

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

INTERVIEW OF: JAMES LAITY

Tuesday, March 8, 2016

Washington, D.C.

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

House Office Building, commencing at 10:02 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

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For the OFFICE OF MANAGEMENT AND BUDGET:

CHARLES LUFTIG, ESQ., DEPUTY GENERAL COUNSEL

MATTHEW B. CARNEY, ESQ., GENERAL ATTORNEY

Mr. Skladany. This is a transcribed interview of Jim Laity. Chairman Chaffetz requested this interview as part the committee's investigation of the promulgation of the Waters of the United States rule.

Would the witness please state your name for the record?

Mr. Laity. James Laity.

Mr. Skladany. Thanks. On behalf of the chairman, I want to thank Mr. Laity for appearing here today, and we appreciate your willingness to appear voluntarily. My name is Jonathan Skladany and I am with the committee's majority staff, and I will ask everyone else from the committee here at the table to introduce themselves as well.

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

Ms. Rother. Katy Rother with Chairman Chaffetz's staff.

Ms. Fraser. Beverly Britton Fraser with Mr. Cummings' staff.

Mrs. Bamiduro. Portia Bamiduro with Ranking Member Cummings.

Mr. Skladany. Anyone else?

So the Federal rules of civil procedures do not apply to any of the committee's investigative activities, including transcribed interviews, but there are some guidelines that would be followed and I'll go over those now.

Our questioning will proceed in rounds. The majority will ask questions first for 1 hour, and then the minority staff will have an opportunity to ask questions for an equal period of time, if they choose. And we will go back and forth until there are no more questions

and the interview will be over.

Typically we take a short break at the end of each hour, but if you'd like to take a break apart from that, please just let us know. We can also discuss taking a break for lunch whenever you're ready to do that.

As you can see, there is an official reporter taking down everything we say to make a written record, so we ask that you give verbal responses to all questions. Do you understand that?

Mr. Laity. Yes.

Mr. Składany. Thanks. So the reporter can take down a clear record, we'll do our best to limit the number of people directing questions at you during any given hour to just the people on the staff whose turn it is. It is also important that we don't talk over one another or interrupt each other if we can help it, and that goes for everybody present at today's interview.

We encourage witnesses who appear before the committee to freely consult with counsel if they so choose, and you are appearing today with counsel.

Could counsel please state your name for the record?

Mr. Luftig. Good morning. Charles Luftig, deputy general counsel, Office of Management and Budget.

Mr. Carney. Matthew Carney, Office of the General Counsel, Office of Management and Budget.

Mr. Składany. Thank you. We want you to answer our questions in the most complete and truthful manner possible, so we'll take our

time. If you have any questions or if you do not understand one of our questions, please just let us know. If you honestly don't know the answer to a question or do not remember, it is best not to guess. Please give us your best recollection, and it is okay to tell us if you learned information from someone else. Just indicate how you came to know the information. If there are things you don't know or can't remember, just say so and please inform us who, to the best of your knowledge, might be able to provide a more complete answer to the question.

You should also understand that although this interview is not under oath, that by law you are required to answer questions from Congress truthfully. Do you understand that?

Mr. Laity. Yes.

Mr. Skladany. This also applies to questions posed by congressional staff in an interview. Do you understand that?

Mr. Laity. Yes.

Mr. Skladany. Witnesses that knowingly provide false testimony can be subject to criminal prosecution for perjury or for making false statements. Do you understand that?

Mr. Laity. Yes.

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

Mr. Laity. No.

Mr. Skladany. Finally, I will note that the content of what we discuss here today is confidential, so we ask that you not speak about

what we discuss in this interview with any outside individuals, excluding those people present here today. That's to preserve the integrity of our investigation.

That's the end of my opening remarks. Is there anything my colleagues from the minority would like to add?

Okay. We will start with the first hour of questions.

Mr. Luftig. Just two notes from us real quick. One is, as indicated beforehand, Mr. Laity has a hard cutoff at 5. Hopefully we don't need to reach it, but if we do, I understand similar accommodations have been made, so we ask the same accommodations be made today for Mr. Laity, if possible.

And second, just to confirm Mr. Laity will be speaking today on matters within his own personal knowledge.

Thank you.

Ms. Aizcorbe. Thank you.

EXAMINATION

BY MS. AIZCORBE:

Q Thank you, Mr. Laity, for joining us today.

A Please call me Jim.

Q Okay. Jim, thank you.

Jim, what is your current role with OIRA?

A I am the chief of the Natural Resources and Environment Branch within the Office of Information and Regulatory Affairs at OMB.

Q How long have you been in this role?

A Since December 1st, 2013.

Q Is that exhaustive of your time at OIRA or just in this role?

A No, I've been at OIRA since July 1st, 1996.

Q And what are your primary duties in your current role?

A In my current role I supervise a staff of approximately eight people in the Natural Resources and Environment Branch. These are professional analysts, and we are responsible for all of the functions that OIRA has assigned to it by statute or by various executive orders for a particular set of Cabinet departments and agencies, specifically the Environmental Protection Agency, the Department of the Interior, the Department of Energy, and a few other smaller subagencies that deal with natural resource and environmental issues, such as, for example, the National Marine Fishery Service in the Department of Commerce.

Q What is your background or expertise in environmental policy?

A I have a master's degree in public affairs from the Princeton University Woodrow Wilson School. And I'm an ABD, not quite a Ph.D., from Princeton University in the Department of Economics. And I did take several courses in environmental economics and environmental policy in graduate school. Most of my experience is through the 20 years working for the Natural Resources Branch. This was my first job after graduate school.

Q During your time in OIRA, did you work for any other branch or has it always been with the Natural --

A No, I've always been at the Natural Resources and Environment Branch.

Q You mentioned earlier that you had staff that handled a range of statutory obligations. Can you describe a little bit of the structure at OIRA? Are the regulatory staff separate from the paperwork reduction staff, et cetera?

A No. With one exception, one person on my staff is called an economist and she does not have line responsibilities for rule reviews and paperwork reviews. She provides professional technical economic support to people doing those reviews and even people in some cases outside of my branch.

But the rest of the people we divide up responsibilities by portfolios, by agency or subagency. So each person, for instance, there is an analyst who is assigned to the Department of Energy, there is an analyst who is assigned to the Department of the Interior, there is an analyst who is assigned to Clear Air Act rules at EPA and so on.

And each one of those people are responsible for regulatory review, Paperwork Reduction Act review, and various other, lesser -- by "lesser" I mean less time consuming and less prominent.

We have a number of other statutory and executive order responsibilities. For example, we participate in the small business advocacy review panels under SBREFA. And as I think you probably know, OMB also reviews testimony of administration officials and reports that are going to be issued by the executive branch and so on. And all of those functions are done by each desk officer for the portfolio that they manage.

Q So for one rule, would one desk officer be in charge of its review or do you share responsibilities across staff?

A There is usually one desk officer who is the lead on a review. We're a very flat, informal organization and we do collaborate a lot. And very often, especially for a big, major rule, more than one person would work on it. But usually there's one person who has the lead in that area of responsibility.

Q Does OIRA ever coordinate with agencies when a rule will be submitted to OIRA for formal review?

A Yes.

Q What role does OIRA play in this regard? Or maybe you could explain the process a little bit.

A There's no real one answer to that question. It's very case specific. Sometimes the agency simply submits the rule, and we have an electronic system that tracks our rule reviews, and sometimes a rule

will simply show up there. More often, the agency tells us that they are getting ready to submit a rule. And depending on workload and priorities and a lot of other things, we may have discussions at various levels, either at the desk officer level or at the branch chief level or at a policy level, about how to manage that workflow and, you know, when an agency is going to submit a rule for review. That's fairly common.

Q Some reports indicate that agencies must seek permission before submitting a rule to OIRA. Can you explain what this might be referring to?

A Agencies do not have to seek permission to submit a rule to OIRA. So I don't know what that's referring to.

Q How early in the process does OIRA become involved in a rulemaking?

A Again, it's case specific, but most often we are really only involved near the end of -- well, two steps. There is a proposed rule, which under the executive orders that govern our review is submitted for a 90-day review to OIRA, and that's the last step before the rule is published for public comment in the Federal Register. And then the same thing happens at the final rule stage.

We do occasionally have informal interactions. Sometimes we get briefings about what's going on. But really usually our primary engagement is only at the end of the process when the rule is submitted for review.

Q In these informal interactions, is that before a rule is

proposed or an NPRM is published? Is that what you're referring to?

A It's possible but rare that that happens.

Q When an agency does come to OIRA before it engages in the formal review process for that first stage, does OIRA have any policies on how you document your communications with those agencies?

A No, not that I'm aware of.

Q Is it typically through email or phone, or how do you engage with agencies at this stage?

A As I said, it's rare that there's more -- that there's engagement beyond the kind of logistical stuff that we talked about, when are you going to submit it and so on. There's really no typical way.

Q What is the difference between OIRA's role before a rule is submitted for formal review and OIRA's role during the formal review period? You sort of touched on that, but is there any other difference?

A Really OIRA has a very minimal role before the formal review period. It is mainly limited to sometimes getting a kind of FYI briefing.

Well, there is one thing I should have mentioned, I apologize. Not all rules are subject to OIRA review, so before it's decided -- as part of the process, a decision needs to be made about whether a rule is significant, is the term, a significant regulatory action under Executive Order 12866.

And the way that works is that the agency writing the rule first proposes and periodically sends us lists of the rules that they believe

are significant and the ones they believe are not significant. If they are not significant, that would mean that they are not subject to OMB review.

And then we review the lists, and that is generally done at the desk officer level, and most of the time we agree with the agency's determination. But sometimes we may look at something and know a lot about it and say: We really think that's significant, for example, if the agency has said it is not significant.

And also, fairly often, not the majority of the time, but it's not uncommon, we'll ask for a briefing to have more information about the rule. Under the executive order, OIRA makes the final determination about whether a rule is significant or not, but we will often ask the agency for a briefing.

So we learn -- those can be fairly detailed briefings and we often learn a lot about the rule through that briefing before we make a significant determination. But most of our interaction happens after the rule is submitted.

Q And I do realize that the WOTUS rulemaking, as I will refer to it now, underwent several different stages of development with guidance and rulemaking, so this might be a unique situation. But at the first time that OIRA was contacted was the rule or proposed rule or proposed guidance ever characterized as not significant?

A No.

Q Would you say that in the WOTUS context and development of that rule you did engage with these informal discussions with the

agencies before it came to OIRA for formal review?

A Well, there are four different transactions. There is a proposed guidance, a final guidance, a proposed rule, and a final rule. And I don't, to be honest, I don't remember a lot of the details of all the logistics, but I'm sure there were discussions about when things would be submitted and so on.

Q What is OIRA's role in reviewing the unified agenda submissions?

A We review them. We offer comments, ask questions. And then we -- you know, I'm actually not that much of an expert logistically. I believe that we publish a version of it, but that the agencies also publish their own for their own agency, but I am not actually sure exactly how that works. But basically we look at it and provide comments and ask questions and then the agency submits a final version.

Q Do you comment on the substance of the proposal or -- when you say you make comments, what are you referring to?

A Well, it's really hard to generalize. I mean, not the substance of the proposal. The agenda is just really a schedule of what the agency intends to do over the next year. But if something is different than what we thought, for example, or something has changed from the last agenda, we would ask questions about that.

Q And would your own workload and the timeliness of these proposals also be something that you would comment on?

A Potentially, yes, although we tend to take the agencies'

submissions at face value. But that could come up in a discussion of the agenda.

Q You said you don't have a ton of familiarity with this. Who at OIRA manages this review process of the agenda?

A The role of managing the agenda is assigned each cycle to somebody. This is horrible to say, but I actually don't know who's doing it right now. There was a young woman in my branch who did it for several cycles and I was a little bit more involved at that point. But it has now been passed on to someone outside my branch and I don't remember who's coordinating it.

Q We understand that OIRA's review of the submissions takes several months. Can you explain this process or why it takes that long to review the submissions?

A I don't -- that's a function that's largely handled at the desk officer level and I haven't been involved much in it lately. But that sounds like a long time to me. I'm not aware that it takes several months. It may be technically under review for several months. I'm not sure how long the window is. I think it varies between when it's submitted and when the agenda is published. But I don't think typically desk officers are taking that long to review the agenda.

Q Approximately how many rulemakings would you say you have reviewed or been involved with during your time at OIRA? Is it possible to approximate?

A A couple hundred is the best I can do. It's certainly 10 to 20 per year at least, and I've been here for 20 years, so a couple

hundred certainly.

Q So you would say in an average year you might review between 20 and 40 rules? Does that sound right?

A That's high. I would say -- I honestly have never done a count or anything, so I might be wrong, but my impression is it is more in the range of 10 to 20.

Q Have you reviewed other joint rulemakings besides the Clean Water rule?

A Yes.

Q Would you be able to approximate how many of those you've reviewed?

A Very, very few. I can only think of one specific one at the moment, but there may have been a handful of others over the course of 20 years.

Q The one you're thinking of, did it involve the EPA or the Army Corps?

A Yes, it involved the same two agencies.

Q Could you identify which rule it was?

A Yeah. It was the Compensatory Mitigation Rule, and I think it was issued around 2008. As I think you probably know, the Army Corps and EPA share some regulatory responsibilities under the Clean Water Act, and so that's one situation where they do occasionally issue joint rules and they also review each other's rules.

Q I know you've only looked at a few joint rulemakings, but would you be able to characterize any differences between joint

rulemakings or single-agency rulemakings?

A Well, the main difference is simply that it's joint, that the staffs and the policy-level officials from both agencies have to work together. A lot of that working together happens outside of the view of OMB. The rule would be submitted jointly by the two agencies and OMB would work with people from both agencies in our review of the rule.

Q When did you first become involved with the development of the WOTUS guidance or rule?

A Could you be more specific about that, only because there's a very long history?

Q Would you be able to point to a certain stage in the rulemaking process, whether it was when the guidance was being developed or the rulemaking, that you were first either tasked with involvement in these efforts or began having discussions with the agencies about their efforts to implement a rule?

A The reason I was hesitating is because this issue predates this administration. And I was for much of my career at OIRA. I was the desk officer responsible for EPA's Office of Water and also the Corps' Clean Water Act rulemakings. So the first efforts to develop guidance following the Supreme Court decision, the SWANCC decision in 2001, and the Rapanos decision I believe was like about 2004, go back to that period in the Bush administration. And I've pretty much have been involved all the way back to then. So first the Bush administration did an ANPRM and then some guidance, and then the Obama administration

did some guidance and then a rulemaking, and I've been involved in all of those transactions.

Q To the best of your knowledge, was anyone else at OIRA involved in its development prior to your involvement?

A Not prior to my involvement, no.

Q Who in OIRA besides you worked on the WOTUS guidance or rulemaking?

A There was a period when I was acting branch chief, which was for about a year before I became branch chief, when I still did a lot of the work on it because I had the institutional memory and I was still formally a desk officer, I was just acting as branch chief. But I did work with another desk officer named Cortney Higgins.

And then the final rule came in after I had become branch chief and the portfolio had actually been divided up. When I was a desk officer I covered both the EPA and the Corps' Clean Water Act portfolios, but during 2015, when we were reviewing the final rule, there were two different desk officers, one covering EPA's Office of Water and one covering the Corps. And so the lead person was named Vlad Dorjets, and he is the desk office for the EPA Office of Water, but he was assisted by Stuart Levenbach, and he is the desk officer for the Army Corps of Engineers.

Q So both Mr. Levenbach and Dorjets were involved in the rulemaking beginning with the development of the final rule or sooner than that?

A No, the -- well, really just for -- as I said, we have pretty

little involvement outside of the OMB review period, but they were the ones who coordinated the review of the final rule.

Q And even though they coordinated the review, you were still involved in that process because of your background in this area. Is that correct?

A I evolved over a number of years from being a desk officer to being acting branch chief to being branch chief. By the time of the final rule, I am their supervisor, so I was involved as a branch chief, but they really took the lead on the review of the final rule.

Q Can you explain the role of Andrei Greenawalt in the rule's development?

A Andrei Greenawalt was -- I don't remember his exact title, but he was a political appointee. OIRA has a Senate-confirmed administrator, currently Howard Shelanski, and then the administrator usually has one or two political -- I think they're called Schedule C -- appointees who assist him, and Andrei Greenawalt was one of those people.

Of course the political leadership of the agency is always involved in reviews of rules, and especially in very significant rulemakings like this one. So I don't exactly remember what exactly his tenure was and what exactly his involvement was, but whatever stage of the rulemaking happened when he was there, he certainly would have been involved.

Q And when you say the political leadership of agencies are always involved in a rules review, do you mean --

A No, I meant OIRA, the political leadership of OIRA. If it is a major rule, you know, the desk officer reads the rule and the analysis and then briefs the political leadership about what's in the rule.

Q Was there any other, to your knowledge, political leadership or other Schedule C's who worked on the rulemaking from OIRA besides Mr. Greenawalt?

A Again, this happened over a very long period of time, going all the way back to 2004, so there would have been various people in that position who were involved at various stages of the development of guidance and rulemaking.

Q Could you explain the role that Dom or Dominic Mancini played in the review of the rule?

A Dom Mancini was the chief of the Natural Resources Branch when I was the desk officer handling the rule. And then he got promoted to deputy administrator of OIRA, which is the most senior career position in OIRA, and I moved into his old job, first as acting and then eventually as branch chief. So he was my supervisor through the entire process going back to 2009 when we did the guidance and rulemakings in the Obama administration.

Q So he would have acted in this supervisory role in anything that you were --

A Yes.

Q -- reviewing at that time?

A Yes.

Q Administrator Shelanski has stated that OIRA staff engaged with agencies in part by trying to understand why an analysis was done a certain way. Can you explain the process that you undertake in your review?

Mr. Luftig. I don't think Mr. Shelanski's statement has been established by this witness. So to the extent he can answer that based on his personal knowledge he definitely will.

BY MS. AIZCORBE:

Q Can you understand the process that you undertake in your review?

A When a rule comes in, there's usually three parts to it, the actual regulatory text, the preamble to the rule, which explains in a fair amount of detail, essentially summarizes the administrative record, explains the basis for the rule. If it is a proposed rule, it asks for comment from the public on a series of issues. If it is a final rule, it summarizes the public -- the comment received and the agency's responses to the substantive comments.

And then there is an economic analysis, which analyzes at a minimum the costs and benefits of the rule, but it often has many other parts, for example, impacts on small businesses, impacts on employment, you know, impacts on businesses generally, things like that.

And the desk officer reads all three of those documents and then we -- the executive orders under which we operate, 12866 and 13563, establish some basic principles of sound regulation. And we evaluate these documents for consistency with those principles of regulation

and we will provide comments and raise questions with the agency about basically how well it conforms with those principles.

In addition, we circulate the rule to people at other Federal agencies whom we believe may have an interest in the rulemaking. And we usually cast a fairly wide net and circulate it to a lot of agencies, even if -- you know, just to make sure that nobody gets left out who might have an interest. And they provide comments back to us, which we then share with the agencies. And to the extent, if there are disagreements, you know, if one agency raises a concern about another agency's rulemaking, we play a sort of a coordination role and try to help resolve those disagreements, hopefully to everybody's mutual satisfaction.

Q And I apologize, but I think I might have missed the first one that you mentioned. You said you consider three documents, the administrative record, the economic analysis, and what was the --

A No, I'm sorry. The three documents are the rule text, which is what's actually being promulgated in the Code of Federal Regulations; the preamble, which is kind of a summary of the administrative record; and the economic analysis, which is often called a regulatory impact analysis.

Q Thank you.

We understand that OIRA also looks very closely both at the process of a rulemaking, but also at the rule's substance. Would that be a fair characterization?

A Yes.

Q Can you explain the role of the Council on Environmental Quality and what it plays in the rulemaking process?

A I mentioned that we circulate the rule to Federal agencies that might have an interest in the rule. We also circulate the rule to offices within the Executive Office of the President that might have an interest in the rule. The Council on Environmental Quality is one of the offices in the Executive Office of the President. My branch is Natural Resources and Environment, and we would -- almost any rule that would be in my branch would be circulated to them routinely, because anything in that general space is their policy area as well.

And so they could provide comments on the rule the same as any other agency and we would essentially deal with them the same as we would the comments of other agencies, send them on to the rule-writing agency and then discuss -- you know, try to help resolve any disagreements.

Q How frequently would you say you consulted with CEQ during the development of this rule?

