions.

Q So when you said that there were some that weren't

completed, you're referring to the option papers as in there was a list of option papers you had discussed in the team that you had all divvied up and were going to complete but that decisions with respect to the final rule were made before some of those option papers were ever completed?

A Correct.

Q Okay. You informed the committee that you and the Corps were still reading and reviewing comments up until the very last day before the rule was submitted for promulgation as a draft, and then the rule was promulgated, and it all became moot.

To clarify, when you said you were still conducting your review to the point of the draft rule being promulgated, did you mean that you were still conducting the review when the final rule was promulgated?

A Yes.

Q Okay. You stated that while you have no knowledge of whether the EPA took all of the comments in before moving forward with the rule, it was your --

Ms. Bamiduro. Sorry, are you quoting from his transcript?

Ms. Aizcorbe. No.

Ms. Bamiduro. He said when.

Ms. Aizcorbe. If you need to know, I'm now reading from page 54, but I'm not quoting directly from the transcript.

Ms. Bamiduro. Thank you. If you could direct me where you are reading from, that would be helpful.

Ms. Aizcorbe. Thank you.

BY MS. AIZCORBE:

Q You stated that while you have no knowledge of whether the EPA took all of the comments in before moving forward with the rule, it was your belief that the EPA still conducted review at the time the rule was promulgated as in the EPA was not done conducting its review or addressing comments at the time that the final rule was promulgated.

Can you explain why you thought the EPA hadn't finished their review at that time?

A I was still engaged in discussions with the Corps headquarters staff and discussing with them possible responses to comments on topical issues that were shuttling back and forth between Corps technical regulatory staff and EPA technical regulatory staff, and we were opining and reviewing responses right up until the day the rule was promulgated, and there were, at least in my view, many critical comments and topic areas that at least we never had the opportunity to discuss with EPA.

Q You also shared that you had concerns about moving forward with the rule without addressing comments per the Corps' routine process and that you would share these concerns with Ms. Darcy and that she responded that her principal concern was addressing comments in the rulemaking. I believe she made that expression several times throughout the rulemaking process.

Do you know whether she gave any instruction to hold off on the rule until all comments were reviewed and addressed?

A She gave me no instruction.

Q Were you aware of anybody at the Army or Corps recommending that you hold off on pursuing the rule before finishing comment review?

A Yes. Myself; Jennifer Moyer, chief of regulatory; David Cooper, chief counsel at the Corps; Lance Wood, counsel at the Corps; just to name -- that's most of them.

Q And do you know whether all these individuals shared those concerns with Ms. Darcy, or who was the recipient, I guess, of those concerns?

A I believe that most of those concerns were shared, either face to face in meetings, and they were, of course, memorialized in the Peabody memos.

Q To the best of your recollection, those meetings where these comments or concerns were shared with Ms. Darcy, did those meetings take place before the final rule was sent to OMB?

A I believe so.

Q But definitely before the final rule was promulgated?

A Absolutely.

Q You informed the committee that sometime in early 2015, Mr. Schmauder informed staff that all communications with the EPA would have to go through him. Mr. Schmauder told the committee that while Ms. Darcy did issue two memoranda directing communications to go through her or her principal deputies, he never personally instructed staff that all communications would go through him.

Can you explain a little bit more about your recollection of Mr.

Schmauder's representation to you about the communications process?

A Yes. In our meetings, with other people present, most of whom I previously mentioned, he stated explicitly to us that all comments would go through him.

Q And what meetings are you referring to?

A Our Gang of Eight meetings.

Q You previously told us that Ms. Darcy's memos were interpreted as gag orders by the Corps. In your experience, are these types of communications directives typically issued in the course of a Corps rulemaking?

A No.

Q Have you ever seen this type of communications directive before?

A Not to me or the Corps on my tenure.

Q Do you know the purpose of their issuance in this rulemaking?

A To inform us that we should not comment on environmental, economic, tribal consultation, or any other issues that might affect the schedule or the ultimate policy goals EPA had for the rule.

Q You mentioned that these types of directives were not common for rulemakings during your tenure.

Do you know if there was a precipitating factor as to why they were issued in this instance?

A I'm unaware of a precipitating factor.

Q You did not discuss them before they were issued with

anybody?

A No.

Q Did you have discussions about the memos with Mr. Schmauder after their issuance?

A I don't recollect discussing them.

Q I have a few questions about whether you were ever told or felt pressured to treat your communications in a certain manner throughout the rulemaking.

Were you ever told or feel pressured to treat your communications in a certain manner with respect to comments made to the public?

A Could you amplify a little on what you mean by "certain manner"?

Q Sure. Were you given any instruction as to how to communicate about the rulemaking to the public, if you were to make comments to anybody in the public?

A Yeah, we were told by Ms. Darcy, Principal Deputy Dominguez, Craig Schmauder, read the talking points that EPA drafted that Craig would review and that were then provided to us, so we would use all written materials that were provided and not say anything further.

Q Who developed these talking points?

A EPA.

Q Do you know when they developed the talking points?

A We had talking points that were developed several years ago and they would evolve periodically at key points in the rulemaking process, so they would just be updated and they would basically say

the same sorts of things, the administration supports the rule, the 117 million Americans will be without protection of water based on sound science, and we look forward to official promulgation, and that's all we were told we should say until the rule was promulgated, and then we would be in an implementation mode, which is different.

Q Is it common for you and/or the Corps to receive a set of talking points on a rulemaking?

A I have not previously. I can't speak for others.

Q And you said that these talking points gave very specific information about the rule and/or its goal. At any point, did you feel that that meant not to share any of the decisionmaking process or type of science that was underlying the rule in response to questions from the public?

A Yes, that's correct. We were not to discuss those matters.

Q With respect to comments that may become a part of the rules administrative record, were you given any instruction as to how to treat those communications?

A No specific instructions. We have a process in place we've done many times before, and I think I described it in my last testimony that we'd get together, we review the comments, EPA reviews the comments, staff teams get together, work out consensus, identification of topics and issues, and then we co-write responses, and that is what did not happen this time.

Q Were you having -- ever given any instruction about what not to put in writing during this rulemaking?

A Well, the two memos I talked about were interpreted by myself and the Corps as saying don't -- don't put anything in writing criticizing any aspect of the rule, rulemaking process, or the EPA's support for the rule.

Q Were you ever told or felt pressured to treat your communications in any manner with respect to the connectivity report?

A Yes.

Q Is there something specific besides what we've already discussed here?

A Two drafts of the connectivity report came out. The first one, maybe a year-and-a-half before the final draft, which I'm trying to remember the time. I believe it was towards fall of 2014.

When the first draft came out, we were invited to comment. The Corps of engineers commented in writing. I commented in writing. The Corps' wetland science experts at ERDC, Environmental Research Development Center commented. And the second time the draft was issued, which was the fall of, as I was saying, 2014. We were told specifically by Nancy Stoner that she did not want comments and that we were -- we were not -- it was their report, they were going to work with their science advisory board, and that there was no need for us to comment on the second draft.

Q And just to clarify, I believe you said fall of 2014 was when the first draft was done?

A I'm sorry. The second draft was fall of 2014. The first draft would have been about a year before that.

Q And how were you aware, or made aware of Ms. Stoner's comments?

A I heard them personally in a meeting.

Q And who else was present at this meeting, if you can recall?

A Well, the room was full, so I would guess the usual Corps folks, chief of regulatory; Lance Wood, counsel; myself; Greg Peck. I can't remember others from EPA. Oh, probably Donna Downing, Karyn Wendelowski.

Q And who are Donna and Karyn?

A I'm sorry, Donna Downing is a staff at EPA. She's a wetland expert. And Karyn Wendelowski is counsel. And a fellow's name who I just simply can't spell, but I'm going to try to say it, Gautam Srinivasan.

Q And he is also with EPA?

A Yes, he's an attorney.

Q And what was the purpose of this meeting?

A It was a general meeting to discuss issues of the rule. At that time in the process, we were teeing issues up, and we'd target them, and we'd meet anywhere from an hour to 3 hours and try and discuss and resolve issues, which would then guide drafting of the rule.

Q Do you know who in the Army typically coordinates compiling a rules administrative record or documents for the docket?

A In the Corps of Engineers, it would have been the regulatory branch and the Corps headquarters, and in this case, it would have been Stacey Jensen, probably assisted by David Olson, who's our Federal

Register and rulemaking expert, having been through a number of these. He did the mitigation rule. He's done two cycles of nationwide permits, and they were -- they're responsible for assembling, compiling, responding to comments.

Q And does anybody in the Army engage in compiling records for a rules administrative record?

A No.

Q Who typically makes decisions on what is included in the record?

A It would have been those individuals I just named, and we include all letters, emails, postcards, whatever -- whatever we get for a public comment period is included in the administrative record.

Q And do you have any understanding of directions given to Army or Corps staff about what documents to retain themselves for purposes of what was considered during the rulemaking?

A It's standard practice for us to retain everything.

Q Do you know who weighed in on the decision to not include the Peabody memoranda in the rules administrative record?

A I do not, no.

Q Did you ever hear of or engage in discussions about their inclusion?

A No.

Q Were you specifically asked to retain documents for purposes of compiling the administrative record or docket for this rulemaking, or is it, as you said, just a matter of standard practice?

A It's a matter of standard practice that I keep every single document that I receive germane to the rulemaking, any rulemaking, and it would only be after an action is completed that we would then would retain it for probably a year, and then we'd send it off for archiving, whether it be electronic or warehouse somewhere.

Q And at some point, then, do staff who are involved in the rulemaking, turn over pertinent information that was considered in the development of the rule for purposes of its inclusion in the docket?

A What we do is, now that we're going mostly electronic, almost everything that I have is now electronic where in the old days it used to be paper, and we have administrative staff that every so often, and I'm not sure what the period is, 3 to 5 years, they archive stuff, so it's always available on a server somewhere, so we don't have to actually take that action.

The only clarification I want to make, so the committee understands, is in response to a FOIA request, and I don't know whose it was from Congress. I did make sure all of my documents were put in a couple of boxes and organized by topic and provided to the Office of the Army General Counsel so that they would be preserved in there.

Q And in the case of a rulemaking then, Ms. Jensen and Mr. Olson would most likely be the individuals in charge of collecting documentation that had been considered during the rulemaking for purposes of inclusion in a rules administrative record?

A For this rule, Stacey Jensen was the lead, and Dave would have been her advisor because he's done a number of rules. He didn't

lead this rule, but he would have -- he did help her on how to do it, but Stacey Jensen was the lead.

Q And typically, does the Corps take direction from the Army as to what is ultimately included in a rulemaking administrative record?

A No.

Q Were you, at any time, informed of the dates that the administrative record for the rule would cover?

A No.

Q I'm going to ask you some general questions about the course of the rulemaking. Were you ever told or feel pressured to conduct your work to achieve a specific result in this rulemaking?

A Yes.

Q And on what occasions would that be?

A Well, throughout the 6-year process, and the two primary examples are to make sure that the rule expands jurisdiction to the maximum extent possible under law and Supreme Court decision; and number 2, develop a finding of no significant impact from a NEPA document not recommend an EIS.

Q Were you ever told or feel pressured to alter the course of your work or data to achieve a specific result, besides what you just mentioned?

A We were asked to not comment at several points in the process, where ordinarily, we would openly and freely comment and discuss. So the difficulty we had is we would write comments up, we

would submit them through Craig, and we never knew what happened to them after that, because quite frequently, he either would say, "Decision made, done," or he would not respond, so I can't -- beyond that, I can't say.

Q So in these instances, you felt that pressure from somebody within the Army, not necessarily directly from the EPA?

A Correct.

Q Were you ever told in any way that certain information would not reach the EPA, the public, or any other body as intended?

A I was not told that.

Q Were you aware of any discussions about certain information not being made public or reaching to EPA?

A Yes.

Q On what occasions?

A When we briefed Secretary Darcy on the implications of changing Clean Water Act jurisdiction for certain water bodies, including ephemeral and intermittent ditches, and waters adjacent to farmlands, and we showed that there would be thousands of acres of loss around the country, and that was part of the reason we recommended an EIS, and -- but we were made clear that that would stay in the room and not be discussed further. That was one instance.

There were other times when it was -- I certainly felt pressured to consider tamping down any comments I might have, which I did not do. I felt my responsibility was to write them up, submit them, and then what happened after that was not -- you know, not up to me.

Q In the case of your briefing with Ms. Darcy, who communicated or made you feel that way about the ephemeral streams?

A Primarily Craig Schmauder.

Q Do you recall what he said?

A I can't quote what he said.

Q With respect to the comments that you were just referring to that you felt some sort of pressure to tamp down, or not make a comment in any instance, who made you feel that way?

A Predominantly Craig Schmauder in Army. I experienced no such pressure or comments from the Corps of Engineers.

Q Did any of this come from Ms. Darcy directly?

A No.

Q Would you say that's also attributable to the fact that you only met with Ms. Darcy four times?

A That's part of it. And the other is simply her demeanor and her practice is to listen, and she typically, on any issue, doesn't opine much, and she'll think, make her decision, or in this case, she conferred with Craig, and then would make a decision, so she didn't -- in broader meetings, didn't usually express views one way or another. Just follow the process and try to work things out was probably the most I can recall her saying.

Q One thing I forgot to ask. When we were discussing the Darcy memoranda about communications and how they would be treated, you mentioned that there was some communication with EPA prior to those memos being issued. Are you aware of anybody at the EPA receiving a

similar directive on their side?

A I'm not.

Q Were you ever told in any way, or feel pressure to achieve the administration's objective in this rulemaking?

A Yes.

Q How so?

A Typically, we're provided a problem, we study it, we assess it, we come up with alternatives, we propose a solution. The boss picks one, and we proceed.

In this case, we were told the answer up front pretty much. We really were not allowed to do the science and study options and alternatives. We went towards one goal and one goal only for 6 years, which is probably the reason we meandered so much, and so there was constant pressure to get from a predetermined initial policy point to a final point that was as close as possible to that, and the only give was to take some jurisdictional waters off the table to help with concerns expressed by USDA and farmers.

Q And these were some of the reasons you mentioned that you felt the rule was political. Is that correct?

A That's correct. That, along with the interpretive rule.

Q And you would say that this process that you just outlined, studying a problem, coming up with solutions, evaluating alternatives, proposing, and making a decision is part of a normal rulemaking process?

A That's correct.

Q Even in the case of a joint rulemaking between the EPA and

Army Corps?

A That's correct.

Q At any other point in your tenure, besides working on WOTUS, did you feel pressure to conduct your work or data analysis to achieve a certain result?