A I don't know if I would characterize our interaction as consulting with CEQ. We distributed the rule to them. I believe we received comments from them. I don't actually remember if they provided comments or not. And again, there were a number of different stages. And any issues that they raised we would have discussed with them, but I don't really remember much detail about their involvement.

Q How would you characterize the types of comments that CEQ typically provides? Are they substantive as far as policy or technical

decisions or do they go more towards the timeline of when a rule will be promulgated?

A There is no general answer to that question. They could make comments on any of those things, even grammatical corrections in the text. I mean all of the agencies and the EOP offices that comment on rules generally provide a mix of different types of comments. There is really no one characterization.

Q And you said that any of these comments that you would receive from any of the offices within the EOP would be considered the same as any other agency reviewing the rule?

A I did say that, but maybe I should amend that slightly. I think it's fair to say that we give a little more weight or pay a little more attention to comments from the Executive Office, you know, EOP offices because they are -- each of them has their own fairly senior decisionmaker within the White House or within the EOP.

And so -- I mean, we treat every agencies' comments seriously and we really do try to make sure that issues get resolved. But we probably do pay particular care to comments that come from other EOP offices, including CEQ.

Q Do you recall which other offices within the Executive Office of the President that you received comments from or engaged with in the WOTUS rulemaking?

A To be honest, I don't. I know the offices that we distribute the rule to. We distributed it to -- you know, typically any rulemaking is distributed to the Council on Economic Advisers, to

the Office of Science and Technology Policy, to the Domestic Policy Council, and to the White House Counsel's Office. But I don't remember if any of those offices had comments on whatever stage of the rulemaking.

Q And that would receive -- your answer would include any instruction that you might have received about the rule's timeliness or substance from any of these offices. Is that correct? You don't recall whether you received any guidance or instruction?

Mr. Luftig. Could you clarify instruction or guidance from whom?

Ms. Aizcorbe. Sure, absolutely.

BY MS. AIZCORBE:

Q I'm trying to understand whether OIRA received any instruction from anybody within the Executive Office of the President, either about the rule's timeliness, when it was going to be promulgated, what the rule contained, how it should be written, so on and so forth.

A I don't recall receiving any kind of instruction like that from other EOP offices.

Q Okay. Or that the rule should be passed through review process and for you to ensure that it should make it through?

A Again, I don't recall receiving any instructions like that.

Q Were you aware of any timeframe or deadline set for the rule's development or finalization?

A I do not remember the details of those discussions, but I do remember that there was a lot of concern that to me was communicated from the senior leadership of OIRA, but they may well have been talking

to other people, I don't know, and that we certainly at various points in time were trying to make deadlines. But I don't, to be honest, it's been a while, like I said, there were a number of different transactions, and I don't really remember exactly what the deadlines were or what was communicated to me at the time.

Q Do you recall whether those deadlines are deadlines separate and apart from the 90-day review deadline?

A I don't recall that, no.

Q The committee understands that the Corps were told the draft final rule would be delivered to OMB in early spring 2015 and that there had been an even earlier timeframe of delivery in late winter. Is it typical for a rule to have a projected timeline of a final rule's delivery to OMB?

Mrs. Bamiduro. Can we clarify that that might be the majority's understanding?

Ms. Aizcorbe. For the minority's understanding, we do have references to all the citations in transcripts, but for the current purpose if we can provide those to you.

Mr. Skladany. Just in the interest of getting Jim out by 5 o'clock, rather than introduce all of this stuff into the record, Christina is just trying to work through, I think, without introducing exhibits. We have these piece of testimony available if it would be helpful to review them. But in the interest of time it might be easier to proceed?

Ms. Aizcorbe. My question is a general question about his

knowledge. So I can ask the question again.

Mr. Luftig. So if you could just ask the question again with the understanding that the dates that you cited were not established by his testimony.

Ms. Aizcorbe. Absolutely. To the extent that any specific data is referenced in a question I will make sure that we introduce that document into the record so you can have a chance to review it.

Mr. Skladany. And just in case it wasn't clear, when Christina is asking questions she's speaking on behalf of the majority staff, that's the three of us here and the chairman, and the minority staff is here to represent the ranking member and ask questions on his behalf. So --

Mr. Luftig. Would you repeat the question?

BY MS. AIZCORBE:

Q Yes, absolutely. The committee has been informed that there were several deadlines for the final rule's transmission to OMB. Is it typical in your experience for a rule to have a projected timeline for its delivery to OMB?

A First of all, I can't speak to anything that staff at other agencies might have been told. I don't know that.

As I think I mentioned before, it is not uncommon to have discussions about the timing of when a rule might be submitted between OMB and rule-writing agencies. So I don't know if that answers your question.

Q So in your roles that you've held with OIRA you haven't

provided any input into the timeliness or when a rule will be reviewed or not besides the 90-day review that you're in charge of. Is that an accurate statement?

A No. As I said, we do have discussions with agencies sometimes about when they are going to submit their rules and what the timeframe for review will be. Agencies do sometimes ask for expedited review of a rule, and we discuss, you know, how that fits in the broader priority scheme and what our workload is. I think it is fair to say we try to accommodate agencies, but we also are careful of our own equities in making sure that we have time for a thorough review.

Q The Corps has informed the committee that there was a sense of urgency to get the rule done. Were you aware of this urgency?

A Again, I can't speak to any anything that the Corps might have thought or said or a perspective that the Corps would have had. There were, as I mentioned, there were discussions about target dates for when things would be completed, and I can't remember the details of what they were, but we were working on a schedule.

Q Who were your primary points of contact in the agency for this rulemaking?

A Again, this happened over a long period of time, but during the most recent rounds, and I honestly can't remember exactly when this started, but during the most recent rounds, certainly during the proposed and final rules, my primary points of contact were Greg Peck at EPA and Craig Schmauder. I believe he's in the General Counsel's Office of the Army.

Q Do you recall communicating directly with the Corps during the development of the guidance or rulemaking?

A We did have some communication directly with the Corps, but most of the communication that I had with the Army was with Craig -- was with Craig.

Q How frequently would you say you met with or spoke to the EPA and the Army?

A Could you be more specific about a rulemaking stage, because again you're asking general questions that cover a wide range of transactions and the answer isn't necessarily the same for all of them.

Q Sure. Would you say that during your formal review processes you had regular engagements with the EPA and the Army?

A Again, which stage are you referring to?

Q The proposed rule formal review.

A During the proposed rule formal review I had frequent interactions with the EPA and the Army.

Q And during the final rule review?

A During the final rule review I had very few interactions. As I mentioned, there was then, at that point, there was a new desk officer -- actually two of them -- and I was simply in the background as their supervisor. So whatever interactions at the staff level were primarily theirs and I don't really know the details about how often they interacted.

Q Do you recall having any discussions with either the EPA or Army between those two periods of review?

A I recall them giving us a briefing at some point to let us know approximately what was in the final rule, kind of a high-level overview. I don't remember any other discussions in that time period.

Q Were there ever any periods of time that you were not engaged with the EPA and Army where you questioned why you were not being contacted or consulted?

A No.

Q Were you or anyone else from OIRA present when the agencies first met to discuss developing the rule in 2009? That would have been with Administrator Jackson and Bob Sussman from the EPA. Do you recall?

A No.

Q No, you don't recall or no, you weren't there?

A No, no, I wasn't present -- which is very typical. I mean, OIRA is almost never involved at that stage in a rulemaking.

Q You mentioned earlier that you were involved in the earlier stages when the guidance was being developed. Can you explain that comment in the context of what you just stated?

A Both of the guidance documents were also submitted to OMB for review as significant regulatory actions and treated the same way as a review of a rule, and I was the desk officer during those reviews of those guidance documents, both in the Bush administration and in the Obama administration.

Q How did those pieces of guidance come to you at OIRA? Had they already been vetted by the EPA and Army Corps or were they in varied

draft form from one agency or the other? Do you recall?

A I don't know what vetted means, but they were submitted to OIRA for review. So when we get a document and submit it for review we assume that this is -- this has gone through some process at the agency. It's not just some staff person's ideas. But exactly what process the Army and the Corps went through before they submitted the draft guidance documents for review, I don't know.

Q Do you recall with respect to the guidance documents whether you had any informal communications with the Army or EPA about their development before that final -- or formal review began?

A I don't recall.

I should amend that slightly. I don't recall a lot of details. I was involved in some discussions at some points. Like I said, I have a very long history with this issue. But I don't really remember in any detail through all the iterations of guidance and rulemakings what involvement I had outside of the formal review process.

Q We understand that part of OIRA's job is to look to see how the agency has reacted to and addressed important public commentary. Can you explain this process? In other words, how does OIRA ensure that an agency has appropriately considered and responded to public comments?

A OIRA is charged with a lot of things in review of the rule, but it is not charged with ensuring that agencies have appropriately responded to public comments. That's a responsibility under the Administrative Procedures Act. So we don't ensure that.

Having said that, we certainly read the public comments and the agency's responses, and that helps to inform our review. Often the public raises issues which are helpful to us in understanding the impacts of the rule.

Q After reading the public's and the agencies' comments, do you make recommendations about what to change potentially in a final draft version of a rule?

A Sometimes.

Q Do you review agencies' proposed changes to their proposal?

A Well, the draft final rule by definition is whatever changes the agency is proposing to make to the proposed rule. So the answer is yes. It's just that that rule that comes in, that draft final rule, is the agency's determination about what an appropriate response to the public comments would be. And we certainly do review both the provisions in the draft final rule, how it's changed from the proposed rule, and whatever public comments might have informed those changes.

Q You say you have a lot of subject matter expertise in this area. So at that stage when an agency comes back with their draft final rule, have you ever encountered a situation where you've seen something submitted in a public comment or an agency comment that was not addressed by the agency?

A Let me start by saying I don't believe I said I have a lot of subject matter expertise, but I do.

Q It was an assumption. I apologize.

A So ask your question again. I'm sorry.

Q Sure. I'm trying to understand after you review these comments and an agency submits a draft final rule, have you ever experienced a situation where an agency has not addressed a series of comments or done so in a way that you would find obvious or --

A I cannot recall -- yeah, I mean, you know, I've worked on hundreds of rules. I would be very surprised if there's never been a situation like that. But I also -- my general impression is that agencies do a pretty good job of summarizing and responding to substantive comments. That's a requirement under the Administrative Procedures Act. A rule can be knocked down in court if they don't follow the Administrative -- you know, the APA requirements.

The APA does not require any particular -- you know, they don't have to do what the commenters want, but they do have to summarize, explain their response and explain how the comment was considered in the development of the final rule, and I think agencies generally do a good job of that.

Q You mentioned that it is not OIRA's role to ensure that comments are appropriately addressed, but would you say you do weigh in on considerations of judicial review and whether an agency has maybe completely addressed something in those comments? Do you ever raise that, bring that to an agency's attention?

A Potentially. It would be more common if a comment raised an issue that, using our executive order authorities, that we thought was an important issue to be discussed, that we would sort of discuss the substance of the issue more than the question of did the agency

properly respond to the comment. But again, I'll emphasize there are a lot of different rules, every rule is case specific. It's hard to make any general statement. That's true of all rules.

Q For the few joint rulemakings that you've reviewed, would you say that you engage with both agencies that are a part of that rulemaking in their review of the public comments or do you simply just review the draft final rule as it comes to you?

A As I said, we don't get involved in the review of the public comments. We are -- first of all, a final rule always contains a fairly substantive summary of the substantive comments and the agencies' responses and we review that. And then we frequently look at a selection. There's usually way too many comments for us to read, but we look at a selection of public comments from key stakeholders in order to understand for ourselves sort of in the commenters' own words what issues the commenters' have raised. But we really don't get involved in the agency's job of responding to public comments.

Q And I know I may be repeating myself, but I just want to make sure I understand. It's not OIRA's role to ensure that these comments are addressed. I'm trying to understand the purpose for which you then review public comments. Is it so that anything under your obligations of Executive Order 12866 and your other authorities that those specifics requirements are being met or -- I mean, is your review limited?

A As I said before, we review public comments because they often raise issues and make us aware of concerns and perspectives that

are very helpful to informing our own review of the rule. And so we are very much interested in what the public has to say and in the substantive issues that the public raises, but the responsibility to respond to the public comments is an agency responsibility under the Administrative Procedures Act, not an OIRA responsibility.

Q In the case of the final WOTUS rule, did you speak with the EPA or Army with respect to how they ultimately incorporated or addressed public comments?

A I don't recall having conversations about how they had responded to public comments.

Q Do you recall whether you speak to the Corps about the draft final rule?

A Most of my communication with the Army was through Craig Schmauder, as I said. I have a long history of working with folks at the Corps, and I believe that on several occasions they may have sent me emails or even called. I can't remember any details. So there may have been a few stray conversations with the Corps, but most of my interaction was with the two people that I mentioned. And also, as I said before, for the final rule I was really in the background in a supervisory role, and it was really the two desk officers, Vlad and Stu, who did the primary interaction at the staff level.

Q Were you aware that the final rule was drafted and sent for interagency review before the Corps completed their review of public comments?

A No.

Q Were you aware that the EPA was also still reviewing comments at this time?

A I don't remember if that is true and if I was aware of that. But I will say that when you say reviewing public comments, that's kind of a vague phrase. The agency -- when an agency has a high-visibility rulemaking in which they get tens or hundreds of thousands of comments, which was the case here, what usually happens is that they review sort of all the substantive comments early in the process in order to inform their development of the final rule, but then the process of actually formally preparing all of the documentation that's required under the Administrative Procedures Act to show that you have in fact reviewed all the comments and provided answers to them and so on, that's an ongoing process.

And my understanding was that that process was ongoing during the review of the rule. But I had no reason to think that the agencies had not substantively already reviewed all of the major comments, and in fact there was a detailed discussion of comments in the preamble to the final rule.

Q Do you know when that preamble was drafted?

A No.

Q Do you typically ask agencies whether they have completed their review of substantive or major comments when a rule is sent to OIRA for final review?

A No, we assume that that's the case.

Q It took the Corps 8 months to re-review and respond to the

2,000 comments received for the 2012 nationwide permit program. The agencies for WOTUS received, as you said, many comments, 1.1 million, around 20,000 of which were unique or substantive, yet the final rule was sent to OIRA for review a mere 5 months after the comment period closed. At any point did you inquire how the agencies completed their review in such a short period of time?

Mr. Luftig. I just want to say, the facts that formed the premise of your question have not been established by this witness.

To the extent you can answer the question based on your personal knowledge, you may do so.

Ms. Aizcorbe. If we can use that as an assumption for every question moving forward, that's fine. This is all about his personal knowledge.

Mr. Laity. I was going to say that I don't know any of the things that you just said. But to answer your question directly, no, we did not have any discussion with the agencies about that.

BY MS. AIZCORBE:

Q Does OIRA keep track of how many substantive comments are coming in on a rulemaking that it is going to review?

A I'm not sure what you mean by keep track of. It usually says in the preamble to a rule how many comments were received and it often gives a breakdown like there were so many substantive comments and then there were so many form letters and so on. But beyond -- so we are usually aware of what the volume of comments was. Beyond that, there's no real sense in which we keep track. As I said, that's an

agency responsibility under the APA.

Q So you don't consider your role at OIRA to include ensuring that the agency had a high quality of review of the substantive comments or any type of quality of those -- that review, that solely lies with the agency itself?

A I don't want to say that we would never raise issues with an agency if we felt that comments were raising issues that should be better addressed or something like that. But again, the responsibility for addressing comments under the Administrative Procedures Act is a responsibility of agencies. There's nothing in our executive orders about that. And so any discussions we might have would be informal, and typically that isn't the focus of our discussions with the agency.

Q Would you say that it is your expectation that an agency's review of public comments would be completed by the time it drafts its preamble?

A No.

Q Why is that?

A I explained before that just by the way the rulemaking process works, of course the agency has to have a pretty good idea of what's in the comments and what the substantive comments are and have the rulemaking informed by that, and we would expect that that would be the case. But the process of actually going through and documenting and reviewing and preparing the documentation that goes into the administrative record frequently is going on during the review of the

rule.

Q And that process, does that get completed before a final rule is promulgated?

A Yes, that's part of the administrative record of the rule.

Q And when is the administrative record of the rule compiled?

A I'm not a lawyer, but my understanding is that the record is closed at the point when the final rule is signed by the agency official of record and at that point the administrative record needs to be complete.

Q Would you expect that the agency's documentation of its answers to public comments would be completed at any point prior to the signing of the final rule?

A Not necessarily.

Q Are you aware that agencies typically finish at any stage before the final rule is promulgated?

A As I've said several times, I have very little knowledge of the details of how agencies respond to public comments. But I have been aware from time to time that preparing for these very high comment volume rules, that preparing all this documentation for the administrative record is a big job and it certainly can be ongoing up until the very end of the process.

Q In the case that a rule is submitted for interagency review, and I'm talking about in the final rule stage, and substantive or policy changes or technical changes are made to that rule after interagency review, are agencies given a second opportunity to review the updated

rule?

A You mean after interagency review of the final rule?

Q Correct.

A It's very rare that there are substantive changes to a rule after interagency review of the final rule. Once we conclude a review, that is the version that is supposed to be published in the Federal Register.

What sometimes happens is the agency will find minor technical mistakes or corrections that they want to fix and they will usually inform us of that. And we would make a judgment at that point about whether or not what was being represented as a minor technical fix really was. And we would certainly maintain the prerogative to say that's more than a minor technical fix and you have to reopen the interagency review, but that typically doesn't happen.

Q Did that happen with respect to this rulemaking?

A I don't recall that it did.

Q The Army and Corps indicated that there had been discussions about recirculating the rule for a second round of public comments after substantive changes were made to the rule, but that recirculating was ultimately decided against. Do you recall whether you or anyone else at OIRA was a part of such discussion?

A I don't recall what you're talking about. I may be -- may have forgotten something, but I don't recall that there were substantive changes to the final rule after OIRA completed review. That isn't -- I have no recollection of that.

Ms. Aizcorbe. Okay. I think we're about on time. We can go off the record.

[Recess.]

[11:13 a.m.]

Mrs. Bamiduro. So it's 11:13, and we'll go back on the record.

EXAMINATION

BY MRS. BAMIDURO:

Q Jim, my name is Portia Bamiduro, and for the next few minutes we'll be asking you some followup questions.

Just wanted to start at a place that was covered in the last hour. I think you said that you were working towards a schedule when the rule was under OIRA review. Is that correct?

A I believe that's true, but I don't remember the details.

Q Is it typical for OIRA to work towards a schedule when a rule is under review in the office?

A It's very common.

Q You were asked in the last hour if you knew whether the agencies were still reviewing comments when the rule was submitted to OIRA, and, just for clarification, what was your answer to that question?

A I am not involved in that process, but I do think -- I have a recollection that at some point they mentioned that they were working on a response to the comments document.

Q Can you give us a sense of approximately how many rules OIRA reviews annually?

A We publish a report to Congress every year in which we have to answer that question. And what I recall that it says in there is that we typically review about 600 rules and that 100 to 200 of them

are economically significant rules.

Q And I believe you might have stated this in the last hour, but OIRA has 90 days to review a rule. Is that right?

A That is the formal directive under Executive Order 12866, yes.

Q And when a rule comes into OIRA for review, it's my understanding -- and please correct me if I'm wrong -- that OIRA can either clear a rule as consistent, with changes or without changes; it can return the rule to the agency for reconsideration; or it can encourage the agencies to withdraw the rule. Is that accurate?

A Yes, that's accurate. I would make one minor -- this is a picky correction, but we don't use the term "clear the rule." We say that we conclude the review of the rule, with one of the two findings that you mentioned, or we might conclude the review by returning the rule, as you said.

Q Thank you for that clarification.

Can you explain what it means to conclude a review as consistent with changes?

A It means that, during the review process, changes were made as a result -- or I won't even say "as a result" because it's very hard to know what caused a change. But during the review process -- in other words, the version that OIRA concluded review on is different than the version that was submitted to OIRA -- and that we made the formal determination that we make under our Executive order authority that this rule is consistent with the requirements of the Executive order.

So, in either case, unless we return the rule for reconsideration, as you mentioned -- and that's a fairly rare event. But in either of the other two determinations, we're saying that the rule is consistent with the requirements of the Executive order, but we're distinguishing between whether no change was made or a change was made during OMB review.

Q And for the WOTUS rule, it was not returned for reconsideration. Is that right?

A Correct.

Q And OIRA did not encourage the agency to withdraw the rule. Is that correct?

A This is such a complicated situation. I think we mentioned that there were many different stages here; there was a draft guidance, a final guidance, a draft rule, a final rule.