A No.

Q Would you say that your experience with WOTUS rulemaking is unprecedented in the manner in which your work was managed?

A Yes.

Q The EPA held numerous outreach meetings to discuss the rule during its development. Were you aware that these meetings were taking place?

A Yes.

Q Were you invited to attend any of these meetings?

A Yes.

Q Were you aware of any meetings that you were not invited to?

A Yes.

Q Which meetings do you recall?

A We had -- well, we have a list. There were 400 meetings. We kept the database, a list that EPA would update every week, and I -- as I recall, the Corps or I, but it was mostly the Corps, attended about a third of the meetings in a listening capacity, and the rest we did not attend either because we weren't invited or because we simply didn't have the staff.

Q When you said "in a listening capacity," was there a reason that you did not participate in a more active capacity?

A Yes, EPA took the lead. This was, in their view, their rule, and they wanted to direct the conversation, lead the discussions, and while we did answer technical questions from time to time, specifically about the Corps or the Army, for the most part, we were simply there, as both Greg Peck, Ken Kopocis, and others would say, to show the flag, to show that it's a joint rule.

Q So that type of a comment, was that how you understood your role to be in a listening capacity, or was it communicated to you in any other manner?

A Well, the agenda showed EPA speaking 90 percent of the time, and they did the slides, they did the talking points, we showed up.

Q Do you know of the reasons for any of the meetings that you were not invited to, and I mean "you" by you and the Corps?

A No.

Q Are you aware of whether any Army or Corps staff were ever disinvited from meetings?

A I was never disinvited from a meeting. I can't speak for the Corps.

Q Does the Army typically engage in outreach meetings during a rulemaking for the Corps?

A No.

Q This was the first time, in your experience with the Army and Corps, that that has happened?

A Yes.

Q To your knowledge, was OIRA invited to all of these outreach meetings?

A I can't say.

Q In your experience, is it common to hold over 400 outreach meetings on a rulemaking?

A It's never happened before, and in this case, they were all, to my knowledge, held after the draft was promulgated and the policy decisions were made.

Q Who, from the Army, typically participates in meetings with outside groups during rulemaking? You mentioned that that typically doesn't happen, but is there anybody who you would consider to be the point person in any of Corps rulemakings to be present at these meetings?

A I'd like to be very specific that we're -- in talking about the regulatory program because the Corps does rulemakings on planning projects, real estate, operations, all kinds of things, so just talking about regulatory, it would be myself, it would be the chief of regulatory, or one of her staff, whoever she delegates. And typically, we don't meet to discuss a rule. That's embargoed information. We're not supposed to discuss administration rulemaking stuff in great detail, but we are always open to listen to people's comments, which we do when people request meetings.

Q Are you aware of any of these outreach meetings where OIRA or OMB were not present?

A I would ask OIRA, but it's my understanding that they weren't present at very many of those meetings, the 400 outreach meetings.

Q You were just speaking about who would typically participate in meetings in a listening capacity with external stakeholders. Would it be your understanding that somebody from the Army Office of General Counsel would also be present at those types of meetings?

A Rarely.

Q And why is that?

A We're typically listening about technical matters and policy, and it's, frankly, not a wise use of their time. Now, if we're in litigation on a matter, or if we have reason to believe that they're going to bring up subjects where we need to protect ourselves, we bring an attorney on those instances. But I would say 90 percent of the time, we're attorney-less, and 10 percent of the time we bring an attorney, and that's a judgment that somebody at my level would have to make. And if I find out that I'm wrong, I can either end the meeting or just not open my mouth.

Q How were you informed that these outreach meetings were taking place?

A We would get this running list, a table from EPA on a weekly basis, sometimes multiple times in a week, and they would just add meetings, put dates, put locations. They were all over the country. They engaged their regional staff, and we try to send people to ones

we could in D.C. when we had staff to do it.

Q You say that a lot of these happened in the region, but that the rule was embargoed, and that is why a lot of activities in the rulemaking took place in Washington, D.C. instead of in the field. Could you explain why, then, there were field staff taking these meetings on EPA's behalf?

A I can't explain it, no.

Q Was the rule similarly embargoed on EPA's side as it was for the Army and Army Corps? When you use that terminology --

A Yeah. Well, I can only speak for Army and the Corps. When we're doing a rulemaking, like the 2008 mitigation rule, like the nationwide permits, we're doing the 2017-cycle right now this minute. I can't tell you the details or anybody else. It's not public information. We tell people we're working on them, we say, Hey, you got ideas, send in a letter, but we don't go out and market or lobby for our nationwide permits, or we don't go out and hold meetings for them at this point.

We're doing internal deliberative stuff until we get a draft to OIRA, and then it opens up for public comment, and then we can go out, and we can have meetings, we can answer questions and do that sort of thing, but we can't disclose our internal thinking process and decisions.

Q And the internal deliberative process to which you refer in this rulemaking is common of all rulemakings. Is that correct?

A Yes, ma'am, that's my understanding.

Q To your knowledge, at least with respect to the meetings that you were at with these external stakeholders, was any of the substance of the rule discussed?

A Yes.

Q How so?

A EPA would explain what kind of water bodies they hoped to regulate or not, and mostly they were very general. But every once in a while, depending on who the audience was, they might say more or less. And while it's purely judgmental on my part, those meetings that were to farmers, homebuilders, mineral extraction companies, and that sort of thing, downplayed the expansion of jurisdiction, and meetings that were to environmental groups like Earth Justice, Sierra Club, and the whole host of folks, they emphasized the expansion of jurisdiction.

So they would tweak their message based on the audience as opposed to what we would do in our meeting. We'd have a template, assuming it was an appropriate thing to do in the first place, so we'd send it out and everybody would read the script, unless there were specific questions that we would have a commander answer, because one district may have coastal waters and another may not, and so there may be some flexibility needed there.

Q And so you're saying that the Army utilizes a template for outreach meetings with respect to other rulemakings, but they did not in this case, because these were EPA driven?

A Yes.

Q In any of these meetings, did you feel that the subject

matter that was being discussed was improperly discussed because the rulemaking was ongoing?

A Yes. And I wish I could remember the date, and if I had to go back and look at my calendar, I might be able to come up with it, but there was one meeting I listened in to rather than attend in person where strategy was discussed by EPA staff on how to reach and get their message across to environmental groups to support the rule, because they were afraid it was in jeopardy, and I and others on the call from the Corps thought that was inappropriate and out of bounds.

Q Did you make any comment during the rulemaking about -- or during the meeting about your feelings that it was improper?

A I did not during the phone call. That would have been inappropriate, but we certainly raised the issue afterwards.

Q To whom?

A Ken Kopocis and Greg Peck.

Q Was Mr. Schmauder on this call, to your recollection?

A No, not to my recollection, he was not.

Q Did you share your concerns with anybody in the Army about that specific call?

A Not in Army; just the Corps.

Q How much notice were you given before these meetings took place?

A Sometimes it would be a week or two, sometimes an hour. It varied.

Q Does Mr. Schmauder primarily represent the Army Corps on

other regulatory matters to outside stakeholders?

A No, that would be Jennifer Moyer's job, the chief of regulatory, with me in oversight and policy support.

Q I think you mentioned earlier that all these meetings happened as the rule was being developed, but after the proposed rule was promulgated. To your knowledge, did any of these meetings take place before the proposed rule was published?