The final guidance was withdrawn by the agency at the same time that they submitted a draft proposed rule. There was a decision made that it would be better to address the concerns in the public through a rulemaking than through guidance. I don't know who suggested that or how that decision arose, but I do know that the draft final guidance was withdrawn at the same time that the proposed rule was submitted.

For the other three transactions, where OIRA concluded review, in each case there was a determination that the rule or guidance was consistent with the Executive order. And I think probably there were changes in all three cases, so it would have been consistent with change.

Q Okay. So all three of the transactions that were concluded --

A Right.

Q -- were cleared, to use my word?

A We concluded them with a finding of consistent with change.

Q Thank you. Okay.

There was some discussion in the last hour about OIRA's involvement in an informal review process. Is that informal process mandated?

A I'm a little bit -- I'm not quite sure -- when you say there was some discussion of OIRA's review in an informal process, I'm not quite sure what you mean. I did mention that we often discussed the logistics of when a rule is going to be submitted and stuff like that, and we also did get a briefing. So beyond that I'm not sure what you're referring to.

Q To the extent that there were conversations between OIRA and the agencies prior to the submission of the final rule, were those conversations mandated or were they at the discretion of the agencies to engage OIRA at an earlier process?

A The only conversations that I have direct knowledge of that happened prior to the submission of the final rule were the discussions about the logistics of when the rule would be submitted and the briefing that I remember getting. So I don't know what else you're referring to.

Q You mentioned in the last hour that your primary point of

contact at EPA was Greg Peck and for the Army it was Craig Schmauder. Is that right?

A Yes.

Q Was there anything unusual to you about those two designees as being your points of contact?

A No.

Q Approximately how long, if you can recall, was the final WOTUS rule under review at OIRA?

A I believe it was about 6 weeks.

Q Is there anything atypical about that length of time for a review?

A No.

Q Would the rule have concluded review and been deemed consistent if there were significant concerns that had not been addressed by OIRA?

A No.

Q You said that you've reviewed prior rules submitted by the Army. Is that correct?

A Yes.

Q Is it your understanding that, for WOTUS, Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy was the final policy decisionmaker on this rule?

A I don't know who the final policy decisionmaker was. I don't usually know the decision structure within agencies very well. But I do know that she was involved in the development of the rule.

Q Would it be fair to assume that she would be an appropriate final decisionmaker on behalf of the Army for the WOTUS rule?

A I really can't comment on that. It's really up to agencies to decide their decisionmaking structure, not OIRA and certainly not a career analyst like me.

Q Are you familiar with GAO, the Government Accountability Office?

A I certainly am. I once worked there for a summer.

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

A Their role is to -- they used to call it audit. I don't know if they still call it that since they changed their name. But it's to basically audit executive branch agencies and identify weaknesses in their programs and make recommendations for how to improve their programs.

Q And as far as you understand, GAO was not a party to the WOTUS rulemaking. Is that correct?

A I don't recall any involvement with GAO about this rulemaking.

Q Would you have an opinion as to whether GAO serves as an independent agency?

A I can give you my personal opinion.

Q Sure.

A My personal opinion is that they're a very independent agency, yes.

Q Were you aware that after the completion of the final WOTUS

rulemaking that GAO conducted a review of the agency's compliance with all relevant administrative requirements, including the economic analysis and the Administrative Procedure Act?

A I might have been aware of that at some time, but I don't recall that.

Q I'm going to hand you exhibit No. 1.

[Laity Exhibit No. 1

Was marked for identification.]

BY MRS. BAMIDURO:

Q What I've just handed you is a July 16, 2015, report from GAO titled "Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency: Clean Water Rule: Definition of "Waters of the United States."

It reads in very small print under the title, "GAO reviewed the Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency's (collectively, the agencies) new rule on the Clean Water Rule and the definition of 'Waters of the United States.' GAO found" --

Mr. Luftig. Sorry. Can we go off the record for a second?

[Discussion off the record.]

BY MRS. BAMIDURO:

Q It continues: "GAO found that (1) the final rule does not establish regulatory requirements, but, instead, defines the scope of waters protected under the Clean Water Act (CWA) in light of the statute, science, Supreme Court decisions, and the agencies'

experience and technical expertise; and (2) the agencies complied with the applicable requirements in promulgating the rule."

Do you see that?

A Yes.

Q So, Mr. Laity, GAO's first finding is that the rule does not establish regulatory requirements but, instead, defines the scope of waters under the CWA. Is that finding significant in any way, in your opinion?

A I don't know what you mean by "significant."

Q Does that finding have any impact on agencies' requirements under the rule in terms of, for example, regulatory flexibility, certifications, or things of that nature?

A I am not a lawyer, and you're essentially asking me for a legal opinion. So, again, I don't know whether this finding has any impact or not legally.

Q Sure.

The second finding is that the agencies complied with the applicable requirements in promulgating the rule. Do you see that?

A Yes.

Q And then the report includes an assessment of various regulatory requirements that were complied with. If you turn to the second page, it goes through the cost-benefit analysis. Do you have any reason to disagree with GAO's finding of compliance?

A No.

Q And then it talks about compliance under the Regulatory

Flexibility Act. Do you have any reason to disagree with GAO's finding of compliance there?

A No.

Q Then it talks about Unfunded Mandates Reform Act of 1995. Do you have any reason to disagree with GAO's finding of compliance there?

A No.

Q Then it talks about Administrative Procedure Act. Do you have any reason to disagree with GAO's finding of compliance there?

A No.

Q It talks about the Paperwork Reduction Act. Do you have any reason to disagree with GAO's finding of compliance there?

A No, but I do want to reiterate something I said at the beginning.

Q Sure.

A I am not a lawyer, and these are all legal findings. So I am giving you my personal opinion, but you asked me in each case do I, as an analyst, not a lawyer, have any reason to disagree with any of these findings, and my answer is "no" to each question, as I said.

Q I appreciate that.

And, finally, it talks about compliance under Executive Orders 12866 and 13563. Do you have any reason to disagree with GAO's finding of compliance on those issues?

A For that one, I will not make the statement that I just made. OIRA does have a responsibility to make a finding that the agency has

complied with that requirement. And I agree, and we so stated, in concluding review, that the agency complied with those requirements.

Q Do you have any reason to believe that GAO did not conduct an independent analysis of the EPA and Army's regulatory compliance in the WOTUS rulemaking?

A Again, I don't know anything about how GAO conducted this report, but I have no reason to believe anything like that. And I generally have a very high opinion of the caliber and independence of GAO.

Q You mentioned that you're not a lawyer, but you also mentioned that you are familiar with the Administrative Procedure Act. Is that correct?

A Yes. Reasonably familiar. I mean, I can't quote chapter and verse --

Q Sure.

A -- but I have a pretty good sense of what it requires in the regulatory sphere.

Q So you are familiar enough to know that it governs rulemaking by agencies?

A Yes, absolutely.

Q Are you aware of any provision in the APA that governs how often agencies must communicate with each other in a joint rulemaking?

A No.

Q Are you aware of a provision in the APA that requires interagency co-rule-writing in a joint rulemaking process?

A No.

Q Are you aware of a provision in the APA that requires OIRA's involvement in interagency meetings prior to the rule submission for review?

A No. I don't think OIRA is mentioned in the Administrative Procedure Act at all.

Q Are you aware of any provision in the APA that requires how agencies deal with responding to comments that they've received in a rulemaking process?

A I do not remember the exact language, but I believe that the Administrative Procedure Act does say that agencies must review and respond to substantive comments received from the public in a rulemaking process.

Q Are you aware of any provision in the APA that dictates how agencies decide to respond to comments?

A I'm not familiar with the details of the language, but my understanding is that agencies have a fair amount of discretion to determine how to comply as long as they review and respond to all substantive comments.

Q Are you aware of a provision in the APA that dictates that parties in a joint rulemaking must notify each other when they begin drafting the rule?

A I'm not aware that the APA speaks at all to the question of joint rulemaking, which is a fairly unusual situation.

BY MS. FRASER:

Q Mr. Laity, I'm Beverly Britton Fraser. I just wanted to talk a little bit more about the subject that Ms. Bamiduro was just discussing.

For the WOTUS rule, do you know approximately how long the comment period was for this rule?

A I believe that the agencies offered a 90-day comment period, and they may have offered an extension after that, but I don't remember the details.

Q Would it surprise you if the comment period here was in excess of 200 days for the WOTUS rule?

A If that's what happened. I mean, that's a matter of public record. I don't remember how long the comment period they offered. I'm pretty sure that they offered one and then they extended it, but I don't remember the length of time for either of those.

Q Would it refresh your recollection if I were to say that the notice of proposed rulemaking was issued on March 25, 2015, and the comment period --

Mrs. Bamiduro. 2014.

BY MS. FRASER:

Q I'm sorry, 2014 -- and the comment period closed in November of 2014?

A I have no reason to think that's wrong.

Q And I know you just mentioned, you just answered Ms. Bamiduro with respect to the APA requirements regarding how long an agency should consider comments. But, in your experience and in your

expertise, does Executive Order 12866 say anything about how long an agency ought to be considering comments that have been subjected to a rule?

A No.

Q And in the previous hour you mentioned that OIRA did not have a role in assessing an agency's compliance with comments and notice and things of that nature with respect to rulemaking. Is that right?

A Yes. Not a formal role.

BY MRS. BAMIDURO:

Q Was there any concern within OIRA that the comment period for the WOTUS rule was rushed or too short?

A No. I did not remember how long the comment period was, as I just said, but that's a very long comment period. Most rules have shorter comment periods than that.

Q Mr. Laity, do you have any knowledge that the agencies that were involved in this rulemaking, EPA and Army, were being directed by the President or otherwise to promulgate this rule with a disregard for science?

A No.

Q Are you aware of the agencies being directed by the President or otherwise to reach a finding of "no significant impact"?

A No. I think that's a NEPA finding. Is that what you mean?

Q That's correct.

A Uh-huh.

Q You mentioned in the previous hour that when the rule comes

in for OIRA review, as a part of that process, OIRA then sends out the rule to a variety of different agencies that could have an interest in the rule. I think you said that you cast a broad net. Is that right?

A Yes.

Q Is it common to address interagency concerns in the rulemaking process?

A Absolutely.

BY MS. FRASER:

Q You also mentioned that OIRA also distributes the rule to a number of offices within the Office of the President, correct?

A Uh-huh.

Q Could you run down the list for us again, what those offices were? I think one of them was the Council on --

A I don't remember exactly what the list was of who we distributed the rule to. But the offices that we typically distribute a rule to would be the Council on Environmental Quality, Council of Economic Advisers, the Office of Science and Technology Policy, the Domestic Policy Council, White House Counsel's office. And I forgot to mention, but also the Office of the U.S. Trade Representative.

Q Thank you for that.

And are you aware whether or not any of these agencies or councils, either by themselves or at the direction of the President, directed OIRA to reach any particular finding with respect to the WOTUS rule that disregarded science?

A No.

Mrs. Bamiduro. Did you have any reason to believe that politics played an inappropriate role in the WOTUS rulemaking?

Mr. Laity. No.

Mrs. Bamiduro. Any reason to believe that the WOTUS rule was promulgated with disregard for appropriate regulations and legal requirements?

Mr. Laity. No.

BY MS. FRASER:

Q And as far as you know, Mr. Laity, of the Executive orders and other statutes that OIRA is charged with consulting in order to review a rule, did the WOTUS rule meet the specifications for all of the statutes that you're charged with looking at when reviewing a rule?

A Again, sort of like with the GAO, there is a legal judgment in there, and it's not my job to make legal judgments about compliance with other than our own Executive orders, where we make a formal finding that they're in compliance.

Having said that, I have no reason to believe that the rule was defective with regard to any of the requirements that I'm aware of.

Mrs. Bamiduro. We can go off the record for now. Thank you.

Mr. Składany. We'll take 5, then rotate chairs.

[Recess.]

Ms. Aizcorbe. We can go back on the record. It is now 11:49. We'll begin with our last round before lunch.

BY MS. AIZCORBE:

Q All right. Jim, how does OIRA typically review an agency's

cost-benefit analysis?

A We read the analysis. And there is a requirement in Executive Order 12866 to use best available science and economics. And we look at methodologies that the agency has used to characterize costs and benefits and whatever other impacts are included in the economic analysis, and we may make comments or ask questions about the methodologies that they've used.

Q So does this review begin, then, when an agency submits its economic analysis to OIRA?

A Typically, yes.

Q And when does that usually happen, what stage in the rulemaking process?

A An economic analysis usually accompanies both a proposed and final rule. So it would be included in the package that's submitted at each stage of the rulemaking process.

Q And OIRA looks at that economic analysis at both stages independently of each other?

A Yes.

Q Were you aware of concerns that certain costs had been mischaracterized by the EPA as benefits?

A No. I'm not sure what you mean by that.

Q The Corps reports that EPA grossly overestimated the amount of compensatory mitigation required under section 404 of the Clean Water Act and that such benefits are traditionally accounted for as costs. Despite the Corps' recommendations to the EPA, the EPA did not

change its calculation to reflect these costs in their final rule.

Did you discuss these compensatory mitigation costs with anyone at the EPA or otherwise?

A First of all, I'm not aware of any of what you just said in terms of the factual background. The economic analysis came to us as a joint product of EPA and the Corps of Engineers.

And I was aware that they had worked jointly on it because the methodology involved taking a database that the Corps maintained of jurisdictional determinations that they had made in the past -- I believe they reviewed several hundred of them -- and looking at the determination that had been made and then making a judgment about which ones of them might have been made differently under the requirements of the rule. And I think it was something like 4 or 5 percent. I don't remember exactly. It wasn't a very big number. And then they extrapolated that to the universe of jurisdictional determinations.

And then they figured out several types of costs -- the administrative costs and then the -- of getting a permit. In a case where something would have been -- where the judgment was that it would have been nonjurisdictional under the old rules and jurisdictional under the new rule, there's an administrative cost of getting a permit. And then there's also the cost of doing whatever compensatory mitigation is required. So I believe that they estimated both kinds of costs.

And then there is a benefit in terms of the value of the resource that is either preserved or mitigated. And they did an estimate that

tried to monetize those benefits using information in the literature about things like the value of wetlands and the value of streams and so on.

And they came up with a global estimate of the costs -- I don't remember the exact numbers, but it was several hundred million dollars -- and a global estimate of the benefits, which was slightly bigger. They were both in the same ballpark, but the benefits were a little bit bigger.

My understanding at the time, although I admit I never asked this question, was that that was a joint product. I wasn't aware that there was disagreement, if there was. And it seemed appropriate to me, that that was done in an appropriate fashion.

Q When you say that they reviewed the data and extrapolated it, how are you aware that it was both agencies working together on this?

A I don't recall the details of how I exactly learned the details of the methodology. I don't remember if it was described in the document or if it was in conversations. But I did have a fairly good sense, I do remember, of what the methodology was. I just described it to you.

And I definitely had the impression, although I'm not sure where I got it, that the Corps did the part where they looked at their database -- it was their database, and they looked at their database, and they looked at the decisions, and then they made judgments about how the decisions would have been made differently.

Q So you would disagree that the EPA characterized compensatory mitigation as a cost?

A Compensatory mitigation is a cost if it has -- like any regulatory response, anything that a party in the public has to do in response to a regulation, any control measure, there is a cost. And then the cost, hopefully, produces a benefit. That's what our review is all about.

So the cost -- like, for example, one way of doing compensatory mitigation is that you -- let's say you fill in an acre of wetland. You can go to a wetland mitigation bank, which is established under a different set of EPA and Corps rules, and essentially buy credit for an acre of wetlands that this bank has created as a replacement for some impact.

And so the cost, in that case, would be what you spend for that credit. But you can also do it yourself. You can also go and find some degraded wetlands and restore it, and there's a cost to that. And then the benefit is the value of that restored or created resource.

Q So, to your recollection, the EPA did consider it as a cost as well as its incidental benefit?

A That's my recollection, yes. And that would be the proper way to do it.

Q Okay.

During the rulemaking, we understand that there were suggestions that EPA was intent on including a benefits analysis that would show that the rule's benefits outweighed its cost. Were you aware of any

efforts to approach the WOTUS analysis with this goal?

A Executive Order 12866 directs agencies to analyze the costs and benefits of the rule. I can't speak to EPA's or the Corps' intentions in producing the analysis, but the cost-benefit analysis that was submitted with the rule appropriately included an estimate of both costs and benefits.

And we reviewed it, and although we had some -- I'm pretty sure we had some technical questions and issues that we raised, basically we thought it was a reasonable cost-benefit analysis. And we did ultimately find that it was consistent with the requirements of the Executive order.

Q Can you explain the process that you undertake when you raise concerns or questions about a cost-benefit analysis with an agency?

A We ask them questions. And I don't remember the details of what specific technical issues we raised, but we asked them questions. We often made suggestions for how to improve the analysis.

Sometimes there are suggestions for how to improve the presentation, and very often agencies agree with those suggestions and go ahead and make those changes. Sometimes they disagree, and we have discussions. We usually work out some resolution that both sides are comfortable with.

Q Do you recall making any such recommendations in this case that were adopted by the EPA or Corps?

A I know that we had discussions about the economic analysis,

but I don't remember any of the details of what specific issues we discussed.

Q Have you ever experienced an agency manipulating data to achieve a particular outcome in its analysis?

A I would never characterize what an agency does as manipulating data because I have no way of discerning an agency's motives. There are certainly times when we don't agree with the methodology that an agency has used, and we have at times vigorous discussions about how to improve methodologies.

Q And you would not characterize your discussions in the WOTUS rulemaking as -- that rose to that level?

A No.

Q In joint rulemakings, would you say that it is typical that one agency is not involved in the process of developing a cost estimate for the rule?

A There are so few joint rulemakings, in my experience, that it's very hard to say what's typical and what's not typical.

Q Did you ever engage in any conversations about the rule's benefits specifically?

A Yes.

Q And were any of those conversations regarding how to emphasize those benefits?

A I can't recall if that was a subject of conversation. That isn't typically what OIRA -- OIRA would raise questions more likely about the methodology used to quantify the benefits and monetize them.

Q The Corps reports that they were not involved in the process of developing a cost estimate for the rule. In your role at OIRA and your review of the economic analysis, does that concern you?

Mr. Luftig. Again, I just want to say that has not been established by this witness' testimony.

But go ahead and answer the question.

Mr. Laity. I cannot comment on what the Corps reports, and I honestly don't know what that statement means or what the basis of the statement is. But my very clear understanding at the time was that the Corps was involved in developing the cost estimate, that they provided the database, that they did the analysis of what waters would essentially flip from nonjurisdictional to jurisdictional as a result of the rule.

I might be wrong about that, but I do have a clear recollection that that was my understanding at the time. And I believe that I even recall having conversations with Corps staff about how administrative costs were estimated and stuff like that. So it surprises me if it's correct that the Corps says they weren't involved in that.

BY MS. AIZCORBE:

Q Did those conversations involve the fact that no estimate for an administrative increase was included in the proposed rule stage?

A I don't remember the details, but I believe there were estimates of the administrative costs included in the proposed rule stage.

Q Okay.

We're going to move on to our one exhibit, which I believe we're on No. 2. I'll mark this as exhibit 2.

[Laity Exhibit No. 2

Was marked for identification.]

BY MS. AIZCORBE:

Q In a December 12, 2013, email, under subsection number 2, you tell Mr. Peck and Mr. Schmauder that, quote, "a lot of stakeholders are complaining that the rules read like substantive decisions have already been made, and includes no 'alternatives' as required by EO 12866. This is a fair concern."

Can you explain your comment that this is a fair concern with respect to the rule at this stage in the rulemaking process?

A I'm sorry. I apologize. I wasn't exactly focusing on your question. Before I answer, do you mind if I take a minute to read this document?

Q Please.

A I'm sorry.

This would have been the review of the proposed rule. Is that correct? That's December 2013.

Okay. Now I remember this email in context, so please go ahead with your question.

Q In this email, you tell Mr. Peck and Mr. Schmauder that, quote, "a lot of stakeholders are complaining that the rules read like substantive decisions have already been made, and includes no 'alternatives' as required by Executive Order 12866. This is a fair

concern," close quote.

Can you explain your comment that this is a fair concern with respect to the rule at this stage?

A Executive Order 12866 requires that agencies present both their preferred -- this is at the proposed rule stage -- present both their preferred regulatory option and reasonable alternatives to the regulatory option.