A Not to my knowledge.

Q Do you recall when the EPA began sharing lists of these meetings with you?

A It was shortly after the promulgation of the draft rule, whatever that date was in April -- was it April or May of 2014? And the concern was that -- the public outreach section of my EA was looking pretty weak, and the -- there was concern about coordinating with stakeholders, and so the strategy that was selected was to have these -- and I don't know if this is the right number, but Administrator McCarthy testified to 400 stakeholder outreach meetings, and so that was what we understood was the purpose of that.

Q Can you explain what you mean by "it was looking weak"?

A We hadn't done much to address comments that we had received on the guidance that we published a couple of years before the issues. A lot of them were the same and similar, and we hadn't really taken any action on those. And so I had an environmental assessment at that point in time that discussed the issues in the comment letters that I had read, based on the draft guidance in the early version of the

rule, but I didn't have the updated comment analysis, any updated comment analysis on more recent letters that we had gotten from Congress primarily, and then a few from stakeholders.

Q So why do you say that not much action had taken place with respect to those comments on the draft guidance?

A Well, we did -- we didn't control the pen or the rulemaking, so we really just waited to see what EPA wrote, and we reviewed it, and there just was not an effort to work on comments together, whether it was the -- from the guidance a couple of years before, or as we moved into the final rulemaking process. It just -- our typical method of operation just didn't obtain.

Q With respect to the Army and Corps' efforts, did you conduct a review of the comments that had been collected on the guidance, and you were simply waiting for EPA to do their part, or did you not take any action on the comments with respect to the guidance at all?

A The Corps did one thing; I did one thing. The Corps did its own evaluation and comments on the guidance and I believe wrote up like a summary table. I went through personally and read comment letters, but I had to do a what you call a stratified random sample, and my objective was to get a sense. So what I did is I picked what I thought were substantive comment letters from different geographical areas, from enviro versus industry, from minority communities and tribes, and tried to get a mix just to get a sense, and I wrote a little -- about a 12-page assessment on the results of that, present for, present against, key topics, and the reasons why somebody

supported or didn't support doing the guidance.

Q And who was that document prepared for?

A It was shared broadly with EPA and Corps staff.

Q Was the decision to pursue a rulemaking instead of the guidance, did that take place at this point or later in the process?

A I can't say I recollect the date on that and the timing. Again, we did guidance the first year; rulemaking the second year; roughly, guidance the third year; and then we flipped to rulemaking and stayed with rulemaking for the rest of the time. So I think -- I think we sent the guidance out for comment the second time around, so it would have been about 3 years into the administration, so '09. Is that right, '09, '10, '11, somewhere in 2011, perhaps.

Q Did you or the EPA, to your knowledge, conduct any outreach meetings on the guidance?

A No.

Q So the outreach meetings that took place with respect to the rule would have been the first instance of outreach taking place on any of the draft language that existed that ultimately became the final rule. Is that correct?

A Yes.

Q Okay. Earlier we were talking about stakeholder groups who used the 117 million statistic, and you mentioned a name, Ms. Carter. Do you believe that she might have represented the National Wildlife Federation? Does that sound familiar?

A Yeah.

Q Okay. I just wanted to make sure we had her with the right group. I have a few questions to help summarize some of our understanding of the themes you've touched on about the rulemaking process.

You previously said that the process did not enable you or the Corps to determine the appropriate approach or develop and translate the necessary science to justify the rule.

Does the Corps typically engage in developing the science underlying the Corps rulemakings?

A Yes.

Q At any point, did you or the Corps communicate that additional science was necessary to move forward with the rule?

A Yes.

Q At any point, did you or the Corps express concern about the EPA's scientific, technical, or economic analysis underlying the rule?

A Yes.

Q At any point, did you or the Corps communicate that the rulemaking process was not being followed?

A Yes.

Q And who did you communicate that to?

A Assistant Secretary Darcy, Principal Deputy Rock Salt, Principal Deputy Therese Dominguez, Craig Schmauder.

Q And generally, how did these individuals respond to that concern that the rulemaking process was not being followed?

A There wasn't much of a response. We were on a track.

Q Do you believe that the agency's complied with all of their constitutional, statutory, regulatory, and legal obligations in the course of this rulemaking?

A I'm not an attorney to really opine on that. I can say the processes that I typically follow for rulemakings, I was -- I did not follow, nor was I allowed to follow for this rulemaking.

Q You are the Army's regulatory expert. Is that correct --

A That's correct.

Q -- plus the Corps?

A That's correct.

Q So to the extent that you are responsible for engaging in making sure that a Corps rulemaking is appropriately fulfilling its obligations in the rulemaking process, with respect to statutes as well, I know you say you're not an attorney, but from your expertise as the regulatory specialist for Army and your work with the Corps, do you believe that the agency's complied with all of their statutory requirements in the rulemaking process?

A No.

Q Do you believe that the rulemaking was fundamentally flawed?

A Yes.

Ms. Aizcorbe. We can go off the record.

Mr. Kerner. Okay. It is now 1:50. Did you conclude the hour for good?

Mr. Hambleton. Yeah.

Mr. Kerner. Okay.

Mr. Smith. Can we take a 5?

Mr. Kerner. Oh, yeah. Let's take another, but a sharp 10, so
2 o'clock we'll resume.

[Recess.]

[2:00 p.m.]

Mr. Kerner. All right. I believe everybody's ready. You guys as well? Reporter? Okay. It is 2:01, and we will resume with the minority's hour.

BY MRS. BAMIDURO:

Q Mr. Smith, in the last hour, you indicated that on the environmental assessment that Mr. Schmauder opined on several scientific issues. Do you recall that?

A Uh-huh.

Q Specifically you indicated that he opined on isolated waters?

Sorry. For the court reporter, please give an audible response, a yes or a no.

A Yes.

Q You indicated that he opined on isolated waters. What precisely was Mr. Schmauder's opinion on that?

A His opinion was that without any scientific underpinning, it was okay to opine in this rule whether isolated waters were subject to Clean Water Act jurisdiction or not subject to Clean Water Act jurisdiction.

Q You also indicated that he opined on significant loss. What exactly was his opinion on that topic, as you recall it?

A I recall talking about significant nexus. Might that have been --

Q With Mr. Schmauder?

A In my previous hour.

Q Is that something that you have a recollection of Mr. Schmauder opining on?

A Yes.

Q What was his opinion?

A We had discussions on the basic hydrology and biology of how a water that's over here might affect the physical, biological, and chemical integrity of a river that's over here. And based on my scientific background and what I have read of the EPA's own connectivity report, I had opinions about that. And Mr. Schmauder would say: Well, I disagree with that. I think it's okay to do what EPA wants. And that -- so he was making a scientific judgment, in my view.

Q Was he making a scientific judgment, in your view, in conversation with you, or did you understand him to be the final decisionmaker on these scientific issues?

A He would make these statements in our Gang of Eight meetings. I don't recall in the last couple months having a one-on-one with Mr. Schmauder. That was during the period of time when he would no longer talk to me. While the Corps would talk to me on a daily basis, he had cut me -- pretty much cut me out of the rulemaking process.

Q In your view, who made the final decisions on the science underlying the rule?

A I can't say because I was -- I don't know who made the final decision. But EPA certainly had the upper hand on it.

Q Do you have any reason to believe that Mr. Schmauder was

the final decisionmaker on the science underlying the rule?