And, in implementing the Executive order requirements, there is always a rule of reason where, sort of, the bigger and more important the rule is, the more effort one puts into things like the cost-benefit analysis and developing the reasonable alternatives and so on.

This was a very important rule, and I'm expressing the opinion there that it is important that the proposed rule include some regulatory alternatives and that, I guess -- I don't remember the details of what led me to write this email, but I guess that we were hearing either in the press or -- I think you know we have a process where stakeholders can come in and talk to us about a rule under review. And maybe we were hearing from stakeholders that they have -- I had forgotten this, but I guess the rule was leaked and that they had seen it and had concerns of this nature.

Q And you would expect at the proposed rule stage, like you said, per the Executive order, that the agencies to this point have assessed and considered alternatives?

A The Executive order requires that the proposed rule present a range of alternatives. And I do feel I need to add that the proposed

rule did, in fact, when it went out, include a number of substantive alternatives and a fairly detailed discussion of them in order to request informed public comment on those alternatives.

Q So when you say this is a fair concern, you don't recall why you said that it was a fair concern that it did not include alternatives?

A What --

Q Or were you referring to the --

A If you read on in that paragraph, I go on to suggest specific ways in which the rule can request comment on specific alternatives. So, you know, "this is a fair concern" essentially is a way of saying: I think that you should consider requesting comment on some of these alternatives, and here they are, here are examples.

And, actually, the final proposed rule that was published in the Federal Register had quite a bit more substance than this and addressed a fairly broad range -- I think it had four other major alternatives to the proposed rule -- as well as the specific requests for comments on some of the smaller issues that are mentioned in this paragraph, like breaks in jurisdiction and stuff like that.

Q Were you concerned at all with the comment that it reads like substantive decisions had already been made?

A You know, sometimes when I'm writing emails, we all know each other pretty well, and I speak colloquially or informally or carelessly. And so I think that my intention in writing this email was to get the attention of the agencies and convince them that it would

be appropriate to include some regulatory alternatives in the proposed rule, which they agreed to do.

Q And when you were saying earlier that there were four other alternatives that you can recall, was that in the proposed rule or in the final rule?

A No. In the final rule, in any final rule, you wouldn't have alternatives. That's when a final decision is made. In a proposed rule, you usually offer a lead alternative, where you provide regulatory text, which was the case here, and then you provide other alternatives. Sometimes it might include regulatory text, as well, for the other alternatives.

In this case, I don't believe it included regulatory text for the -- I have a distinct memory that there were four major alternatives that were discussed in the preamble, and I don't believe there was regulatory text. But there was a fairly substantive discussion. It went on for quite a few pages. And then all through we kind of requested comment from the public on these various ideas in order to inform the development of the final rule. And that's pretty typical, appropriate, and consistent with the requirements of our Executive order.

Q So do you feel that the agencies, to your recollection, responded to your recommendation to seek comment on those alternatives?

A Yes.

Q Okay.

A And that's reflected in the proposed rule that was

published.

Q When did you first receive a copy of the EPA's draft connectivity report?

A I don't remember.

Q Was it before the draft final rule was provided to OIRA for a final review?

A The draft final rule? Very likely, yes. I believe that it was submitted to the agency's Science Advisory Board, and I believe that the Science Advisory Board -- I might have the timeline wrong here, so I apologize. But from the best of my recollection, the Science Advisory Board provided its recommendations and response in the summer of 2014, between the proposed and final rule. And I think it's very likely that I saw a copy of it sometime after that, once it was kind of final, having incorporated whatever recommendations the Science Advisory Board made.

Q Did you read the connectivity report?

A I read the executive summary. It was several hundred pages long. I'm not a scientist. I didn't read the whole thing. But I did read the executive summary, and I did have a sense of, sort of, from a 50,000-foot level what it said.

Q During the rulemaking, were you aware that the connectivity report was created to serve as the scientific basis for the WOTUS rulemaking?

A Yes.

Q The connectivity report was not finalized until January of

2015, well after the rule was drafted, and the agencies undertook drafting the final rule. At any time during the rulemaking, did you discuss the fact that the EPA had not finalized the science underlying the rule?

A Yes.

Q And what were those discussions like?

A We asked them about that. In fact, I think some of that's implicit in this email. And the answer that they gave was that they felt very comfortable that the substantive science was done. There had already, I think -- let me just refresh my memory by looking at this, but I think there had already been one peer review of the connectivity report.

Q Yes. We'll actually get into that right now.

A Yeah. So there had already been -- this was their response when I raised this question. They said there's already been one review of the connectivity report, and they felt that, really, they could very easily, in full compliance with all of the requirements and our guidance on peer review and everything, have simply said that that was the connectivity report and we were done. But they were taking a, sort of, belt-and-suspenders approach, and they knew that this was going to be very important, that they have a solid scientific basis to the rulemaking, so they were going to go through another round of, sort of, higher visibility peer review with their Science Advisory Board.

But they felt very comfortable that they had done a good job, that the connectivity report served as a reasonable basis for the proposed

rule. If the Science Advisory Board had significant recommendations for improving it, they would incorporate those into the development of the final rule.

And I believe that the Science Advisory Board was fairly positive in its review of the connectivity report, although they made some changes, but I don't think major changes resulted from that. So, in fact, it turned out pretty much the way the agency had expected that it would.

Q In the same email we're looking at, you state that, "If we can show that the Report already went through a round of peer review (which was hopefully favorable) and was already revised once to address peer review comments, this will help a lot to address this concern." And the concern was that the rule was getting ahead of the science.

Did you review the comments made during the peer review meeting of the draft report?

A No. I was not involved in anything to do with peer review. That's another agency responsibility.

But this -- I just described to you the conversation that we had about peer review. And this sentence in this email that you're highlighting, when they said to me, well, you know, this was already peer-reviewed and we're going to do it again because we want to be super-careful, but we already did this once and we feel that it's a good, solid scientific basis for our rulemaking, I said to them: Well, it would be great if you could make the results of that first peer review available to the public as part of the record for the proposed rule.

And I believe that they agreed to do that and that that was put in the record for the proposed rule. It's possible that I'm misremembering, but I believe that was the outcome of this conversation.

Q In this email, you asked to see a copy of the peer review report. Did they ever transmit it to you, do you recall?

A I believe they did, but I don't recall for certain.

Q Did you ask the EPA whether the comments of that peer review were favorable?

A I don't recall.

Q Did you or anyone else in OIRA, to your knowledge, engage with the EPA and Army Corps to ensure that the concerns from this peer review were addressed?

A No, I don't believe we did. I'm not a scientist, and my feeling was that, as long as they followed the process -- which, I have to say, it seemed to me a very rigorous process that they were going through, both an internal peer review process first and then going through an external peer review -- and that if the peer reviewers, who were scientists, were satisfied that the report represented the best available science, then that was good enough for me, and I didn't need to kind of look -- I read, like I said, the executive summary of the report, made my judgments about its relevance to the rulemaking. But I felt like the process that they went through ensured that it was good science, and it wasn't my role to get down in the weeds and second-guess the science.

Q But you did say, on some level, OIRA does engage with an agency to evaluate the analysis it undertakes in a rulemaking, correct?

A Yes, it does. But, you know, we can't redo all the analyses. I mean, our job is to look and see, did they do a good job. And when you come to me with a report and say, this went through all this peer review and the peer reviewers generally were satisfied with it -- I mean, I don't remember exactly what they told me, but I presume they told me that, or we would have had more discussions about it -- and then you say, and, by the way, we're going to do a second round of peer review with our Science Advisory Board, and that's a very public process, that's a pretty gold-plated process for getting good science. So I was satisfied with that.

Q Is the peer review with the Scientific Advisory Board mandatory, to your knowledge?

A No.

Q Do you have any knowledge of why --

A I mean, I can tell you that it's not mandatory. That was a choice that the agencies made, to do that.

Q According to the EPA's Scientific Advisory Board's authorizing statute, which we can introduce as exhibit 3 --

[Laity Exhibit No. 3

Was marked for identification.]

BY MS. AIZCORBE:

Q And I won't quote from this directly, but just for your general knowledge.

A Let me --

Q Sure.

A Let me say right away that I don't know anything about the authorizing statute of the Science Advisory Board.

Q Okay.

A I do know that the agency frequently consults with the Science Advisory Board on important analyses that support rulemakings. But I have to admit I don't know anything about the legal framework in which that happens.

Q Okay. Well, I'm just referencing subsection C at the top right corner of this document, which is a part of that statute.

A Uh-huh.

Q The EPA Administrator is required to submit any rule proposed under the Clean Water Act, along with the scientific and technical information underlying the rule, to the SAB at the time it is provided to any other agency for review. That is what this section represents. You can read it if you'd like.

A Uh-huh.

Mrs. Bamiduro. Sorry, Christina. Where are you reading from?

Ms. Aizcorbe. The top right corner, subsection C.

[12:30 p.m.]

Mr. Laity. Uh-huh. Okay.

BY MS. AIZCORBE:

Q Many stakeholders raised concern that the EPA submitted the proposed rule to OIRA before sharing the rule with the SAB.

When OIRA received the draft proposed rule, were you aware that the board had not yet received both the proposed rule and the connectivity report for review?

A I suspect that I was aware of that, yes. I mean, I'll say, I was aware of that. But I -- I do need to say that I -- first of all, again, let me reiterate, I'm not a lawyer, and I don't know what exactly these requirements mean.

But I don't see anything in this paragraph that you showed me that would necessarily apply to the connectivity report. And so I --

Q Were --

A My impression was that that was a discretionary choice that the agency made to submit this connectivity report to the Science Advisory Board.

Q We're speaking about OIRA's review of the science underlying the rule.

A Right.

Q So I just want to understand, when you're referencing the peer review that was conducted by the SAB, were you aware that they did not have the actual rule text in front of them when they were looking at the report?

A No, I was not aware of that. I don't think that would have occurred to me one way or the other.

Mrs. Bamiduro. Did the witness say he didn't have the rule text in front of him?

Ms. Aizcorbe. You can ask questions during your period of time. Thank you.

Mr. Luftig. Let me make the point that the premise of your question was not established by this witness.

BY MS. AIZCORBE:

Q Did understand the question?

A Can you repeat the question? I -- I'm a little confused what's going on now.

Q My question was whether you had any awareness that the rule text was not per the statute submitted to the Scientific Advisory Board at the same time that it was provided to OIRA for review?

A No. I don't have any awareness about that one way or the other.

Q You mentioned that you have taken into consideration or reviewed the board's comments on scientific bases of other EPA rules. Is that correct?

A I'm just trying to remember. I'm not sure if I said that. I don't remember saying that. If there -- usually, as I said here, we do want to make sure that when they're using -- this is a -- actually, a separate authority of OIRA that we have a peer review bulletin, and we have information quality guidelines and all that.

We want to make sure for influential and highly influential scientific and technical analyses that they have gone through appropriate procedures. But it's rare, if they have gone through appropriate procedures, that we kind of look down in the weeds, and, you know, get in -- get in the middle of arguments between scientists and stuff like that.

If they've -- if they've had a peer review that meets the requirements of the peer review bulletin, we would generally accept the scientific validity of whatever the document was at face value. And there may be cases -- you know, again, it's -- 20 years is a long time, hundreds of rules, where we actually got into discussions about the details of a -- of a peer review. But that's very unusual, and I don't recall it happening here.

Q So you mentioned that you would consider the fact that the connectivity report went through one round of peer review with the agency, and then the Scientific Advisory Board round of peer review to be, you said something to the effect of gold standard. But it was a high --

A Yes.

Q -- standard?

A Yes. That's a high standard of review.

Q But then -- and I just want to make sure I understand your comments. Is that you just said that OIRA would take the report at face value. It would not dig into the science of the actual report, or look at the comments that came out of those peer reviews. Is that

correct?

A I guess I'm -- not necessarily.

Q Did you do so in this case?

A I don't remember doing so.

Q Would it have been anybody else at OIRA who would have done so on this rule?

A I don't think so.

Q Okay. At what point in the rulemaking process would you expect, from OIRA's perspective and your rule review there, for scientific bases of a rulemaking to be peer-reviewed? Before the draft final is drafted?

A In general, a peer review -- I mean, almost by definition, a peer review happens -- I don't think there's a hard-and-fast rule about when a peer review happens. You need to have a substantive version of the document for the reviewers to review.

But almost by definition, there's almost always some changes made to a document as a result of the peer review. Even when peer reviewers are reasonably happy, they usually have suggestions. So there's going to be a new final version if -- you know, after the peer review.

And in the case here where there were two peer reviews, there would have been a version before the first peer review that went to the first set of peer reviewers. And then there would have been a version -- and that was before OIRA was ever involved -- then there would have been a version that was submitted that reflected the comments of the first round of peer reviewers and that ultimately went to the SAB. And then

there would have been a version that incorporated whatever recommendations the SAB have coming out of the second peer review.

Q Was OIRA engaged at all with the agencies to make sure that comments coming out of these reviews were addressed or otherwise considered?

A I don't recall that we were.

Q Have you been on other rulemakings, to your recollection, with respect to peer reviews of the underlying scientific bases for rules?

A I have not personally been involved in that, but I think there have been cases under the Clean Air Act where we have sometimes looked closely at comments by peer reviewers and -- and asked questions about them, or discussed with the agency to what extent these comments were taken into account.

It depends a lot on what the -- it's really very case-specific, and it depends a lot on what -- for instance, if a peer review was about an issue that OIRA had also raised independently, we would be much more likely to look into the -- what the peer reviewers had to say and to ask details about the peer review.

In this case, OIRA did not really get involved in the science underlying the rule, other than to understand what the report said about the science. So we didn't have a lot of discussions or disagreements or anything about the science. So, I don't recall that we -- that we really dug into the details of the peer review.

Q To your recollection, was any representation made to you

that the peer review comments from either the first or second round were addressed in the final rule or the final -- excuse me -- or in the final report?

A I do not have any specific recollection of that, but it's very likely that they would have told me that at some point.

Q Okay. Did the rule undergo any review by agencies before the NPRM was published?

A I'm sorry. Any review by agencies?

Q Yes.

A We have a whole interagency OMB review process, so I'm not sure what you're asking me on that.

Q Before the proposed rule entered its review stage at OIRA --

A I'm sorry. You said "published." You mean, before it was submitted to OIRA for review?

Q Sure. Yes.

A Okay. I don't know -- I mean, the Corps and EPA were working together on the rule. But beyond that, I don't know if they consulted with other agencies or not. That is not at all uncommon.

In fact, OIRA encourages agencies, when they're writing rules, before it ever gets to OIRA, if the rule might impact the mission or equities of another agency, we encourage them to work informally with those agencies before the rule comes in for review because then that helps to facilitate, you know, hopefully it minimizes issues that have to be resolved during the interagency review process. But we usually don't know the details of those interactions, and I don't in this case.

Q You mentioned earlier that you understood that the connectivity report would be, or serve as the basis for the rulemaking.

Were you aware that the EPA had not finalized the connectivity report by the time that the draft final rule was -- was submitted to OIRA?

A I don't believe that's true. You just told me that the connectivity report was finalized in January of 2015. The draft final rule was submitted to OIRA later in the spring of 2015.

In addition, my understanding was that the agencies felt that the Science Advisory Board had largely agreed with the conclusions in the connectivity report, and that they were aware of that at a much earlier timeframe than January 2015, like going sometime after the summer of 2014, which is when I believe -- I don't remember exactly, but that's what sticks in my mind as to when the Science Advisory Board issued its report.

So all through the fall of 2014, the agencies were already aware that the Science Advisory Board had essentially accepted the connectivity report and they may have been making minor changes, but they had a document that had, essentially, been favorably reviewed by the Science Advisory Board.

Q And that was their representation to you that it was a favorable review? Or is that your interpretation of the Scientific Advisory Board's review?

A I don't remember where I got that impression. I don't remember if I read any of the review, or if that was their

interpretation, but I do have the impression that it was a favorable review.

Q And you mentioned that the draft connectivity report was finalized before the draft final rule was sent to OIRA, but --

A I don't have any knowledge of when the connectivity report was formally finalized. You told me January 2015.

Q Right.

A I do know that the draft rule was sent to OIRA sometime after that. I don't remember exactly. It might have been March or April, something like that, in 2015.

Q Were you aware that the Corps and Army took no part in the creation of the connectivity report?

A "No part" is a strong statement. I was aware that it was primarily an EPA product. I didn't know for -- I mean, I don't know for sure that they had no part in it, but I was aware that it was primarily an EPA product.

Q Were you aware of the Army Engineer Research and Development Center or ERDC's conclusions that the report science needed to be broadened in order to support the rule in terms of supporting the connectivity between tributaries, adjacent wetlands, and isolated water bodies?

A No.

Q Did you review any of ERDC's recommendations throughout the rulemaking?

A Not that I recall. On this -- I mean, on this topic,

certainly I don't. They may have been involved in some other aspect. I don't recall offhand. But, no, I don't recall.

Q At any point in your review, did you discuss a need to conduct additional science?

A No.

Q Is there a reason why you did not?

A I felt the connectivity report, as I think I said already, was a very good job of summarizing the available science; and that it had been through a rigorous peer review process. That -- you know, I'm not a scientist, but I've been around the Clean Water Act a long time. And the conclusions in the executive summary seemed reasonable to me, and so I had no reason to question either on process or substance the questions of science in the report.

Q Do you know whether the executive summary was updated to reflect any changes to the report made after these peer reviews?

A No.

Q The agencies used a statistic during the rulemaking that 117 million Americans have not had and will continue to not have clean water without the WOTUS rule. Top regulatory staff at the Army and Corps could not identify where the statistic came from or how it was developed.

Do you know how it was developed?

A Now, the statistic was that 117 million Americans get drinking water from a source that is -- is vulnerable to not being protected without this rule, something like that. I don't remember

the exact words. But it was about drinking water, and it was about a source. And we did ask them about the basis of that statistic.

And the explanation they gave, which seemed reasonable to me, was that -- I have to get into a little bit, you know, of the technical part here -- but the Clean Water Act says, it protects navigable waters, and then it defines those as waters of the United States. And everybody agrees that something like the Potomac River or even, you know, like, Four Mile Run or something is a navigable water.

What the -- what the issue is about in this rulemaking is the minor tributaries up at the top -- sort of at the fringes of a major river system, and the adjacent wetlands to those tributaries and the isolated waters.

And, so, what the agency explained to us that that statistic meant was that 117 million Americans get water from a source that is influenced by -- that is, for example, I believe that the city of Washington gets its water from the Potomac River. I think that the Corps of Engineers runs, you know, that aqueduct up in Maryland.

And the Potomac River itself is a navigable water, regardless of this rule or not. Nobody would question that. But the Potomac River is fed by thousands of small tributaries up at the top of the tributary system that -- whose protection under the Clean Water Act was at issue in this rule.

And so, all of the people who get their drinking water from the Potomac River would count in that statistic because pollutants essentially could be getting into that water at the upper reaches of

the tributary system without -- you know, without the protection of the Clean Water Act. That was our understanding of what that statistic meant.

Now, I don't -- we don't have the data to check their math or anything. But under that understanding, that seemed like a reasonable statistic to us.

Q Did you -- did it give you pause at all that the rule was decreasing jurisdiction over existing regulated bodies of water, and yet, the statistic was saying that it would actually increase the protection for these 117 million Americans?

A That is a -- a confusing aspect of the rule, which is much broader than just this question of the 117 million Americans. Let me just take a minute and explain.

The answer to the question has to do with what baseline you use to determine the effect of the rule, and there are essentially two choices: One is to use a baseline of what it says in the existing regulations that are on the books, and the other is to use a baseline of existing practice.

And so, when the Supreme Court raised questions in the SWANCC and Rapanos case, they raised questions about several aspects of the Agency's regulations, but they did not actually remand or vacate any of the regulations.

So when the agency made statements like "this rule actually reduces the jurisdiction," they were talking about relative to the rules that were currently on the books, still, at the time.

However, immediately after the Court decisions, the agencies, over some period of time -- I don't remember exactly -- but they issued guidance to their field offices how to apply the regulations in -- in a way that was consistent with the Court decisions.

And, so, the actual practice between, say, 2004 and 2015 over what they would restrict -- assert jurisdiction was more restrictive than what was in the rules on the books. Because they didn't -- you know, they didn't, essentially, want to apply any rules that the Supreme Court had raised questions about. So relative to existing practice, the rule increased jurisdiction.

By the way, in OIRA's -- this is a technical issue, but one that's very important to OIRA in our circular A-4, we -- we say that agencies should use what the world would look like in the absence of the rule, which in this case we interpreted it as meaning is this in practice.