A I have no reason to believe that.

Q You indicated in the last hour that folks at the Army and at the Corps were given talking points. Is that right?

A Yes, ma'am.

Q Is it unreasonable for an agency to expect that it would speak with one voice on what you deemed to be a generational rule?

A No.

BY MS. FRASER:

Q Have you ever been a spokesperson or tasked with speaking on behalf of the Army or the Army Corps with respect to any rulemaking that's been engaged in?

A Yes, many times.

Q Did anyone designate you as a spokesperson for the Waters of the United States rule?

A During the first 6 years, I was one of several. And then, as I said before, during -- starting about November of 2014, my role was continually eroded and minimized by Craig Schmauder, to the point where, in July, then I met with Ms. Darcy, and I was taken off formally.

Q How many other people were tasked with speaking on behalf of the agencies --

A Well, I would speak --

Q -- about the rule?

A -- Craig Schmauder would speak, and that's the Army side of the equation. Principal Deputy Marie Therese Dominguez, when she

was there, would speak. Principal Deputy Terrence "Rock" Salt, when he was there, would speak. When you go to the Corps, it would be General Peabody, the Commander of the Civil Works at the Corps. It would have been Chief of Regulatory, Jennifer Moyer, and the Chief of Operations, which initially was Jim Hannon, and then currently is Eddie Belk.

Q Is there any document or other concept that guided what the communication on this rule ought to be? Or would every person authorized to speak on behalf of the agency essentially develop whatever agenda they wanted to speak on and then do so?

A No. We commonly worked together to develop talking points so we all speak as one, a, agency, and, b, Federal family.

BY MRS. BAMIDURO:

Q Mr. Smith, are you familiar with GAO, the Governmental Accountability Office?

A Yes.

Q What's your understanding of what their role is as a Federal agency?

A As I understand it, Members of Congress can request what they call engagements. I call them studies, but they call them engagements. And they will look into a particular question or series of questions at the request of a Member of Congress, typically interview and/or visit agencies and projects, and then write a report with recommendations and submit it to the Member who requested the engagement in the first place.

Q They were not at all a party to this rulemaking. Is that

correct?

A That's correct.

Q Would you agree that GAO functions as an independent agency?

A Yes, ma'am.

Mrs. Bamiduro. No. 7, please.

Mr. Burns. I'm sorry.

Mrs. Bamiduro. I'm going to hand you a document that I'll mark as exhibit --

Ms. Wise. I think we're on 4.

Mrs. Bamiduro. Does that sound consistent with your recollection? 4?

Mr. Kerner. It's 4.

Mrs. Bamiduro. Are we on 5?

Ms. Wise. And can we go off the record for a second.

[Discussion off the record.]

Mr. Kerner. And we are now going to mark this document as --

Mrs. Bamiduro. Exhibit 4.

Mr. Kerner. -- exhibit 4, please.

[Smith Exhibit No. 4

Was marked for identification.]

Mrs. Bamiduro. Okay.

Mr. Kerner. Do you want to tell us what the document is?

Mrs. Bamiduro. Sure. These are questions for the record for Administrator Gina McCarthy that were submitted after the July 29, 2015 hearing before this committee.

BY MRS. BAMIDURO:

Q Here you go.

In written responses that she provided in that document, Administrator McCarthy noted, if you'll flip to page 2, in response to question No. 4, paragraph 2, beginning with, "following completion" -- do you see that?

A Yes. I do.

Q She writes: "Following completion of the final rulemaking, the General Accountability Office conducted an independent review of the agency's compliance with all relevant administrative requirements, including the Economic Analysis and the Administrative Procedures Act, and concluded that the agencies met every requirement."

Were you aware of that finding by GAO?

A I was not.

Q You can put that document to the side.

Mrs. Bamiduro. And I'll now hand you what I will mark as exhibit No. 5, which is the GAO report that Administrator McCarthy referenced.

Here's exhibit No. 5. Do you have it?

[Smith Exhibit No. 5

Was marked for identification.]

Mr. Smith. Yes, ma'am. I have it.

BY MRS. BAMIDURO:

Q And I apologize. The font is very small. But at the beginning of the document underneath the title -- and it's a report number GAO-15-750R, dated July 16th, 2015. Directly under that, it

reads, quote: GAO reviewed the Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency's, paren, collectively, the agencies, closed paren, new rule on the Clean Water rule and the definition of, quote, "Waters of the United States," end quote. GAO found, number one, the final rule does not establish regulatory requirements but, instead, defines the scope of waters protected under the Clean Water Act, paren, CWA, closed paren, in light of the statute, science, Supreme Court decisions, and the agencies' experience in technical expertise, and, number two, the agencies complied with the applicable requirements in promulgating the rule, end quote.

Do you see that?

A I do.

Q And at the bottom of that page, it's signed by Robert J. Cramer, managing associate general counsel.

Mr. Smith, you've said earlier that you're not a lawyer. Is that right?

A That's correct.

Q Have ever received any substantive legal training?

A No.

Q Ever teach any courses on administrative law?

A No.

Q Constitutional law?

A No.

Q Regulatory law?

A Yes.

Q You've taught legal courses on regulatory law?

A I teach continuing legal education. I do lectures, not courses.

Q Okay. In what capacity do you do that teaching?

A The CLE International or ALI-ABA invite me to come and train lawyers so that they can get credits and be recertified for bar every year. And I do the regulatory part for them on the Corps of Engineers' section 10 and 404 program.

Q Are you -- how are you trained to do that teaching?

A I would say on-the-job experience. There is not a class on that sort of thing really. I just --

Q There's not a class on regulatory requirements?

A Not the way I teach it. It's just -- you learn it over time. We teach regulatory mostly to regulators.

Q Are you teaching statutes to these lawyers?

A Yes.

Q And on what basis are you teaching statutes without a legal degree?

A How I've applied them. How we all apply them. Thirteen hundred of us all across the country do it every day.

Q So you're using your nonlegal experience to teach lawyers about the statutes?

A Yes, ma'am. And its application.

Q Do you have any reason to dispute the GAO -- that GAO

conducted an independent analysis of EPA and Army's regulatory compliance in the WOTUS rulemaking?

A I'm not going to opine on what GAO did. They're expert in these matters. I am not.

Q You can put that document to the side. Thank you.

A All right.

Q I want to, while we're talking about statutes and regulations, ask you about the Administrative Procedure Act. Are you familiar with that?

A Somewhat.

Q Is it your understanding that the Administrative Procedure Act governs rulemaking?

A Yes, ma'am.

Mrs. Bamiduro. I'll hand you exhibit 6, No. 9.

Mr. Kerner. Six. Oh, your No. 9. Six.

[Smith Exhibit No. 6

Was marked for identification.]

BY MRS. BAMIDURO:

Q There's exhibit 6.

A Thank you.

Q And that is a copy of the Administrative Procedure Act, title 5, section 553, entitled "Rulemaking." You indicated earlier today and on your initial visit when you were here that you had procedural concerns with the WOTUS rulemaking. And the last time you indicated -- and if you want to reference your transcript, you can,

page 58 -- that at the beginning of the process it was, in your words, quote, "collaborative and a lot of interaction. We would have 6-hour meetings, 2-, 3-hour meetings in a week."

Do you recall saying that?

A I do.

Q Can you point me to a provision in the APA or any other regulation that governs how often agencies must communicate with each other in a joint rulemaking?