So when the agencies did their -- for instance, their economic analysis, they showed an increase in jurisdiction, they showed positive costs, they showed positive benefits. And this statement of 117 million Americans being protected was in that context of these additional waters, which whatever it might say on the books, in practice, their protection was in question before the rule and was being clarified by the rule.

Q Do you know why the EPA changed its methodology from using the existing regulation, which resulted in narrowing the jurisdiction, whereas the economic analysis uses current practice and results in a 3 percent increase of jurisdiction?

A It is my observation that the agency was not consistent in how they presented which baseline in different contexts, and I don't have any opinion about that or any comment about that. I am not responsible for statements that the agency makes to the public.

What OIRA is responsible for is how the agency does its economic analysis of the rule. The economic analysis of the rule used the baseline of existing practice, and OIRA believes that that is the appropriate baseline to use for its economic analysis of the rule.

Q And just so I can understand, because I was under the impression that the economic analysis used current practice versus --

A Yes. That's correct.

Q -- the previous regulation, the 1986 regulation. Is that correct?

A The economic analysis used current practice, that's right. And relative to current practice, the rule was expanding jurisdiction and, therefore, there were positive costs and positive benefits.

If -- if you used a baseline where you were contracting jurisdiction, as the agency asserted in a number of public statements, then you would think that there would be cost savings and you would actually have disbenefits in the sense that there would be fewer waters protected, but that's not the analysis that was presented to us and that we reviewed.

Q Specific distance thresholds were added to the draft final rule after it had undergone comment period and interagency review. Did the agencies discuss including these limits in the final rule with you?

A We had very few discussions with the agency between -- if any. You know, I already went over this -- between the proposed and final rule.

However, during the proposed rule, one of our concerns was that the agency provide as much regulatory certainty to the -- all stakeholders, including both the regulated public and environmental advocates and States and everybody else. And so the -- some of the specific alternatives that they added, you know, that we talked about already in the proposed rule did -- did talk about the possibility of various ways of providing greater regulatory certainty, including, I believe, drawing some kind of bright lines like that.

And, so, we didn't discuss with them, before the final rule came in, anything specifically about, you know, 4,000 feet or anything like that. But the concept of looking for ways of providing greater regulatory certainty was something that we had had a lot of discussions with them about during the proposed rule.

Q Do you know how these limits were developed?

A I don't.

Q Did you ever inquire?

A I did inquire, and I believe the answer I got was that they were essentially judgment calls; that every situation is unique and if you -- the -- the limits apply to two specific situations. And, again, this gets technical.

But the categories of waters that are jurisdictional, one category is adjacent waters and adjacent wetlands, and another category

is isolated waters and isolated wetlands. And for those categories that are, in other words, not -- not directly linked to the tributary system, it sets out -- you know, it sets out some bright lines about when things are and are not jurisdictional.

The answer that I got when I said where do these lines come from was essentially that there -- there isn't any science that will say it should be 100 feet, if not 110 feet, or 4,000 feet, but not 3500 feet. But that if -- if you don't draw lines, then you're basically left having case-specific determination about everything, which was something that OIRA certainly agreed with the agencies that it would be better to move away from that.

And so they felt that this was basically a judgment call that's coming out of the connectivity report, that these were lines that were a reasonable balance of essentially -- that the standard for -- that was established in Justice Kennedy's opinion for what constitutes a jurisdictional water is that it has a significant nexus to a navigable, in fact, water.

So these lines were meant to, essentially, identify those waters that were highly likely to have a significant nexus and exclude those that were not.

Q When you referenced "they," who were you referring to as far as making the representation that, you know, lines were going to be drawn?

A I have this impression that that's how it was developed. And since I was speaking mainly to Greg Peck and Craig Schmauder, I

assume that they're the ones that explained this to me.

Q You mentioned that these came out of discussions about the connectivity report.

Were you aware at that time that the connectivity report itself advises against using distance thresholds to make those determinations?

A I don't remember what the connectivity report said on that specifically. I do remember that the connectivity report -- at least, this is how I remember it -- it was basically supportive of including tributaries as jurisdictional. It was supportive of including adjacent waters as jurisdictional. And it said that -- that it was hard to make any generalization about isolated waters. That they might or might not have -- be connected. They have connectivity. It didn't use the term "jurisdictional," but it talked about connectivity.

Q Did you receive comments from the Army or Corps on the limits, to your recollection?

A The proposed rule included the limits, so I don't know why I would have re -- I mean, no. They were their limits. So they -- they -- they explained in the rule sort of the logic for how they developed, which is something like what I just told you. But beyond that, no.

Q Were public comments on specific distances solicited?

A I don't remember.

Q Were you aware that the Corps had concerns about implementation of those distance limits?

A I was aware of one specific issue having to do with the limits that the Corps had.

Q Did you discuss those with anybody?

A Yes.

Q With who? And what were the discussions about?

A The one -- the one specific issue that I was aware that the Corps had concern -- one of the limits was 4,000 feet. And what that said was that if an isolated water, that is, one not connected to the tributary system and not adjacent, was more than 4,000 feet away from a jurisdictional water, there were -- there were a couple of special cases that this didn't apply to. They were identified, and they were like prairie potholes and Delmarva bays and stuff like that.

But except for that, if an isolated water was more than 4,000 feet away from a jurisdictional determination, then it would be categorically not subject to the jurisdiction of the Clean Water Act. And if it was less than 4,000 miles -- or 4,000 feet away, and it wasn't in some other category, like it wasn't adjacent or something like that, then it would be subject still to a case-by-case determination about whether it had a significant nexus to a navigable, in fact, water or not.

I was -- became aware during the course of the review that the Corps was concerned that some waters that they believed should be jurisdictional and that they -- they felt that they traditionally would have considered jurisdictional, might fall outside of that 4,000-foot limit. And so there was a decision made to address that concern by

changing the regulatory text slightly so that, if a water was outside of the 4,000-foot limit, but within the 100-year flood plain of a jurisdictional water, then, it could still be subject to a case-by-case determination, even though it was outside of that 4,000 foot limit.

I was not aware of any other concerns that the Corps raised about those bright lines.

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

[Discussion off the record.]

BY MS. FRASER:

Q I just have a very few questions, Jim.

In the last hour, we talked about the reviews of the connectivity report, both by peer review, and by the Science Advisory Board. Do you recall that?

A Uh-huh.

Q And you characterized that review as the gold standard. Could you explain what that means?

A I mean that they had both an internal peer review, and then revised the report in response to an internal peer review and then had an external peer review by the Science Advisory Board, and again, revised the report in response to the external peer review.

OIRA actually has a peer review bulletin that provides guidance to agencies about peer review. And we generally -- one round of peer review is all that's sufficient to comply with the peer review bulletin.

So having had two rounds of peer review, and the second one being by a very highly visible external body like the Science Advisory Board, I believe -- I'm not an expert on the process, but I believe they actually have some public meetings where the public can come and everything. That seems to me -- I'm not the expert on peer review, but to me, that seems like a very rigorous process.

Q And the version of the connectivity report that you ultimately saw was the product of that gold standard review. Is that correct?

A I believe that I saw a version, both following the first

peer review at the time of our review of the proposed rule, and a version following the second peer review, either during the fall of 2014, or sometime before or during our final -- our review of the final rule. But I don't remember the details of exactly which version I saw when.

Q Okay. Thanks.

BY MRS. BAMIDURO:

Q It was discussed in the last hour about the connectivity report being primarily a product of the EPA. Do you recall that?

A Yes.

Q In your review of that work, did anything strike you as improper regarding the EPA being the primary contributor to the connectivity report?

A No.

Q You also mentioned in the last hour that there were discussions about bright lines. Do you recall that?

A Uh-huh.

Q Sorry. For the record, we have to have an audible response.

A I'm sorry. Yes. I recall that.

Q Thank you.

And was it -- excuse me.

Was it your statement in the last hour that OIRA recommended it would be beneficial to get away from a case-by-case analysis?

A Yes.

Q Was it your testimony, or was it your view that bright lines aided in bringing about greater regulatory certainty?

A Yes.

Q In your review of the science underlying this rule, did you come across anything to suggest that the bright line cutoffs were not based in science?

A No. But as was pointed out, the connectivity report did not recommend bright lines. I didn't remember the statement -- I don't know if it recommended against bright lines.

I know that in the executive summary that it -- that I read, it talked about -- a lot about the variability and how it's hard to generalize, especially for the isolated waters.

But I felt that -- that the ultimate decision on exactly how to write the rule was absolutely based on science, but it was also informed by policy choices.

And there is a balancing among different competing goals, and one of the goals was to provide more regulatory certainty to the regulated community, and also to the stakeholder community and States and localities and everybody.

And if everything is a case-by-case determination, then, you know, nobody knows in advance how that determination is going to come out, and it's very difficult to have that be consistent across the country.

So I felt that it was, while not specifically identified in the connectivity report, that it was not inconsistent to try to use the science in the report, but to make some policy choices about where to draw lines that would, for lack of a better word, sort of be the right

answer most of the time. And, you know, there's a tradeoff between the precision that you might get by doing case-by-case analysis in every single case versus the implementation advantages of a lot less resources for the agencies and a lot greater certainty for everybody to have bright lines that, then, everybody would know.

And to be honest, even the case-by-case determinations, you know, some of these questions really come down to judgment about what is or isn't a significant nexus. And so I wasn't even sure that -- that you would get better answers if you did case-by-case determinations all the time.

Q In your review, was there -- and you mentioned policy choices were made in connection with the bright lines.

In your review, was there anything unreasonable about the policy decisions that were used in connection with the bright lines in WOTUS?

A No.

Q At the conclusion of OIRA's review of the economic analysis, which was discussed in the last hour, did you have any reason to challenge the agency's methodology that was used?

A No.

Q Did you have any reason to challenge the ultimate analysis and conclusions that were reached?

A No.

Q Would you have recommended concluding the review of the rule as consistent if you had significant unresolved concerns about the economic analysis?

A No.

Q Would you have recommended concluding the review of the rule as consistent if you had significant unresolved concerns about the underlying science of the rule?

A No.

Q Do you have any evidence to suggest that this rule was forced upon the Army by the EPA?

A I was aware that some members of the Corps staff were unhappy with the process. But the -- when you say the Army, the Army is not one thing. They have a decisionmaking process. And their decisionmaking process, I believe, was fully supportive of their -- of their role in the rulemaking process.

Q Do you have any reason to believe that Assistant Secretary Darcy would have signed off on this rule if she had not been comfortable with the analysis that was done?

A I don't know Secretary Darcy at all, so I really have no basis to answer that question.

Q You are not a political appointee. Is that right?

A Yes. That's correct.

BY MS. FRASER:

Q When you started at the agency, what was your position when you started?

A I was a desk officer in the natural resources branch -- natural resources and environment branch.

Q And I believe, in the very first hour, you mentioned that

that was in 1976?

A '96.

Q '96. I apologize.

A That's okay. I'm coming up on my 20-year anniversary in a few months.

Q And you stayed in the position of desk officer in the natural resources division until 2015. Is that correct?

A December 1, 2013, is when I was officially promoted to branch chief. I had been acting as branch chief for approximately a year before then.

Q And you mentioned that, in the natural resources division, you dealt specifically with issues like drinking water -- I'm sorry -- the EPA water division?

A I -- over the course of 20 years, I worked on many different departments and agencies within the ambit of natural resources and environment.

But my -- the role that I had for the longest period over that time as sort of my primary role, perhaps -- I don't remember exactly, but 10 or 15 years of that period, was as the desk officer for the EPA Office of Water, and the Corps of Engineers, and that meant that all the rulemaking under the Clean Water Act and the Safe Drinking Water Act was my primary responsibility.

Mrs. Bamiduro. We can go off the record for now.

[Discussion off the record.]

BY MS. AIZCORBE:

Q We spoke a little bit about the process that OIRA engages with the agencies as a rule is submitted for formal review in the first phase when it's a proposed rule.

We understand that the EPA sent OMB a copy of the proposed rule on September 17, 2013. And I'll --

A I believe that's correct.

Q You do?

A Yeah.

Q Do you need to --

A No.

Q All right.

A That sounds right to me.

Q Okay. And the NPRM then was published on April 21, 2014. Does that sound right to you as well?

A Yes.

Q Can you explain a little bit about what happened between these two dates?

A I don't remember the details of everything that happened in that period. But I -- I obviously am aware that that review took longer than the normal 90 days. I think that might be what you're getting at. And I don't remember exactly why.

But sometimes when you have an important rulemaking that has a lot of visibility and a lot of interest; and, also, a number of agencies have concerns about it or interest in it, it -- it just takes longer than the -- than the 90 days.

So I don't remember anything particular that held it up or anything like that. But it -- it took us -- I don't remember exactly when we concluded review, but it was shortly before it was published. So it was some -- probably sometime in April or March of that year.

Q And so I understand, in that first phase of formal review, do you do an interagency circulation --

A Yes.

Q -- in that phase as well?

A Yes.

Q Okay.

Mr. Luftig. Sir, please wait for her to finish the question so you make sure you're answering the right question.

Mr. Laity. Absolutely. I'm sorry.

Ms. Aizcorbe. That's fine.

BY MS. AIZCORBE:

Q Did you review the economic analysis and technical support document for this rule?

I know we've spoken a bit about the economic analysis, but did you also look at the technical support document?

A I don't remember spending much time looking at the technical support document.

Q And by "not much time," do you mean that you don't recall receiving it or looking at it?

A I expect that we received it, but I don't have any particular recollection of it.

Q Do you recall when these documents were first provided to OIRA?

A I believe that the economic analysis was provided approximately at the same time, or, if not exactly at the same time, as the rule and preamble. I'm not sure about the technical support document.

Q Okay. When you say the rule and preamble, would that be at the proposed rule stage when it's first submitted to OIRA?

A Yes.

Q Okay. Were you aware that the Army and Corps did not receive a copy of the economic analysis or technical support document until after the draft final rule was submitted to OIRA for final agency review?

A No. I -- I don't know that.

Q Does it concern you hearing that now, that they did not have input or ability to review these documents?

Mr. Luftig. The facts that you just stated haven't been established by this witness, but answer to the best of your ability.

BY MS. AIZCORBE:

Q Does it concern you that the Corps did not have input or ability to review these documents before the draft rule is finalized?

A It's really hard for me to comment on that. Because, as I said before, it was my understanding at the time that the Corps participated in developing the economic analysis. Perhaps I was mistaken, but that was my understanding. So I really don't know what

it means for the Corps to say that they didn't see it or review it.

Q Given your experience at OIRA in reviewing these rules, including these larger rules where multiple agencies have interests, would that concern you if one of the rulemaking agencies had not reviewed these types of analyses before the draft final rule is finished?

A Again, it's -- it's hard for me to answer that question, because agencies are not monolithic things, and I don't know what that statement means.

But I frankly find it hard to believe that the Department of the Army, everything that I know suggests that the Department of the Army was aware of, involved in the production of the documents, and that it was a joint presentation by the two agencies to OMB for review.

So anything else that you're telling me that's inconsistent with that is just outside of my knowledge.

Q Sure. I'm speaking about your opinion.

And with your experience at OIRA, if you were to be handed a rule from two agencies and the agency that is responsible for implementing the program and is a joint regulatory partner in this rulemaking, if they told you they never looked at those analyses, would you question the agency's development of that rule?

Mr. Luftig. So you're asking the question hypothetically?

Ms. Aizcorbe. Absolutely.

BY MS. AIZCORBE:

Q Would that not give you pause?

A Let me -- let me answer in a different way. I think that it is appropriate when agencies are doing joint rulemaking for them both to take ownership of the documents that are presented to us. And, so, if an agency refused to take ownership of a document and I was aware of that, that would concern me.

However, if some individual staff member at an agency complained about something, that would not necessarily concern me, although, obviously, it's better for the agency to be, you know, speaking with one voice.

But I -- unless I felt that the agency, as a whole, had somehow not participated or was not owning one of the documents, that would be the level at which it would be something concerning to me, and I was not aware of that situation here.

Q So at no point it was represented to you, in the development of the rulemaking, that the Corps or Army did not want to take ownership of either of these documents?

A Not that I remember.

Q Okay. At any point during the rulemaking, or before the rule was finally published, did you hear about the so-called Peabody memoranda?

A I'm not sure what the Peabody memorandum is. I have a guess, but why don't you tell me because I don't -- if it's what I'm thinking of, I don't know it by that name.

Q I don't mean -- we don't need to get into specifics here. I was more curious of your awareness of whether you knew that these

memoranda had been published, but they're memoranda that the Corps issued late in the rulemaking process that raised scientific, legal, and other concerns about the analysis and the rule itself.

A I became aware, at some point, that such a memoranda existed. I don't remember exactly at what point. But my best recollection is that it was not until after the rulemaking had concluded that I became -- I mean, that our participation had ended -- that I became aware of that. And it did not play any role in -- in our review.

Q Do you recall about how you found out about the memoranda?

A I don't. I believe it eventually made it into the press, and I might have seen it online someplace, or somebody might have forwarded me a copy of it, sort of as an FYI at some point, but I don't remember.

Q Do you recall raising any concerns that we haven't already addressed today about the economic analysis or technical support document, including any discrepancies or anomalies with the analysis contained therein?

A No.

Q Did you review the Army's NEPA analysis for the rule?

A No.

Q Do you typically review an agency's NEPA analysis?

A No.

Q Can you explain why?

A NEPA compliance is really not a responsibility of OIRA. And, in fact, since I have worked primarily on EPA rules for most of

my career, EPA is actually exempt from NEPA compliance in its rulemakings.

What is the responsibility of OIRA is to -- is to review the economic and regulatory impact analyses the agencies produce. And to the extent that they cover the same ground as NEPA in terms of analyzing the economic and environmental effects of a rule, we would expect and hope that they would be consistent with each other. And we might raise issues about the analysis that's submitted to us.

And on occasion, the NEPA analysis might come up. Like the agency might say, well, we did this in our NEPA analysis, or we did that, and that's why we did it here. But that would be a fairly tangential conversation, and what we are primarily concerned with is the analysis that the agency is required to submit to us under our executive order authority.

Q And that would not include an environmental assessment, or an environmental impact statement?

A Correct.

Q In any of your reviews that you recall, have you considered, or reviewed an environmental assessment or environmental impact statement?

A On very rare occasions I have gotten briefings about environmental impact statements, and I might have looked at one in some point in my career in the rulemaking process, I believe. For some reason, I don't remember why, but I believe I looked at a draft of an environmental impact statement that the Office of Surface Mining did

for its stream protection rule at some point a number of years ago, but typically, I don't do that.

Q We were informed that the drafter of the first environmental assessment, Mr. Chip Smith, had contact with OIRA to ensure that his analysis was being performed correctly.

Do you know who Mr. Smith was in contact with at OIRA?

A I worked closely with Chip, and it could well have been me. I don't remember those conversations. And I suspect that if we did have conversations, it would have been about methodological issues, sort of more generically, which, from his point of view, might have been informing the NEPA analysis. But I don't remember any conversations with Chip about the NEPA analysis, and I don't know who else he would have talked to besides me.

Q If you had received questions from an agency about the way that they were pursuing their NEPA analysis, would you expect to inform them that that's not within the purview of OIRA, or would you engage in a dialogue there?

A I would expect to treat those -- if they were questions sort of legally about what is required by NEPA, I would likely say I -- I'm not a NEPA expert and I don't -- you know, that's really outside of my area of expertise.

But if they were questions about how to do proper economic analysis, which we do sometimes get questions about, you know, what does OIRA recommend, you know, for the baseline, or, you know, for a discount rate or something like that, which could well be asked in the

context of informing a NEPA analysis, I would give an answer that was consistent with both the extensive guidance that OIRA provides on generic questions like that, and on my understanding of sort of best practices in the economics literature.

Q Do you recall ever working with a gentleman by the name of Gib Owen?

A I have a vague recollection of that name, but I have no idea who it was. I apologize. I don't know --

Q That's okay.

A I don't know who that is.

Q He drafted the second environmental assessment for the rule. So I was wondering if he --

A I see. Well, then, in that case, I'm reasonably certain that I did not have -- at least, I have no recollection at all of having any contact with him about that.

Q The committee was informed that the draft final rule was submitted to OIRA before the environmental assessment was completed.

I understand you said that NEPA analysis is not within the purview of OIRA per its executive orders.

But to your knowledge, do agencies typically finish their NEPA analysis before a draft final rule is sent to OIRA for review?