A Nope. There is no such citation as far as I know.

Q You also said in your transcript, on page 173, that the process was not followed because, quote: "We didn't have the interagency co-rule writing. We didn't have OIRA guiding and helping us. We didn't get together to talk about comments about how to respond to them," end quote.

Do you recall that?

A I do.

Q Can you point me to a provision in the APA or any other regulation that requires interagency co-rule writing?

A I can't in the APA.

Q In any other regulation?

A I'm not familiar with one.

Q Is there any regulation that requires agencies seek guidance or help from OIRA during the rulemaking process?

A Would you say that again, please?

Q Sure. Are you aware of any provision in the APA or any other

regulation that requires that agencies seek guidance or help from OIRA during the rulemaking process?

A Not in the APA. I can't think of another regulation, but I do believe it's referenced in the executive order, it might be, 12, boy, 888. That's the executive order that OIRA uses to review regulations. And I think early discussions are encouraged, but I can't say for sure. It's just been our practice.

Q So are you referring to Executive Order 12866 --

A Yeah.

Q -- entitled "Regulatory Planning and Review"?

A Yes, ma'am.

Q Are you able to point to a provision in there that requires that agencies seek out OIRA help during the rulemaking process as opposed to submitting their rule for review at the end of the rulemaking process?

A I don't believe so.

Q You also said, on page 174 of your transcript, quote "I would say that the first 2 years, guidance and rule, we worked hard to execute the interagency process that we successfully executed for the 2008 mitigation rule," end quote. Do you see that?

A I do.

Q Mr. Smith, can you point me to a provision in the APA or any other regulation that indicates that the standard that was established for the 2008 mitigation rule is what's required by law?

A Nope.

Q You also said in your transcript, on page 57, that in your experience the rulemaking process begins with an initial meeting with principals and key staff to discuss the issue and study it and assess recommendations, which you claim did not happen here for WOTUS.

Can you point me to a provision in the APA or any other regulation that requires that process be followed in the rulemaking?

A No.

Q You also said, on page 58, that, in your experience, agencies would brief OIRA together like you did for the 2008 mitigation rule, which, according to you, did not happen here. Can you point me to a provision in the APA or any other regulation that requires that agencies must brief OIRA together in a joint rulemaking?

A No.

Q Another basis for your concern was that in your view -- and this was expressed on page 36 of your transcript -- that the Corps was not aware of when the EPA began drafting the rule. Do you recall that?

A Could you point to a paragraph, please?

Q Sure. Did you find it?

A I found a question that says, "We understand that the Army Corps also was unaware of when the EPA began drafting the final rule."

Q That's exactly what I'm referring to. And your response was: "No. It's unheard of." The question was: Is it uncommon -- I'm sorry -- is it common in your experience that the Corps would not be aware of when its own joint rulemaking is being drafted? And you responded, "No. It's unheard of." Do you see that?

A Yes.

Q Are you familiar or can you point me to a provision in the APA or any other regulation that requires that agencies must notify each other of when rulemaking -- rule drafting begins?

A No.

Q So, Mr. Smith, if you can't point to legal requirements that dictate that the rulemaking must unfold the way that you are used to, on what basis are you claiming that the process was deficient here?

A All of the rulemakings that I have been engaged in in my career and the process that we've always followed, including with EPA on the 2008 mitigation rule. And beyond that, I -- it's not in the APA, but it's well established, at least in my mind, how Federal agencies go about rulemaking.

Q So you're basing it on your prior experience and not the law?

A That's correct.

Q You said in the last hour, and -- I believe you said it in the last hour and in your last visit here, that tribal consultations did not take place.

Mrs. Bamiduro. I'm going to hand you exhibit No. 7. And that is No. 10.

[Smith Exhibit No. 7

Was marked for identification.]

BY MRS. BAMIDURO:

Q Here you go. And I will refer you to -- this is the Federal

Register. This is a copy of the final rule. And I'll refer you to page 37103. And if I could direct your attention to the middle column, the first full paragraph, beginning with "The agencies." Do you see that?

A Yes.

Q And it reads: "The agencies began consultation with federally recognized Indian tribes on the Clean Water rule defining 'Waters of the United States' in October 2011. The consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, continued, in stages, over a 4-year period until the close of the public comment period on November 14, 2014. EPA invited tribes to provide written input on the rulemaking throughout both the tribal consultation process and the public comment period." Do you see that?

A I do.

Q Do you know who has the authority to define the time period of the tribal consultation period?

A Each agency.

Q So is there anything, to your knowledge, that would prevent EPA from defining the tribal consultation period as being October 2011 through November 2014?

A If that's how they choose to define it, that's their prerogative.

Q You can put that document to the side for now.

Mrs. Bamiduro. I'll now hand you exhibit 8, No. 11.

[Smith Exhibit No. 8

Was marked for identification.]

BY MRS. BAMIDURO:

Q Here's exhibit 8. And that is the "Final Summary of Tribal Consultation for the Clean Water Rule: Definition of 'Waters of the United States' Under the Clean Water Act; Final Rule," dated May 2015. Do you see that?

A I do.

Q And it says, on page 4: On October 12, 2011, EPA sent a tribal consultation notification letter to all federally recognized tribal leaders via email and -- excuse me -- via mail and email, inviting tribal officials to participate in consultation and coordination events and provide comments to EPA in coordination with Army.

Do you see that?

A I do.

Q Mr. Smith, do you have any evidence to suggest that the EPA did not issue that letter to the tribes?

A No.

Q That paragraph continues, quote: "EPA consulted with tribal officials consistent with the consultation plan developed for the proposed rule to gain an understanding of tribal views and solicited their comments on the proposed action and on the development of today's rule," end quote. Do you see that?

A I do.

Q And you've stated consistently that no tribal consultations took place. Is that your position?

A By me or the Corps of Engineers.

Q Right. And then you were also asked -- and you stated that in your transcript you -- here the last time. You were also asked whether, quote, "the EPA conducted any tribal consultations," on page 112 of your transcript, and you responded, quote, "I am not aware of any they conducted." Do you recall that?

A I do.

Mrs. Bamiduro. No. 4.

I'm going to hand you exhibit No. 9.

[Smith Exhibit No. 9

Was marked for identification.]

BY MRS. BAMIDURO:

Q And this is an Army document that was produced, Bates No. 0013239 through 0013241, dated October 24th, 2011. Here you go, exhibit No. 9. On page 3 of this document, with the Bates number at the top 0013241, it reads at the top, quote: Regional Tribal Operations Committee, paren, RTOC, closed paren, meeting October 18, 2011.

Do you see that?

A Yes.

Q Okay. And that was less than a week after the EPA, according to the rule, said that it issued the tribal consultation

notification. Is that right?

A Well, I've forgotten the date already, but --

Q It was October 18th.

A Okay.

Q I'm sorry. It was October 12th. So we are 6 days later.

Is that right?

A I'm sorry. I'm focused on this.

Q Sure. So --

A I'll trust you.

Q October 12th is when the EPA sent tribal consultation notification.

A Okay.

Q And then this meeting takes place 6 days later on October 18th. And that's within the October 2011 and November 2014 tribal consultation period as defined within the rule. Is that right?

A I believe so.

Q The next two lines read, in bold: Tribal Outreach on Pursuing Options for Rulemaking Regarding Waters of the United States Under the Clean Water Act, paren, Presenters: Damaris Christensen, EPA; Chip Smith, USACA -- CE, excuse me, closed paren, Summary. Do you see that?