A I am not an expert on the NEPA process. As I said, most of the rules I work on don't have a NEPA analysis because they're EPA rules and they're exempt.

But my layman's understanding of the NEPA process is that a draft

environmental impact statement is usually completed as part of the rule development process, and that that draft is submitted for public comment. There's a step where the -- where EIA is submitted for public comment. And I believe that either is or can be done concurrently with the proposed rule, also, being out for public comment. But I'm actually not sure about exactly how that sequence works.

Q You said the EPA is exempt from NEPA, but you didn't mention the Army Corps.

Do you know whether --

A No. The Army Corps is not exempt from NEPA.

Q Was it your impression that this rule was an EPA rule? I just want to clarify and understand your comment.

A No. This is a joint rule. And I only meant that in the sense that I -- that's why I know less about NEPA than probably a lot of other desk officers in OIRA, because I don't deal with it very much.

However, in this particular case, I have done other Army Corps rules, and the Army Corps is subject to NEPA. And my understanding is that there was a legal requirement for the Army to do a NEPA analysis of this rule, and that they had the responsibility for that and not for EPA. And so they -- to the best of my knowledge, they were not involved in the NEPA analysis.

[2:25 p.m.]

BY MS. AIZCORBE:

Q And so I understand your comments about OIRA not reviewing NEPA, it's my understanding, and we can look at it if we need to, but that Executive Order 12866 requires OIRA to look at the compliance with Regulatory Flexibility Act and names specific other statutes, and then says, "and other applicable law." Has that been not considered or interpreted to cover things like NEPA?

A "Other applicable law" is a very broad statement, and it may well be that many desk officers within OIRA who deal with agencies that routinely do NEPA analyses would consider some kind of looking at the NEPA process to be part of their job.

In my experience -- again based primarily on EPA, but also in the occasional Corps rules that I did review over the years, because they do a lot less regulation than EPA -- I did not feel that focusing on the NEPA analysis or on the agency's compliance with NEPA was part of my job. I felt that, again, that the analysis should be consistent with the analysis that they did for us under our authorities, but I didn't typically read NEPA analyses or comment on them.

Q You mentioned earlier that Stuart Levenbach was the lead or one of the leads in the final development of the rule and that he handled the Army Corps. Is that correct?

A We identified a single lead, and that was Vlad Dorjets, who was the EPA Office of Water desk officer, but Stuart Levenbach assisted Vlad as the Army Corps desk officer.

Q So at any point did you have a discussion with Stuart about the NEPA analysis or whether you were with going to consider it?

A I don't recall. We might have. Stuart primarily works on agencies, the Department of the Interior, that does do NEPA analysis for most of its rulemakings. I am not sort of looking over his shoulder in every review, but he may well be more engaged in looking at agency NEPA compliance than I typically have been.

Q But at no point did you ask him at that stage in the rulemaking to evaluate the Army's NEPA analysis?

A No.

Q And so I understand that's because you typically don't review them, not because there wasn't a concern there?

A In my case -- I can't speak for Stuart, but in my case, that's correct. I typically don't focus on NEPA analyses as part of my review. Remember, by that point I was the branch chief and they were doing the review and I was there as a resource, but I was nowhere near as involved in a hands-on way as I had been in the earlier stages of the rulemaking process.

Q As a branch chief, what level of review do you have over your desk officers' review of a rulemaking?

A Generally my involvement is driven by them and that's the way OIRA functions generally. Once we have -- these are both good desk officers and I trust them, and once we have -- once somebody reaches that level of autonomy, which is the way most of the desk officers in OIRA function, it's their responsibility to keep the branch chief and

higher levels of management in the loop if issues arise that they feel at whatever level, you know, it's appropriate to bring the person in now.

On a rule like this, if they hadn't told me anything, I certainly would have said: You know, what's going on with the rule? But it would be typical and it was the case that, you know, I largely left it to them to drive the review and to bring issues up, first to me and then to higher levels as they felt appropriate.

Q Did you become aware at any point in the rulemaking that the Army had changed its determination from an environmental assessment finding that there may be a significant impact to a finding of no significant impact?

A No, I wasn't aware of that. I was aware -- I mentioned to you the discussion that we had late in the rulemaking process about the 4,000-foot bright line and the Army's concern that that might cut out waters that they felt had traditionally been considered jurisdictional. And I believe I remember as part of that discussion that the question came up of, if that were left the way it was, that that might cause the Army to have a concern about its finding of no significant impact.

And I don't know if the decision to change that was made above my level and I don't know what factors went into that or what the Army's view was after that. But I do know that that was changed in the way that the Army was requesting so that waters beyond the 4,000-foot level -- 4,000-foot limit -- if they were in a 100-year floodplain,

which can be very big, it can be way more than 4,000 feet for large rivers, that those could potentially be included subject to a case-by-case determination.

So I was not aware that there was any further concern after that decision was made.

Q So when you say that was made above your level, do you mean within OIRA and OMB or do you mean within the agencies?

A I don't know exactly where that decision was made, but I know that it was discussed within the agencies and within the EOP.

Q And how did you find out that that was being discussed within the EOP?

A I was invited to sit in on a phone call among some senior officials in which it was discussed. And at that time, I don't recall where the decision was made. I was not -- I was an observer on the phone call. My boss, Howard Shelanski, was speaking for OIRA. But I was there, kind of like as his adviser. And shortly after that phone call the decision was made to make that change, but I don't know who made it or exactly the dynamics of how that happened.

Q Do you recall who else was on that call?

A Christy Goldfuss, I believe was on the call, she's the head of CEQ. And I believe Brian Deese was on the call. He's a senior adviser in the chief of staff's office, I think. I'm not actually sure what his title is. I cannot remember -- I have a feeling that there were two or three other people at senior levels on the call, but I can't remember who they were.

Q Was anybody from the agencies present on that call?

A No.

Q Do you recall whether you discussed anything besides the finding of no significant impact and adjacency limits?

A Just to be clear, we did not discuss the finding of no significant impact.¹ That didn't come up at all on the call. What came up was the issue of whether the requirement in the rule would be changed so that waters outside of the 4,000-foot limit could still be considered jurisdictional if they were within the 100-year floodplain.

Q Is this the first type of this type of call that you've engaged in to make substantive decisions in a rulemaking?

A It's my understanding that calls like that are not uncommon, but usually career staff are not involved in them. I was only involved, as I said, as an observer in order to be able to provide advice following the call to my principal, Howard Shelanski, if he needed any information.

So it's not unheard of, but unusual for me to be involved in a call at that level, but my understanding is that regulatory issues are often decided at various levels, including up to that level.

¹ Laity later amended his testimony to reflect that the group did, in fact, discuss the Corps' Finding of No Significant Impact (FONSI). Letter from Tamara Fucile, Office of Management and Budget, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform (Apr. 28, 2016) transmitting "Addendum to March 8, 2016 Transcribed Interview of Jim Laity" (Apr. 27, 2016). "Following review of my transcript earlier this month for errata, and upon further reflection on the conversation, I now believe that the Corps' FONSI was briefly discussed. Specifically, as stated in my answer, the call was about whether to modify the draft limit to allow a case-specific jurisdictional determination for waters beyond 4,000 feet that were still within the 100-year floodplain of a navigable water. I now recall, however, that one of the points in favor of making this modification was that the Corps believed it would be more consistent with their FONSI. The final rule did include this modification, consistent with the Corps' FONSI."

Q And Administrator Shelanski was the one who invited you to participate on that call?

A Yes.

Q At any point did you discuss whether EPA would be considering conducting NEPA analysis under sections 401, 402, or 311?

A Again, I'm not a NEPA expert, and I could be wrong about this, but my understanding for most of my career is that EPA is not required to conduct NEPA analyses. And so in my mind the issue of EPA conducting NEPA analysis has not come up.

Q Right. They are exempt, but they can voluntarily engage in that analysis. So I was just wondering if that --

A I didn't even know that, to be honest.

Q Okay. Do you typically review agencies' compliance with Executive Order 13175, Consultation and Coordination With Indian Tribal Governments?

A It is rare that that's a major issue in a rulemaking, but I think it's fair to say that that would be part of that sort of "and other applicable authorities" phrase that you read from the executive order. And so if we were aware of a concern, it might be something that we would engage the agency on. But it's not something that I would typically go out of my way to look into, because it doesn't come up in that many rulemakings.

Q So it was never represented to you that there was any concern with the tribal consultation process in this rulemaking?

A No. I have no recollection of that.

Q At any point, did the EPA make any representation to you that it complied with its responsibilities under the executive order?

A I don't recall. Usually there is language in the preamble to rules that goes through the various executive order and statutory sort of regulatory process requirements and there usually is one about consultation with Indian tribes. And the fact that I don't have any distinct memory of it suggests to me that there was something there and that it said we had consulted with Indian tribes, but I don't remember any details.

Q The committee was informed that neither the Corps nor the Army tribal liaison engaged in tribal consultation under the executive order. You did not know this during your review. Is that correct?

A That's correct.

Q The final rule provides that the EPA's consultation process included multiple Webinars and national teleconferences. Is this typically a type of consultation process that you have observed in a rulemaking?

A Yes. In fact, when you said the tribal consultation representative, I don't know exactly what that office is, but I'm fairly sure that the executive order is very nonprescriptive about how the tribal consultation process should work.

And most often when I'm aware of that process, which does happen sometimes, the agency typically does a presentation at a tribal meeting or something like that, and they may also reach out individually to representatives of the specific tribes. And I don't know the details

of how that works, but I think there are a wide variety of methods that the Agency might use to engage in tribal consultation.

Q And when you say the agency, you're referring generally to any agency?

A I think that is true generally for any agency, but I'm referring specifically to EPA, because the vast majority of my experience is with EPA.

Q And so when you say that such informal outreach as group meetings, Webinars, or national teleconferences, in your opinion, would satisfy that requirement because the requirement itself is not prescriptive, you're speaking primarily to your experience with the EPA. Is that correct?

A Yes. And I'm just giving you my personal opinion. I wasn't involved in the drafting of that executive order. And as I said, it hasn't generally been a significant issue in rule reviews that I've been involved in. But I do -- my general impression is that EPA is very conscientious about wanting to make sure that they have tribal input into their rules.

Q And what makes you say that?

A Because it's not uncommon that they mention sort of in passing in the course of a rule review that we reached out at this conference or we got these comments or did this consultation. And it comes up from time to time in discussions, sort of what is the perspective that EPA has gleaned from tribes.

Q The EPA indicates on its Web site that it was going have

a second phase of consultation. Were you ever aware of that second phase happening?

A No. I was also not aware of that on the Web site. As I said, I didn't really focus much on the tribal consultation process.

Q It was in the letter that they sent out to all of the tribes in the beginning of the rulemaking.

A Okay.

Q And that letter is posted on their Web site.

A Okay.

Q I was just curious about your familiarity with the process and whether they completed that second phase.

A I'm not familiar with that process.

Q As you know, the EPA concluded and certified that the rule does not have a significant economic impact on a substantial number of small entities, relieving it from conducting a regulatory flexibility analysis and small business advocacy review panel under SBREFA. When did you become aware that the EPA was going to certify the rule?

A Pretty early in the process, even probably before the proposed rule was submitted, since the panel process, which OIRA has a statutory role in, usually takes place before a proposed rule is developed, and there were conversations about what the Agency's plans were for Reg Flex compliance and we are were involved in those conversations.

Q Do you recall who those conversations were with?

A I had conversations with Greg Peck and very possibly other folks in the Office of Water. My boss at the time was Cass Sunstein, the administrator of OIRA at that time. My understanding was that he also had conversations about that at a higher level, but I don't know who with.

Q Are you aware that the U.S. Small Business Administration's Office of Advocacy submitted a formal comment that the agencies improperly certified the rule?

A Yes.

[Laity Exhibit No. 4

Was marked for identification.]

BY MS. AIZCORBE:

Q I would like to submit this as exhibit 4.

A Is this their comment?

Q It's their letter to EPA and Corps, yes.

A Right. Okay. I'm aware of this letter.

Q In its comment letter -- I'm referencing page 4 under "The Proposed Rule Has Been Certified in Error" -- Advocacy states that the agencies used an incorrect baseline for determining their obligations under the RFA and the rule imposes direct costs on small businesses and the rule has a significant economic impact on small businesses.

A Correct. That's what it says.

Q The EPA drafted a document entitled "Final Summary of the Discretionary Small Entity Outreach for EPA's Planned Proposal Revised Definition of Waters of the United States," which I'm also going to

submit now as exhibit 5.

[Laity Exhibit No. 5

Was marked for identification.]

Mr. Laity. Okay. I'm also familiar with this document.

BY MS. AIZCORBE:

Q So you said you are aware of this document, the small entity outreach summary. Have you read the document?

A Yes.

Q And I apologize that there are no page numbers here, but on the third page, including the title page, the fourth paragraph down, the EPA states that the rule, quote, "does not have a significant direct economic impact." Are you aware of whether this was the standard the EPA employed in deciding not to conduct a regulatory flexibility analysis and SBAR panel?

A My understanding is that the EPA used two legal explanations for why it felt that it was appropriate to certify the rule. This was one of them, that impacts were not direct. And there is some case law that says that the Regulatory Flexibility Act requires agencies to consider direct impacts but not indirect impacts.

And the other was -- I remember we had a discussion about the baseline previously -- that if you used the baseline of the rules that were legally in effect at the time, which was what was in the Code of Federal Regulations, then the general impact of the rule would be deregulatory in that there would be fewer waters declared jurisdictional than could have been declared under the existing rules.

And so for that reason also there was not a significant adverse effect on a substantial number of small entities.

Q To your knowledge, does SBREFA require that it be an adverse impact?

A I don't -- I think that the word -- the phrase -- we always called it a SISNOSE -- I don't think adverse -- a significant impact on a substantial number of small entities. So I guess the word adverse is not in there. But we generally focus on adverse impacts. I mean, the agencies generally focus on -- I think OIRA would generally think that is appropriate, to focus on adverse impacts in interpreting that phrase.

Q Do you know of anything within SBREFA that limits an agency to only consider direct costs in its decision whether to certify the rule?

A As I said, it's my understanding that there is case law -- and I'm not a lawyer and I'm not an expert on this, but I know EPA has cited cases to me in the past that says that the agency is only required to consider direct effects. The example that was given to me, and I don't remember what the case was, but where an agency was challenged because it didn't consider -- it considered the effects on directly regulating entities, but didn't consider upstream or downstream market effects on their suppliers or customers. And my understanding is that a court determined it was not required to consider effects like that.

Q And so that is the standard that OIRA employs in its review?

A I can only speak for myself and not OIRA on this issue, because I don't think we've ever adopted a formal interpretation. It's really not OIRA's role to interpret -- to second guess an agency's certification under the Regulatory Flex Act. We do, once an agency determines that they are required to do a regulatory flexibility analysis, if it is EPA then we do become involved in the panel process, but the actual determination to certify is an agency determination and not an OIRA determination.

Q So I understand, are you saying that it's not -- the way that OIRA's role is interpreted or utilized in this review process, you're saying that you would not feel it's appropriate to question an agency's certification?

A No. Maybe I spoke too strongly. If I felt that an agency was improperly certifying, I would raise a question about that. It's not ultimately OIRA's role, it's the agency's responsibility to certify the rule, but we would certainly raise questions about an agency certification.

Q And what would rise to the level of you asking questions about a certification?

A If we felt that an agency, for example, had not conducted appropriate analysis or did not have -- I think the phrase in the statute is a reasoned basis, something like that, for the certification. Although, generally the Small Business Administration Office of Advocacy often takes the lead in raising those questions, but we would likely also participate in those discussions if a rule

were under review.

Q So considering the Office of Advocacy in this case did say that the agency improperly certified the rule, that in and of itself did not rise to the level of you questioning the EPA certification?

A I personally -- and again I'm not speaking for OIRA -- I personally did have some questions about the agency certification.

Q And when you say you're making that statements on your personal behalf, why are you not making it in your capacity as an OIRA staffer engaged in review of that rule at the time?

A I guess I'm being particularly careful here because I don't speak for OIRA, the political leadership of OIRA speaks for OIRA. And the political leadership of OIRA was comfortable with and accepted -- after internal discussions accepted the agency's determination that it was appropriate to certify. It was largely a legal determination that turned on this discussion of what is a direct and indirect effect and what is the appropriate baseline. And ultimately I'm not a lawyer and I'm not an RFA specialist, so that decision was made appropriately within OIRA at the appropriate level.

Q Do you recall who engaged in those discussions?

A I believe that the -- I don't remember the details of the discussions, but it was Cass Sunstein who made the decision that OIRA was comfortable with the agencies certifying the rule.

Q Are you aware of EPA's efforts or intent to use informal outreach to obtain input from the small-business community in lieu of holding an SBAR panel or conducting a regulatory flexibility analysis?

A Yes.

Q Can you explain?

A As I understood it, the decision that was made above my level that was conveyed to the agency by Cass was that we accepted -- OIRA accepted the agency's legal determination that these were indirect effects and that they were using a baseline of what's legally in the CFR at the time when the rule was issued.

But there was also a strong desire to be as transparent as possible and as sort of forthcoming as possible in reaching out to all interested stakeholder groups, including small businesses. And so part of the discussion about whether EPA would certify the rule or not included a commitment by EPA to conduct a SBREFA-like process and to make it as much like the SBREFA process as possible. And OIRA and the SBA Office of Advocacy did participate in that process.

Q On page 3, paragraph 4 of the small-business outreach report, EPA states that the outreach effort was led in part by the Office of Information and Regulatory Affairs within the Office of Management and Budget. That's at the bottom of that paragraph.

A Uh-huh.

Q Who at OIRA participated in the small-business outreach summarized in this document?

A I did.

Q Anybody else?

A Not that I remember, but it's possible that somebody else might have been there as well.

Q We spoke a little bit about what stakeholders would have to say about the certification. Are you aware that the national industry associations present at this outreach meeting expressed that the rule would in fact have a significant economic impact on a substantial number of small entities, including that the rule would impose direct costs?

A Yes, I'm aware of that. I was there and heard all the comments.

Q Was that part of any discussions that you had at OIRA about EPA's certification?

A At that point, we had already had the internal discussion about whether it was appropriate for EPA to certify the rule or not. And the internal discussion had, as I said, turned largely on the question of what is a direct or indirect cost. And so I didn't feel that any new issues were raised by that comment and I felt like it had been decided at an appropriate level and it wasn't up to me at that point to relitigate that issue.

Q Were you aware at the time of the rule's drafting that the agencies estimated the rule will impose up to \$465 million in indirect costs?

A Yes. I don't remember the exact number, but I know it was in the hundreds of millions.

Q Did you ever recommend including these costs in the agency's analysis?

A You're talking about the reg flex analysis?

Q Yes. At any point in the development of this rule, did you make a recommendation or suggest that the EPA and agencies consider indirect effects?

A First of all, that analysis, I believe, came after the decision about how to conduct the small-entity outreach. My opinion and advice internally was that I did not -- I had concerns about how the agency was interpreting the phrase "indirect effects."

And I felt that if a rule -- that this situation was different than the one that had been explained to me in the court case because where you have a constellation of rules acting together and you change one of them and that has the effect of having the constellation of rules as a whole impose what to me seems like a direct effect, so if you have a small entity discharging pollutants into a waterway, that before the rule is not considered jurisdictional and after the rule is considered jurisdictional, then as a result of that rule, with nothing else happening, that small entity would have to get a permit for that discharge, which they would not have had to get before.

To me that seemed like a different situation, and I did raise the question as to whether it was appropriate under the Reg Flex Act to interpret that as an indirect effect and whether it would be better to do a substantive analysis of what the actual -- this was before we had the cost-benefit analysis -- to do a substantive analysis of what the actual effects were and then make a determination about whether or not to certify the rule and act accordingly.

But as I said, I'm not a lawyer. And my boss, Cass Sunstein, is

a lawyer, and he made the decision to accept EPA's legal interpretation and I suspect he consulted with other people as well.

Q Between November 26th, 2013, and December 2nd, 2013, you and Mr. Peck exchanged a series of emails regarding the small-business outreach report, which I will label exhibit 6.

[Laity Exhibit No. 6

Was marked for identification.]

BY MS. AIZCORBE:

Q Again, I've tabbed for you where I will be referencing.

A Okay, I see. I've read the email.

Q Okay. On November 27th, about halfway down the page, you say to Mr. Peck, quote: "If you can get me a draft small entity outreach report soon, I will try to make that work per our earlier agreement," unquote.