A I do.

Q Under that, can you please read the next two sentences, beginning with "On October 18th," out loud.

A Just a second here. Let me find it again. Oh. On October

18, 2011, Chip Smith, Stacey Jensen, and Shanti Santulli attended the Regional Tribal Operations Committee, RTOC, meeting on the Pala Tribal Reservation. RTOC includes tribal leaders and members as well as State and Federal environmental agency representatives within EPA Region 8 -- 9.

Q The last sentence of that paragraph reads, quote: The goal of the RTOC -- sorry -- RTOC presentation, the webinar, and other efforts to consult with tribes at this stage is to consult early in the process to gather comments from the tribes prior to publishing the proposed rule in the Federal Register. Do you see that?

A Yes.

Q This document was sent by Stacey Jensen on October 24, 2011. Is that right?

A Yes.

Q And it was sent to your wife. Is that right?

A Yes.

Q And the subject is "RTOC Meeting Notes, Unclassified." Correct?

A Correct.

Q And RTOC --

Mr. Kerner. Are we on the front now or --

Mrs. Bamiduro. Yes. I've gone back to the front.

Mr. Kerner. The front page?

Mrs. Bamiduro. I'm reading from the subject line.

Mr. Kerner. From the front page.

Mrs. Bamiduro. From the front page.

BY MRS. BAMIDURO:

Q And are you also a recipient of this email?

A I don't know. Let me look.

Q You can take a look at the --

A Yes.

Q -- header.

I'm sorry. RTOC stands for Regional Tribal Operations Committee. Is that right?

A That's correct.

Q Do you have any evidence to suggest that this document does not accurately reflect your attendance and presentation on the Pala Tribal Reservation?

A It accurately reflects my attendance and participation in this information-sharing meeting on the Pala Reservation.

Q And this is within the time period of tribal consultations as defined in the rule. Is that right?

A This is -- meeting was on the guidance, not on the rule.

Q My question was, this meeting took place within the period defined as the tribal consultation by the rule. Is that right?

A I'm not sure I understand what you're asking me.

Q Do you need to refer back to the rule as to when they defined the tribal consultation period?

A Oh. Okay. Let's do that.

Q 37103. Middle column. First full paragraph: "The

agencies began consultation with federally recognized Indian tribes on the Clean Water rule defining 'Waters of the United States' in October 2011. The consultation and coordination process" -- and I'm skipping down a little bit -- "continued, in stages, over a 4-year period, until the close of public comment period on November 14, 2014."

And I've already read the entirety of the paragraph a few moments ago. Do you see that?

A I do.

Q And so this meeting that documents your attendance and presentation at this meeting on the Pala Reservation, is that within that time period of tribal consultation as defined by the rule?

A Yes.

Q In your -- as far as you understand it, are tribal consultations governed by Executive Order 13175?

A That's one document we use.

Mrs. Bamiduro. I will hand you that. I think we are up to exhibit 10. Here is exhibit No. 10, Executive Order 13175.

[Smith Exhibit No. 10

Was marked for identification.]

BY MRS. BAMIDURO:

Q And if you look at -- on the second page, section 5, where it says, "Consultation," subsection b, it states, quote: To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications that impose substantial direct compliance costs on Indian tribal governments and that is not required

by statute unless, number one, funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government or, two, the agency, prior to the formal promulgation of the regulation, A, consulted with tribal officials early in the process of developing the proposed regulation.

Do you see that?

A I do.

Q Can you point to language in Executive Order 13175 that mandates specifically when in the rulemaking process tribal consultations must occur other than prior to formal promulgation or early in the process?

A No.

Q You can put that document to the side.

Mrs. Bamiduro. I'm going to hand you exhibit No. 11, which is going to be "EPA's Policy on Consultation and Coordination with Indian Tribes." It was issued on May 4, 2011. Here you go.

[Smith Exhibit No. 11

Was marked for identification.]

BY MRS. BAMIDURO:

Q On page 1 of that document, as it's written on the bottom right-hand corner, section 1, Policy Statement. Do you see that?

A I do.

Q Under that, in the first paragraph, it reads:

"Consultation includes several methods of interaction that may occur

at different levels," end quote.

On page 7, if I can direct you there, under section D, How Consultation Occurs, it says: "There is no single formula for what constitutes appropriate consultation, and the analysis, planning, and implementation of consultation should consider all aspects of the action under consideration."

Do you see that?

A I do.

Q In the last hour, you opined that webinars and other mediums of communication did not suffice for tribal consultation. But if EPA is following their own policy, which says that there's no single formula for what constitutes appropriate consultation, would webinars fall within the confines on their internal guidance on tribal consultations?

A I can't say. It's their guidance.

Q Does it exclude webinars?

A Not in the language that they have written, no.

Q And, as a matter of fact, does it say that there's no single formula for what constitutes appropriate consultation?

A Correct.

Q Is it fair to assume that EPA could conduct tribal consultation pursuant to its own policy governing tribal consultation?

A Say that again.

Q Sure. Is it fair for EPA to conduct tribal consultations pursuant to its own internal guidance on tribal consultations?

A Yes.

Q Do you need to take a break?

A No, I'm good. It just tasted good.

Q In the last hour and maybe in the preceding hours and certainly the last time that you were here, you indicated that you thought this rule was political. Did you ever receive direction from the President to promulgate this rule with a disregard for science?

A I did not.

Q Did you ever see any evidence of a directive from the Army or EPA to promulgate this rule with a disregard for science?

A No.

Q Did you ever receive direction from the President to reach a finding of no significant impact?

A No.

Q Did you ever have any evidence of a directive -- strike that.

Did you ever receive direction from the President to promulgate this rule in violation of legal requirements and regulations?

A No.

Q Did you ever see any evidence of a directive from the Army or EPA to promulgate this rule in violation of legal requirements and regulations?

A No.

Mrs. Bamiduro. I'm going to hand you exhibit No. 12.

[Smith Exhibit No. 12

Was marked for identification.]

BY MRS. BAMIDURO:

Q Here you go. And these are excerpts from a transcript before the Transportation and Infrastructure Committee, held a hearing on June 10, 2015, where Assistant Secretary Darcy testified. If I could direct your attention to page 76, which should be the last page in your packet, she was asked, quote: What steps did you take? Did you hold meetings? Did you respond to the -- did you respond to -- the Corps had some serious concerns about the process of the Clean Water rule and what is in the Clean Water rule, end quote.

Assistant Secretary Darcy responded, quote: "We took those concerns and talked through them and walked through them with the Environmental Protection Agency before finalizing the rule," end quote.

Mr. Smith, were you privy to conversations Ms. Darcy had with the EPA?

A No.

Q Do you have any evidence to suggest that Ms. Darcy's statements in this transcript were not true?

A No.

Q In response to being asked to whom Ms. Darcy took the concerns, she responded, quote: "Our colleagues at the Environmental Protection Agency because we were jointly developing this rule," end quote.

Do you have any evidence to show that Ms. Darcy did not take these concerns to the EPA?

A Well, she didn't take the concerns to the Corps or I.

Q That was not my question. Do you have evidence to suggest that she did not take the concerns to the EPA?

A No.

Q You can put that document to the side.

Mrs. Bamiduro. I will hand you exhibit No. 13.