Is this the agreement you were referring to earlier about making such report public as an informal outreach versus RFA compliance?

A Yes.

Q Was there anything else about that agreement that we haven't already covered?

A Well, we covered it, but I'll be more specific. Remember that I said the agreement was to make this as much like the SBREFA process as possible, sort of in all but name. And part of the SBREFA process is that the report is drafted jointly by the three agencies. Usually the rule-writing agency, which is typically EPA, only a few agencies are actually subject to this requirement, will provide the

first draft of any report, and then make it available to the other two agencies, OIRA and the Small Business Administration, to provide comments. And then we try to work out sort of a consensus version of the report and it goes as a recommendation to the Administrator of EPA.

So I was saying to Greg Peck, basically following up on that agreement and saying, you know, please get me the draft of the report so that we can go through this process of OIRA and the Small Business Administration providing comments on the report and working out kind of a consensus version.

Q I see. Keep this handy, I'm going to refer to it just in a second, but I have another set of emails I'd like to introduce as exhibit 7.

[Laity Exhibit No. 7

Was marked for identification.]

Ms. Aizcorbe. In fact, I guess this is just one email and an attachment.

Mr. Laity. Can I off the record for a minute?

[Recess.]

[Discussion off the record.]

BY MS. AIZCORBE:

Q Jim, just let me know when you're ready.

A You were going to focus on, at least to start, with the Reg Flex Act part of this?

Q Yes.

A Okay. I've read that and I recognize it.

Q Great. On December 11th, 2013, you sent an email to Dominic Mancini, which included comments you sent to the EPA and Army, which I believe I have already introduced as exhibit 7. In these recommendations, under Regulatory Flexibility Act compliance, you state that the SBA does not agree with the EPA's small business certification. Is that correct?

A Yes.

Q In the second paragraph under that subsection you go on to recommend that, quote, "EPA provide a draft report of this outreach effort, including recommendations to the Administrator, to OIRA, and SBA for comment as a part of the interagency review process," unquote, and, quote, "The goal would be to produce a consensus version of the report to be included in the administrative record for the proposed rule," unquote. Is that correct?

A Yes.

Q And you just spoke a little bit about the process of building that consensus version. Did this report in fact undergo comments from those entities?

A Both of those entities were offered the opportunity to comment on the rule. OIRA, I believe, I don't remember very clearly, but I believe OIRA did not have comments and the Small Business Administration's only comment was that they felt that the rule should have been -- should not have been certified and should have gone through a regular SBREFA process.

We offered them an opportunity to add language to the report

stating that and they declined to do that. And I believe they indicated that they would write a public letter at some point saying that instead.

Q In the same paragraph you recommend that, quote: "The proposed rule would also make clear that this is a voluntary outreach effort on the part of EPA which is not judicially reviewable under SBREFA," unquote. Can you explain why you made this specific recommendation?

A The recommendation was -- I know it's a little hard to parse this sentence -- but the recommendation was that the proposed rule would make clear that this is a voluntary outreach effort on the part of EPA. It was essentially a descriptive statement to say that a voluntary effort is not judicially reviewable under SBREFA. So I wasn't suggesting or wasn't intending to suggest that that should be emphasized in the preamble. That's really up to EPA what they wanted to say about that. I was telling my boss Dom that I wanted to make sure that EPA was clear that this was not a regular SBREFA report, that it was a voluntary report.

Q And why did you feel it necessary to make that clarification?

A Simply for transparency for the public. I actually think that it is fairly clear in the report. Just to refresh my memory, but I think the report is labeled in a way where you wouldn't -- no, this isn't it -- where you wouldn't confuse it for -- here it is -- for an actual SBREFA report. It says of the discretionary small entity outreach, but it was more kind of explaining to Dom, my boss, who wasn't

as steeped in all the details of this, what was going on here.

Q So your comment about judicial reviewability was only to provide clarity, that this was not a formal SBREFA report.

A Yes.

Q In the same paragraph you also mention that this outreach meeting was, quote, "SBREFA-like." You've mentioned this previously. Is it your opinion that SBREFA-like outreach satisfies an agency's obligation to comply with the RFA and SBREFA?

A Not unless they certify the rule. If they certify the rule, which they did in this case, then their obligation ends under the RFA and SBREFA. So at that point the -- any outreach that they do is discretionary. And so it isn't the SBREFA-like outreach that satisfies any requirements in this case, it is the certification of the rule. If they had not certified the rule, that would not satisfy the requirements of the Reg Flex Act and they would have to do a proper SBREFA then.

Q But OIRA felt it necessary or you felt it necessary to engage above and beyond that certification to address the concerns of stakeholders? Is that a fair statement?

A I wouldn't say necessary. What we advised and EPA agreed to was that for the sake of maximum stakeholder engagement and transparency that we conduct a targeted -- that they conduct with our help in a SBREFA-like process targeted outreach to small entities and draft a report for the Administrator that the three agencies would collaborate on that would make recommendations about the rule.

Q Did you feel you were under any pressure to agree with the EPA certification?

A As I said, it is appropriate for me to discuss my concerns and I did ultimately. It is not my job to agree or disagree. And my policy-level boss had already agreed to this approach.

Q Are you aware or have you ever worked out similar arrangements for other rules that informal or, as you put it, voluntary outreach be conducted when an agency certifies a rule?

A No.

Q Then why did you do it in this case, because the policy recommendation from your superiors or for my other reason?

A This is a very high visibility rule that a lot of stakeholders had a lot of interest in, and we knew that there was going to be a lot of scrutiny of it. And so even though the agency had made a legal determination which my boss, who was a lawyer, agreed with that these were indirect effects and that it was proper for the agency to certify the rule, I think everybody involved, including EPA and OIRA, agreed that it would be appropriate to provide voluntarily as rigorous an outreach and sort of formal outreach opportunity to small entities as we could and adopt a SBREFA-like process.

Ms. Aizcorbe. Thank you.

We can go off the record.

[Recess.]

BY MRS. BAMIDURO:

Q It's 3:22. We can go back on the record.

Jim, in the last hour you mentioned that the former Administrator, Mr. Sunstein, made the ultimate decision that he accepted the agency's certification with regard to RFA. Do you know what he made that decision based upon?

A No.

Q Do you have any reason to question his ultimate decision?

A No.

Q It was mentioned in the last hour that some small entities challenged the certification. Is that uncommon in the RFA process?

A I don't know how common that is. I --

Q That's fine. I'm not asking you to speculate.

A Okay.

Q You also mentioned in the last hour in the context of conversations about concerns being raised by Corps employees, and you said -- and I'm paraphrasing, and please correct me if I'm wrong -- I think you said THAT you would not necessarily have concerns about the propriety of a rule if a staff member had concerns. Can you tell us a little bit more about why you wouldn't necessarily have concerns?

A I have a very clear sense of how the government is supposed to work, which is that policy officials who are accountable to the people ultimately through the President and his advisers make decisions and career staff provide advice, information, and analysis to support those decisions. And then once the decisions are made, we're the ones who get down in the weeds and the details of regulatory language and all that and make sure that the decisions are implemented in the way

that they are -- that they have been communicated to us by our policy officials.

So I feel that it is the role of the policy officials ultimately at an agency to speak for what the agency's, quote, unquote, position is. Most of time the -- I think most career official share my view of the functioning of the executive branch, and when they speak I am comfortable that they are in fact speaking for their policy officials and that they know what their policy officials think.

If I see evidence that there is some kind of disconnect between what a career staff person is telling me and my understanding of what the policy officials are saying, I would be concerned about that and I would try to get to the bottom of that and understand what the policy officials, whom I believe are the ones who are authorized to speak for an agency, are really saying.

In this case, it was my understanding that this was a joint product -- that this rulemaking was a joint product of the Corps and EPA. I was directed by -- I don't remember who told me, but it was communicated to me that I should work with -- primarily with Greg Peck and Craig Schmauder. And Craig was in the office -- I believe in the Office of General Counsel of the Army, but I'm not positive about that. But in any case, he was in an office.

It was my understanding that he was in close contact with Jo-Ellen Darcy, who was a policy official, who I don't -- like I said, I don't know the details of how decisions were made within the Army leadership, but she certainly seemed like an appropriate policy official to be

making these decisions. And it was represented to me by Craig that she and the Army as an institution were 100 percent owning and on board with this rule.

So to the extent that there may have been murmurings that career staff were dissatisfied in some way or other, I felt that that was really not my concern to be involved in those kinds internal dynamics within the Army, as long as I felt I was getting the straight story from the Army leadership about what the Army's position was. That's my job as OIRA, is to deal with agencies through their accountable leadership.

Q Is it your understanding that ultimate policy decisionmakers have an obligation to accept and incorporate every single recommendation that is made by a career staff person?

A Absolutely not. In fact it is extremely common in my own personal experience that policy officials receive input from a wide variety of sources, including -- and I certainly feel they should give significant weight to the information and the recommendations of their staff, but they get information from a lot of other places. And in my experience they often make decisions that are not fully consistent with the recommendations of their staff.

That's certainly happened to me many times. And now that I'm a branch chief, I always try to impress on the people that I supervise that our job is not about winning and losing arguments. Our job is about giving the best possible information to the decisionmakers who are accountable to the political process so that they can make the best possible decision. And if we do that, we should sleep well at night

and feel that we've done a good job and that it's not a reflection on us and it's not ultimately our concern what decisions they ultimately make.

And I think that, as I said, most people in the Federal Government accept -- that I've dealt with at the career level -- share that view of the appropriate working of the executive branch, but people do sometimes get in the heat of an issue, get very attached to their particular point of view.

I'm not going to say about any particular person whether that happened or not. I don't look inside agencies and make judgments about that. But as a general rule it is not uncommon for senior policymakers to make decisions that are not necessarily what was advised to them by their staff.

[3:30 p.m.]

BY MRS. BAMIDURO:

Q And in a rule of the magnitude of WOTUS, would you have expected there to be differences of opinion among the participants involved in the process?

A Let me answer that in a very general way. It is my experience that in many rulemakings, and particularly in large rulemakings, there are vigorous discussions within the executive branch, both within and across agencies, in which rules are looked at from all perspectives, and I personally believe that that's very healthy, and that that is one of the reasons why, when I came to work for the executive branch 20 years ago, that was one of the things that struck me was how thoroughly issues were considered before decisions were made in the executive branch, how vigorously different points of view were represented in internal discussions, and I believe that better decisions come out of that process.

Q And did that process bear out here that there were vigorous discussions and that there were thoughtful considerations of the various viewpoints?

A Yes.

Q It was asked of you in the last hour about a second environmental assessment being provided to OIRA. In your recollection, was there more than one official environmental assessment that was provided to OIRA by the agencies?

A No. I didn't really focus much on the environmental

assessment. I think I mentioned that. So I don't know, I don't remember what exactly was provided.

Q Do you recall if there was more than one environmental assessment that was provided?

A I don't recall, no.

Q At any point in the process of this rulemaking, did you feel like you had a lack of access to Corps employees if you needed to speak to them about particular questions that you had?

A I did not have a lack of access. I know these people pretty well. I know their phone numbers, and I certainly felt that I could call them up if I needed to, and on occasion, I did have conversations with them. But I had been informed that the leadership of the Army, what is it, the Office of Civil Works or whatever, the Division of Civil Works that supervises the Corps had designated Craig Schmauder as the primary contact person for my interaction with the agency and my review.

Generally, we feel it's appropriate to respect the agency's internal processes and to deal with whomever the agency designates as the appropriate person to deal with OMB. So I did not have a lot of interaction with other Corps staff because it had been set up that Craig would be my point of contact.

Q And I think you said in the last hour that you didn't see anything unusual about Craig Schmauder being the point of contact for the Army; is that correct?

A Yes.

BY MS. FRASER:

Q You also mentioned that the point of contact at the EPA was Greg Peck; is that right?

A Yes.

Q Did you feel that at any point of your review, whether it's the final review, or at any point that you were reviewing the WOTUS rule, that you were cut out of discussions between the Army and EPA?

A There were a couple of places where I don't remember the details, but I do remember that there were a couple places where it was made clear to me that both agencies felt if an issue came up, that it was appropriate for them to discuss the issue first, and then get back to me formally through Greg and Craig, rather than having me sit in on sort of a free-for-all with both agencies. That didn't strike me as inappropriate or unusual, although sometimes there's a wide variety of how rule reviews are conducted. It's a very case-by-case thing. Sometimes there might be less formal lines of communication and sometimes more formal, but I didn't feel cut out in the sense that there was anything inappropriate or that I was missing out on something that I needed.

As long as the agencies ultimately responded to the comments that we made and as long as I felt that they were speaking to me with one voice, and that I had, you know, a kind of reliable partner in the two of them to deal with in the discussions that we had, I felt that that was both appropriate and not out of the normal.

BY MRS. BAMIDURO:

Q And did you feel like you had a reliable partner in the

agencies?

A Yes.

Q And did you feel like you got the information that you needed throughout the review process?

A Yes.

Q There was discussion in the last hour about the SBREFA process under the Regulatory Flexibility Act. Would you have supported concluding the review of the rule through OIRA as consistent if there were significant unaddressed concerns regarding the small entity certification?

A No, but I already told you, I think in some detail, that I did have questions about how the agency had chosen to make the certification determination, but I discussed those questions internally with the agency and then internally in OIRA. As I just explained to you, the process, as I see it, my policy level decisionmaker, Cass Sunstein, made a decision, and I had no reason to question that decision. He's a lawyer. You showed me that GAO apparently agreed with the decision. I hadn't known that.

So I felt at that point, having aired that issue, and having had policymakers who are the appropriate people make that decision, that it was fully appropriate for me to recommend to my new boss at that point, Howard Shelanski, that we would conclude review with a finding that it was consistent.

Q And did Mr. Shelanski have any basis to disagree with that certification?

A No.

Q Do you have any basis at this point to question the conclusion of the review of the WOTUS rule as consistent?

A No.

Mrs. Bamiduro. We can go off the record. Thank you.

[Discussion off the record.]

BY MS. AIZCORBE:

Q I'm going to close up a little bit of our discussion on the small business questions here.

You were discussing how Cass Sunstein made the determination, or was the ultimate figure of authority at OIRA when the agencies decided to certify the rule. Do you know exactly when that decision was made?

A I do not recall, but I believe it was well before the proposed rule was developed or submitted to OIRA, like maybe a year before or something in that time frame, but I don't remember exactly when.

Q Okay. And you mentioned that you may have had a discussion with Mr. Shelanski when he came on board about it. Is that correct?

A At some point during the review of the proposed rule, it certainly came up in our discussions with Howard what the agreement was about, how Reg Flex Act compliance would be handled; and, in fact, he read this memo, so he was aware of this issue.

Q And he didn't have any questions about the approach that was pursued?

A No. He was aware that the Small Business Administration

disagreed, as it said here, but I think he was comfortable with the agreement that OIRA and EPA had worked out.

Q Who decided which small business industry representatives to invite to the EPA's outreach meeting? Do you recall?

A Under SBREFA, what happens is the EPA and the Small Business Office of Advocacy consult. Usually EPA prepares an initial list first, and then the Office of Advocacy often suggests initial names for that list. It's usually very collegial, and EPA usually accepts whatever names Advocacy wants to add to the list.

My understanding, because we were trying to make this as much like SBREFA as possible, is that a process something like that happened where they collaborated on inviting the small -- identifying and inviting small entity representatives. OIRA typically does not get involved in that process, so I don't know the details of it.

Q When you say "they," you meant the Office of Advocacy was involved in creating that invite list?

A I believe so, but I don't know that for a fact.

Q Okay. Going back to your November 27 email, which I believe was exhibit 6, you stated that "I will offer SBA the opportunity to make comments, paren, (we might have some too) and try to convince them that this is a good way forward," quote.

Can you explain this comment?

A As I've said, we were trying to make the process as much like SBREFA as possible, and so having them participate in the drafting of the report through making comments was consistent with that. I was

also aware that they were raising concerns that it would have been better not to certify the rule and to have an actual SBREFA process, and so I wasn't sure if they would agree.

You know, the first part had happened like over a year earlier when we had the outreach, and they did participate. I believe they helped craft the list of invitees. They certainly showed up for the outreach meeting, so they had been cooperating up to that point. But they had informed us that they didn't agree during the review of the proposed rule. Now, I don't know if they ever formally agreed to this at an earlier stage or not. All I know is that Cass formally agreed to it.

I don't know what the Small Business Administration's earlier position was, but at the time of the proposed rule review, they were raising concerns about it, so I wasn't sure if they were going to follow through or not. But I was telling Greg that I would do my best, consistent with OIRA's position here and agreement, to have them participate in this process.

Q And did you end up having that conversation with somebody at the Office of Advocacy?

A Yes.

Q With whom?

A Kia Dennis.

Q And how did she respond?

A She thanked me for the opportunity to provide comments; she said she would have to consult internally; and then she got back to

me at some point later and said that advocacy would not provide comments on the report.

Q You mentioned earlier, and we referenced Advocacy's comments about a different baseline being used. We, I think, discussed that in the economic analysis, the current practice was used as a baseline versus the regulatory, existing regulatory scheme as written was used for the agency's SBREFA certification. Can you explain if that's accurate. Is that accurate?

A Yes, that's accurate.

Q Did you have that conversation with Kia at this time or anybody else at the Office of Advocacy?

A I don't remember. I know that they disagreed with the certification and, as I think I said, there were two bases for the certification. One was the choice of a baseline that showed the rule being essentially deregulatory relative to the CFR, and the other was this issue of what's an indirect effect and what's a direct effect. I don't know if either of those or if there were some other basis for SBA disagreeing with the certification. I just know that they disagreed with it.

Q I apologize if you already answered this question, but do you recall asking the EPA why they changed the baseline?

A I don't recall asking them that, no.

Q Was it concerning to you that they didn't use the same baseline in both of those analyses?

A I would personally have preferred a consistent baseline,

but the way that I understood it was in case of the economic analysis, this was an OIRA determination about what is the appropriate baseline for economic analysis, and we routinely -- we have a lot of guidance out, and it's our job to make that determination.

The SBREFA determination, or the Reg Flex determination was a legal determination about what were the requirements of the Regulatory Flexibility Act and, as I said, this issue had been fully aired at an earlier point, and people whom I felt were the appropriate people to decide had decided that it was an appropriate interpretation of the Reg Flex Act, that using the requirements that were legally on the books at that time could be part of the determination for what was the baseline.

Q Have you experienced other rulemakings where agencies have employed different baselines for different analyses?

A Not that I can think of right now.

Q Going back to the Office of Advocacy's statements that the agency improperly certified the rule, how do you typically handle similar situations where the Office of Advocacy disagrees with core elements of an agency's compliance with the RFA?

A We do our best to find a resolution that makes both sides happy when those kinds of discussions occur, and we often do find such a resolution. However, the Office of Advocacy is a very unique creature. It's in the executive branch. It's a very independent advocacy agency, and it actually has authorities that, to my knowledge, no other executive branch agency has. For example, it can join in an

amicus brief against the Federal Government.

And so, at the end of the day, it is not that uncommon for advocacy to be not fully satisfied with an agency's compliance with the Reg Flex Act, and when that happens, they typically write a letter publicly after the proposed rule is issued expressing their concerns, which is what happened in this case, and I think we were certainly aware at the time.

I mean, we did broker some discussions between EPA and SBA, and they basically -- you know, EPA said we had this agreement with OIRA. We think this is appropriate. Our lawyers tell us that this is legally sufficient under the Reg Flex Act, and, by the way, we did all this great outreach. And SBA essentially said, We don't think that's enough. We left it that they would agree to disagree and SBA could use its independent authority to object publicly if they so choose.

Q Do you understand what EPA's concerns were with not conducting a Regulatory Flexibility Act analysis or panel in this case, despite its certification?

A When you say "despite its certification," once it's certified, it had no obligation to conduct such a panel.

Q Correct, but it may voluntarily conduct a panel and conduct an analysis, and knowing all the concerns of these national industries representing small businesses and the Small Business Administration, do you have any indication as to why the EPA did not just go ahead and conduct the analysis and panel?

A They gave me one reason early in the process when that decision was being made. They said that they -- first of all, they

were very adamant all the way through these discussions that they had done a legal analysis of the requirements of the Regulatory Flexibility Act, and they felt that it was totally proper for them to certify on the basis that they did. So they started with that.