[Smith Exhibit No. 13

Was marked for identification.]

BY MRS. BAMIDURO:

Q Here you go. This are excerpts from a July 29th, 2015, hearing before this committee where Administrator Gina McCarthy was asked to confirm whether the EPA knew of the concerns that the Corps had before finalizing the rule. If I could direct your attention to the top of page 112 in your packet, she responded, quote: "Since I am not privy to the exact language in the memo, I can't speak directly."

Do you have it? Page 112? Okay.

"But I can tell you that, in working with Jo-Ellen Darcy on this rule, she indicated that all of the concerns of the Army Corps had been satisfied. In moving forward with the final, I individually had conversations with her about the changes that the Army Corps was interested in making as the proposal moved through the interagency process, and I understood that everything had fully been satisfied."

Do you see that?

A I do.

Q Were you privy to the conversations that Ms. McCarthy had

with Assistant Secretary Jo-Ellen Darcy that's referenced in this statement?

A No.

Q Do you have any evidence to suggest that those conversations did not occur?

A No.

Q Mr. Smith, just a few general questions. Is it uncommon for staff members to express differences of opinion throughout a rulemaking process?

A It's common.

Q It's common? Is it common --

A Yes.

Q I'll rephrase it. Is it common --

A Yes.

Q -- for staff members to express differences of opinion in a rulemaking process?

A Yes, ma'am.

Q Is it unusual for professionals to examine the same set of data and reach differing conclusions?

A It's not unusual.

Q Did you expect to be the final decisionmaker for the Army's position on the Waters of the United States rule?

A No.

Q Was Ms. Darcy, as Assistant Secretary for the Department of the Army, in a position to bind the Army when she entered this joint

rulemaking with the EPA?

A Yes.

Q Mr. Smith, is one of the purposes of the Clean Water Act to ensure that our drinking water is safe?

A Yes.

Q Should that be a goal of the EPA and the Army Civil Works program --

A Yes.

Q -- to ensure that we have clean drinking water?

A Yes.

Q Did the Waters of the United States rule have an impact on the ability to ensure clean drinking water?

A May I ask a question?

Q Okay.

A Since it's stayed in court, it technically has no impact.

Q If it were being enacted, would the Waters of the United States rule have an impact on the ability to ensure clean drinking water?

A Yes.

Q Are all rivers in the United States considered navigable waters for purposes of the Clean Water Act?

A No.

Q So part of what the rule does is to preserve protection of those rivers for Clean Water Act jurisdiction. Is that right?

A Right.

Q But the rule goes beyond those easily identifiable rivers and other known waterways. Is that right?

A Correct.

BY MS. FRASER:

Q Is there a category of rivers that are not considered navigable for purposes of the Clean Water Act?

A We typically refer to water bodies because rivers are a continuum of those with perennial, meaning continuous, to intermittent, periodic to ephemeral, rarely flow, and at some point in that trajectory, jurisdiction will end. So, yes, in some cases, there are parts of rivers that are no longer jurisdictional.

Q My question, however, concerned mapped major rivers in the country. Are there any of those mapped major rivers excluded from clean water protection?

A I believe so. And we have also found that the maps are not accurate. They're out of date. River courses change. River bodies come and go. So while we use the maps as a guide, we always go out and -- always go out in the field or use aerial photography to ascertain where water bodies currently are today.

Q Understanding that rivers start out as large bodies of water and then sometimes trickle all the way down to streams, are you referring when you're excluding rivers that are navigable or are considered navigable waters to be those streams that are no longer a large body of water? Is that what you're excluding?

A I'm sorry. Could you repeat that? I got distracted there.

Q Understanding that rivers are usually large bodies of water that then trickle down to streams, are you excluding the streams and other parts of the river that may cease to exist as being the categories that are excluded from navigable waters? Or are you also including large bodies of waters as being excluded from --

A To the best of my knowledge, perennial streams, as a rule, are always jurisdictional. Most intermittent streams, meaning periodic flowing streams, are jurisdictional, but not all. And in ephemeral waters, we do case-specific evaluations and determine whether that they are sufficiently connected to a downstream, sorry, but traditional navigable water, to render them jurisdictional or not. So you have to do a case-by-case determination on many of these waters. And some we determine are not covered, and some we determine are. It's very fact- and case-specific.

Q I guess in a general sense what I'm asking is that if you put can put a boat on it, is it considered navigable?

A Yes, ma'am.

Q Okay.

Mrs. Bamiduro. I want to show you what's going to be marked exhibit 14.

[Smith Exhibit No. 14

Was marked for identification.]

Mr. Kerner. Portia, what is it?

Mrs. Bamiduro. It is a news release by the EPA entitled "Clean Water Rule Protects Streams and Wetlands Critical to Public Health,

Communities, and Economy," dated May 27, 2015. Here you go.

And, again, I apologize for the small font. But on the first page of this document, the third paragraph down, beginning "For the water," do you see that?

A I do.

Q So Administrator McCarthy is quoted in this release as saying, quote: "For the water in the rivers and lakes in our communities that flow to our drinking water to be clean, the streams and wetlands that feed them need to be clean too," end quote. Do you disagree with that?

A No.

Q She also said in that same paragraph: "Protecting our water sources is a critical component of adapting to climate change impacts like drought, sea level rise, stronger storms and warmer temperatures, which is why the EPA and the Army have finalized the Clean Water rule to protect these important waters so we can strengthen our economy and provide certainty for American businesses," end quote. Do you see that?

A I do.

Q Do you dispute that if being implemented, the Waters of the United States rule would play an important part in ensuring Americans have clean drinking water?

A I don't dispute that.

Ms. Fraser. The release also says that one in three people get drinking water from streams that lack clear protection before the Clean

Water rule.

Mrs. Bamiduro. Do you see that? It's two paragraphs down, beginning with "People need clean water."

Mr. Smith. I see that.

BY MS. FRASER:

Q Do you agree with that?

A Would you ask me exactly which language you are talking about here?

Q One in three people get drinking water from streams that lack clear protection from the Clean Water rule.

A I have seen no data on that. I have no basis to opine whether that's true or false. That's related to the 117 million question, which we never did get an explanation from the EPA for where it came from.

Q At this point, I'm going to ask specifically for your speculation, and let's be clear about that. What is your sense, based on your experience, of the number of people or that rely on waters that are not protected by the CWA for their drinking water?

A Oh, boy. I can't come up with a number. All I can say is that the current Clean Water Act program has been in place since '86, as supplemented by Rapanos and SWANCC guidances, plays a critical role in protecting clean drinking water. And the WOTUS rule will protect the same waters, just in a somewhat different way, but then takes some that are currently protected off the table.

Q Would you agree that there are some people or -- that rely

on those sources for their drinking water --

A Yes, ma'am.

Q -- that are currently not protected? You just don't have a sense of or what percentage of our population or how many people do?

A That's part of the basis why I recommended doing an EIS, so we could figure that out and come up with the actual benefits and the problems, particularly in tribal and minority communities where this is often the case.

Mrs. Bamiduro. Mr. Smith, do you dispute that the rule is intended to have a positive impact on clean drinking water for Americans?

Mr. Smith. I do not.

Mrs. Bamiduro. We can go off the record.

[Whereupon, at 2:54 p.m., the interview was concluded.]

Certificate of Deponent/Interviewee

I have read the foregoing ____ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Witness Name

Date