But then as a policy argument, they said that they felt that this rule, that the policy decisions in this rule were driven by, essentially, a legal interpretation of what the Supreme Court had said in the various decisions that were sort of lurking behind EPA's rule, and also in the science which, you know, the Justice Kennedy standard was a significant nexus to a downstream navigable water, and they felt that science was important to answer the legal question of what is a significant nexus, but they didn't feel that an analysis of the impacts of the rule on anybody, including small businesses, should be a primary factor in the rule because they really felt it was a legal interpretation of a set of court decisions.

Q SBREFA allows an agency to apply the regulatory flexibility requirements if it believes the rule may have a greater than de minimis impact on a substantial number of small entities. Did you discuss this with EPA at any point?

Mr. Luftig. Are you reading from the --

Ms. Aizcorbe. No, it's a generalization of a requirement, or a provision within SBREFA that says that an agency, if it decides that there's a greater than de minimis impact on businesses, that it may go forth and conduct.

Mr. Laity. I'm not aware of that.

Ms. Aizcorbe. Okay.

Mr. Laity. My understanding is that if the agency can certify that a rule will not have a significant impact on a substantial number of small entities, then it is not required to conduct a SBREFA panel, and in my experience, I'm not aware of an agency conducting a SBREFA panel if they so certify. If they do not certify, and they're EPA or OSHA or CFPB, then they have to do a panel. So I did not know that there was a voluntary aspect of that.

BY MS. AIZCORBE:

Q The chief counsel for advocacy may waive the panel process based on the agency's consideration of the concerns collected from small entities. Did the chief counsel make such a waiver in this case?

Mr. Luftig. I'm sorry, are you reading from something there?

Ms. Aizcorbe. No. My question. It's about general knowledge of SBREFA. I mean, clearly, Mr. Laity is an expert in SBREFA compliance, so I'm just asking if the chief counsel made any waiver of the requirements of SBREFA in this case.

Mr. Laity. I'm not aware that the chief counsel made any such waiver. I would recommend that you ask him or her. I don't remember who that was at that time. But I'm not aware that they did.

BY MS. AIZCORBE:

Q Okay. In the same November 27 email, exhibit 6, you state that, quote, "Howard will call Gina soon to discuss process and timing for resolving the five policy level issues that I mentioned earlier today," unquote.

Do you recall those five issues?

A I believe -- let me just double-check this. I believe this memo, which went to -- I believe this went to EPA. This went to EPA, and it was also shared with Howard. I believe it was referring to the issues discussed in this memo.

Q Do you know whether the administrators ever met on these issues?

A I don't know about met. I know that they had discussions about these issues. I believe they were primarily by phone.

Ms. Aizcorbe. I have another email I would like to introduce as an exhibit. I believe we're up to 8.

[Laity Exhibit No. 8

Was marked for identification.]

BY MS. AIZCORBE:

Q As you can see, on December 31, 2013, you email Alex Barron of EPA's Office of Policy, quote, "I suggest you reach out to Greg Peck directly if you want to discuss timing or process," unquote.

Do you recall what this was in response to?

A No.

Ms. Aizcorbe. Okay. Next is Exhibit 9.

[Laity Exhibit No. 9

Was marked for identification.]

Mr. Laity. Okay.

BY MS. AIZCORBE:

Q On February 7, 2014, Mr. Peck responds to your email

regarding an extension request from the Department of the Interior stating, quote, "I'm feeling increasingly concerned about the review process and the lack of a clear path forward. It would be helpful to get your insight," unquote.

You then set up a call with him for that afternoon. Can you explain Mr. Peck's concerns and your discussion?

A I don't remember the discussion, what exactly this was about. The context is, as I think you noted, the rule was submitted in September of 2013, and this email is in February of 2014, so it was past the 90-day review period, and Greg was concerned about how long the review was taking. We certainly try very hard to meet our 90-day requirement, and I think we have a reasonably good record most of the time in doing that; but for a rule like this, it's not uncommon for it to take longer than 90 days, and I feel, and I think I generally have the support of my political leadership in this, that it's very important to make sure when a rule is this important, that all interagency review, interagency concerns, other agencies' concerns are addressed and vetted.

I don't remember what exactly an extension was of what or for what reason or about what issue. By this time, we would have already circulated the initial rule and gotten the agency's comments back much earlier in the process, so I suspect that this was a subsequent step where some later version of the rule I had, again, submitted back to the agencies -- and this is very typical -- and said, Here is EPA and the Corps' response to your comments. Let me know if you have any

additional concerns, or if anything in here you feel still hasn't been adequately addressed, and I'm guessing that what happened here is that I gave them some period of time to do that, and DOI said, Can we have some additional time?

In general, I try to be responsive and keep the review moving on schedule, especially when it's behind schedule, but I also, just to be honest, I try to calm down the agencies a little bit and say, Look, I know you're in a hurry to get your rule out, but we want to make sure that, you know, if DOI needs a few more days, this is a long, complicated package, that we should give them that time.

Q And so I understand, this would be the review period for the proposed rule or the draft final rule?

A This was all during the review of the proposed rule when this happened. As you noted, the proposed rule came in at the end of September of 2013, and we concluded review sometime in the early spring of 2014.

Ms. Aizcorbe. I have another email which I'll introduce as exhibit 10.

[Laity Exhibit No. 10

Was marked for identification.]

Mr. Laity. Okay.

BY MS. AIZCORBE:

Q On February 10, 2014, Mr. Peck emails you directly, asking whether you have a, quote, "agreement in principle" unquote, if he were to change upland ditches to less than perennial and move forward with

some other issues.

Was it typical through the rulemaking that you would negotiate directly with the EPA without involving the Corps?

A It was my understanding that when Greg or Craig spoke to me, that they were in close cooperation with each other and that neither one of them would have a communication like this with me unless they had coordinated, and I had no reason, throughout the entire rulemaking process, to question that assumption. It seemed to me that there was never a case where it appeared that one of them didn't know what the other was doing or that there was any disagreement.

So when I got emails like this, I did deal more directly with Greg. He and I had been working on this issue together for many years, going back into the Bush administration, but I assumed that he was speaking on behalf of both agencies.

Ms. Aizcorbe. The next email is exhibit 11.

[Laity Exhibit No. 11

Was marked for identification.]

Mr. Laity. Okay.

BY MS. AIZCORBE:

Q On February 26, 2014, you email Mr. Peck and cc Mr. Schmauder, quote, "In the interest of time, I have not reviewed the Corps comments that I received Friday. Ideally I would do this, but I know you need this ASAP. I will leave it to Craig to ensure that any outstanding Corps comments are appropriately addressed," unquote.

Do you recall ever going back and reviewing the Corps' comments?

A No. I had completely forgotten until you showed me this email, that the Corps sent me comments separately. I'm not sure why that happened, since this is their rule, and I think I was saying to Greg that since I had been instructed to -- it was kind of a diplomatic way of saying this is really up to the Army and the Corps to work out, and it's kind of Craig's job to decide if there's any outstanding issues from the Corps or not.

Q So I understand, did you recall receiving comments after this email?

A Now that I've read this email, I have a vague recollection that they -- I mean, I guess they sent me some. It says here that they did, but I had not remembered that, and I only vaguely -- it kind of vaguely rings a bell, but I don't remember what they were about. I believe, as it says here, that I didn't really focus on them very much.

Q Did you ever circle back with Mr. Schmauder to make sure that the Corps' comments were addressed in the rule, or did you just assume from no response that they had been?

A I assumed from the beginning that Craig was fully in the loop in the decisionmaking process within the Army and the Corps, and that any interaction between the Corps and OIRA, it was appropriate to have Craig be the primary point of contact.

I didn't have any objection to the Corps' staff providing comments, but I felt that, especially as it says here, given that we were in a hurry and that Craig had been designated as the person to communicate with us that it was appropriate for me to leave it to Craig

to decide if there were issues that needed to be worked out or not.

Q You mentioned that you had worked on one joint rulemaking between these agencies previously. I believe it was the compensatory mitigation rule.

A That's correct.

Q Did you experience in that rulemaking the same sort of situation, where you would have a primary contact with one agency, and that agency would speak on both of the other agencies' behalves, or was it more of a collaborative, you speak to both points of contact?

A The points of contact in that review were a little bit more decentralized, and I worked fairly closely with, I believe, three or four people at each of the agencies on that review.

Q Is it typical for you not to review comments from a rulemaking agency in a joint rulemaking, whether it be in the interest of time or for any other reason?

A I really can't answer what is typical because this rule was such a unique rule. All I can say is, it is very typical and very appropriate for agencies to tell me who the appropriate point of contact is for me to deal with, and I generally try to respect that. So, again, here I didn't feel that there was any foul or anything out of line if the Corps' staff wanted to send me comments, but I felt that given the way that the Corps' leadership or the Army leadership had set up the process along with EPA, that it was appropriate for me to deal with those through Craig.

Ms. Aizcorbe. I have another email that I will introduce as

exhibit 12. I have, again, tabbed the two parts I will ask about.

[Laity Exhibit No. 12

Was marked for identification.]

Mr. Laity. Okay.

BY MS. AIZCORBE:

Q In a March 19 email in 2014, toward the bottom of the page, Arvin Ganesan of EPA emails Andrei Greenawalt, cc'ing Ken Kopocis asking, quote, "Does it make sense, looking at the clock, to have Ken walk through for you and Jim, et cetera, what we will likely send over, understanding that the Corps is still reviewing?" Unquote.

Is it common, again, in agencies in this context to share one version of a rule while the other is still reviewing, or would you say that this is, again, just a unique circumstance given this specific rulemaking?

A This is absolutely a unique circumstance, given this specific rulemaking, so it's not possible for me to comment on whether this is typical or not. I'm pretty sure that what this was referring to was some language on -- remember, I told you that OIRA encouraged the agencies to include some additional regulatory options in the preamble, and I believe that this was in reference to those -- that language. It wasn't, in other words, a change to anything in the rule text of the proposed rule, it was the preamble discussion.

So, you know, as you picked up from the earlier emails, EPA was trying to keep the review moving, and they wanted to get our initial read of how we felt about what language they would be comfortable with,

and they were making clear to us that they were continuing to work with the Corps and that there might be some changes, but that they felt that this was pretty close to what the two agencies would be comfortable with, and I generally accepted their judgment about those kinds of judgments.

Q In the same email chain at the top, Ken Kopocis of EPA transmits revised language on other waters saying, quote, "it does not reflect the final comments from the Army and Corps, but we do not expect any substantial comments or changes to the document," unquote.

Did you ever discuss with anybody else at OIRA that the EPA was making such assertions about what the Army or Army Corps did or did not care about, or might or might not comment on since this is a unique situation?

A No. Again, I read this email as suggesting that -- first of all, this email was directed to Andrei Greenawalt, who was a policy-level appointee above me, so, by definition, this email already -- people above me in the OIRA chain were aware of this, and I interpreted this as the EPA being very above board and saying, essentially, you know, we are still processing the Corps' comments, but we have a pretty good sense from our working with them already that they're going to be comfortable with this language, and we want to get it to you right away, but we want to make sure you know that their final comments are not yet reflected in this, but we will be sending you something tomorrow; and also, we want to make sure you know that we are being completely above board with them, and that they know we are

sending this to you. So that's how I read this email.

Q Did you check with the Army after receiving this revised language whether they had comments?

A I don't remember.

Q Going back to exhibit No. 11, in his February 26 email, Mr. Peck expresses concern with the quote, "considerable coordination left and work to be completed" unquote, and states, quote, "I have a very involved administrator to whom I have promised OMB edits since last Friday. My credibility is at a low ebb!" Exclamation point, end quote.

Can you explain your understanding of Mr. Peck's statements?

A I think I already explained it was Greg Peck's job to try to keep this moving as quickly as possible. That is not uncommon at all in reviews, where the rule-writing agency is eager to get their rule moving, especially when we're over the 90-day review limit. To be perfectly honest, I tend to take emails like this with a little bit of a grain of salt and explain to anybody who writes me an email like this that I am doing the best I can, that we are eager also for them to conclude review and to move the process forward, but that we don't feel that we can short circuit, you know, making sure that everybody's comments are accounted for and so on. So he was just reminding me that he's got a political boss who is antsy and wants to get this out, and I thought that was fine, but I basically just continued doing my thing.

Q It didn't influence your review at all?

A I always try to be accommodating to the agencies, and I'm

always very aware if I'm past the 90-day review limit, that puts additional pressure on me, but beyond that, this did not unduly influence. It certainly didn't influence me to cut corners in any way.

Q Was the Friday timeline for OMB edits something you had promised Mr. Peck?

A It might have been. I don't remember. It's not uncommon for me to make promises, and then miss them by a few days.

Ms. Aizcorbe. That's fair. All right. I have another email, Exhibit 13. While I printed off the whole chain, I am only going to refer to one particular email in this chain that's on the second page from Sunday, March 16.

[Laity Exhibit No. 13

Was marked for identification.]

Mr. Laity. Okay.

BY MS. AIZCORBE:

Q Would you say that in this time frame we're still talking about the proposed rule? Is that correct?

A Yes.

Q On March 16, 2014, you send an email to Mr. Peck, cc'ing Mr. Schmauder stating, quote, "Greg, I expect you won't be surprised to hear that I consider this draft a major step backwards. I don't see how we could conclude any time soon based on this draft, and I have so informed my management," unquote.

Who do you recall informing?

A Howard Shelanski, Dom Mancini. I don't remember whether

Andrei was still there or who -- but at this point, this is very near the end of the review, and the senior leadership of OIRA is fully engaged in the review.

Q What do you mean by that statement versus earlier in the review? Would the senior management have not had the same level of engagement?

A Yes. Typically, a lot of the early engagement goes on at the staff level, the career staff level, and once we get to the point where issues have been elevated to the policy level -- the five issues in the memo that you were looking at before -- and policy officials then get engaged in discussions directly with each other. At that point, they tend to focus a lot more on the rulemaking than at the earlier stages.

Q Can you recall what the administrator or Mr. Mancini's reactions were to your conclusion at this stage about this draft?

A My recollection is that they agreed with my -- they also read the draft. It wasn't the entire preamble. It was maybe about a dozen pages of language on this issue that we've already mentioned several times of requesting comment on various other alternatives. We had come very close to what we thought was an agreement on how the agency would do that, and then we got this thing. I believe it came, like, maybe on a Friday evening or something. I think this was something where I had to work over the weekend to look at this thing, and it was completely changed from where we had thought we were really close. And so I admit that I was a bit taken aback.

I will also tell you that there is a certain amount of negotiation implicit in this email. He wants to get this done quickly, and I'm saying to him, Gee, Greg, if you want to get this done quickly, you know, we were so close, what happened? And I believe that my political leadership had the same reaction.

Q Were you given any reason for the changes that had been made to the draft?

A Yes.

Q And what was that?

A I was told that the Administrator of EPA was very personally engaged, and that she had suggested a lot of the changes.

Q In the earliest email on this same chain, Mr. Peck and Mr. Schmauder indicate that this version is the final version of the joint rule and preamble. Just so I'm 100 percent clear, it's the final version of the joint rule and preamble at the proposed rule stage; is that correct?

A I believe that label is misleading in the context of this email chain, and that that was, perhaps, aspirational on their part. Following this email, there were at least one and maybe several discussions between Howard and Gina, and EPA ultimately came back with a version that was not all the way back to the one that we had originally thought we were so close on, but that was much more back in that direction, and that was something that we felt did appropriately present alternate regulatory options in a way that would set up informed public comment.

Q Is this the first time at this point that you received a similar justification, that the Administrator of the EPA had decided to make substantive changes, when you were so close to reaching a deal with staff at the agencies?

A Yes, but I was aware for a long time before this that the Administrator of EPA was paying close attention to the rulemaking and to the engagement with OMB.

Q But you don't have any indication as to why she had not recommended those changes at any previous stage?

A That's correct. I don't know exactly what communication went on between the people that I was dealing with and the Administrator of EPA. As I said, and as I think is reflected in this, I was surprised when the draft came back, and I don't really know -- I was told that the Administrator was personally involved in making the changes, but I don't really have any knowledge about what her reasoning or thinking was or exactly what the interaction was that led to that.

Ms. Aizcorbe. I have another exhibit I'll introduce as exhibit 14. Again, I printed out the whole chain for context, but I will be referencing the first full email on the second page on March 20 from Andrei Greenawalt.

[Laity Exhibit No. 14

Was marked for identification.]

Mr. Laity. Okay.

BY MS. AIZCORBE:

Q On March 20, 2014, which was a Thursday, OIRA and the EPA

exchanged emails until 11:03 p.m. regarding the final time frame, quote, "to make this happen for Tuesday," unquote.

According to the proposed timeline sent by Mr. Greenawalt, agencies would only have the weekend to coordinate on and incorporate OIRA's edits, and then OIRA would only have one day to sort out final edits with the agencies and conclude its review. Is this sort of timeline typical for what you would experience in the final week leading up to a rules proposal?

A It's really hard to say what's typical because each rule is different, but when a rule has this high level of visibility, and it's been under review for, I guess, approximately 5 or 6 months at this point, it's not at all surprising that everyone would be in a hurry to try to get it done.

Also, at this point, I believe what this reflects is that there had been a series of discussions and a fairly detailed agreement already reached about how the language would look and what it would say. So this was basically an opportunity to see an agreement that had already been made down on paper. I think that both Ken Kopocis and Andrei, who were both political appointees above my level, were optimistic that given where we were, that we had reached substantive agreement that we could review this language in that time frame. And again, as I mentioned, this was, I don't know, a dozen pages or something of language. It wasn't a huge amount of language.

Q At any point in the rules development, did you ask for more time for your review?

A I don't remember.

Q I know we discussed withdrawal a little bit earlier, but I want to make sure I understand. Did you ever discuss potentially asking the agencies to withdraw the rule or guidance before that decision had been made with anybody at OIRA or OMB?

A I don't recall what discussions led up to it, or exactly at what level they happened, but I do know that the draft final guidance was withdrawn from OMB review at the same time that the draft proposed rule was submitted, and my understanding was that that was the result of a decision that was made above my level, and I don't know by whom, that it would be better to proceed with rulemaking rather than to complete the guidance.

[4:30 p.m.]

BY MS. AIZCORBE:

Q We have touched on this a few times, and, to save time, I won't get into the details or reiterate. But, in your experience, has the Army Corps ever expressed dissension over an ongoing rulemaking?

A Could you clarify? I'm not sure what you're asking.

Q Sure. In a rule that the Army Corps would have been involved in developing, have --

A So one of their rules?

Q Correct.

A Uh-huh.

Q -- have you ever experienced the Army Corps disagreeing with the way a rule is either scientifically based or being developed or the conclusions included in that rulemaking?

A Are you talking about a joint rule? I'm a little confused by your question. If it's an Army rule, they wouldn't be disagreeing with their own science and their own conclusions. If you're talking about a joint rule, the only other joint rule that I can remember working on was the compensatory mitigation rule. And I can answer with respect to that one, if that's helpful.

Q Yes.

A I think that the compensatory mitigation rule was generally a collaborative process. And, as I said, I worked on that rule more with -- directly with a wider number of staff people at both agencies.

Q So would you say that the same collaborative process was

engaged between agencies and OIRA in this rulemaking?

A As I said before, the process between OIRA and the agencies was very collaborative in this rulemaking, although we had vigorous discussions about issues, as I think you see in some of these email chains. But it was more centralized in that I dealt primarily with Craig and Greg. And that was the agency's decision, both the Army leadership and EPA leadership, that that's how they wanted to handle the review.

Q Executive Order 12866 requires OIRA to consider the priorities of the President in its review. How does OIRA receive information about the President's priorities, and how does OIRA incorporate that information into its review process?

A The most common source of that information for OIRA career staff is our own Administrator, Howard Shelanski, who deals on a regular basis with senior advisers in the White House.

We do also get input from other EOP offices. But, to be honest, EOP offices will tell us their interpretation of the President's priorities, but we usually want to make sure. And we will often tell Howard or whomever the Administrator is what we're hearing from CEQ or DPC or CEA. But we generally want to make sure that we're representing the President's priorities as our Administrator understands them. We work for him.

Q And you mentioned that you do not consult with these other parts of EOP but you do receive comments from them. I believe you also said that you did not recall receiving any instruction from any other

part of the Executive Office of the President on how to conduct your review. Is that correct?

A It is. "Consult" is a broad word. So if I said I don't consult, maybe in the context of the question you asked me before. We certainly discuss things with them. They do not generally give us direction directly, although perhaps -- when direction comes to us from Howard, who is the only person, really, who is authorized to give OIRA direction, I don't know where that comes from, and it may, in some cases, come from other places in the EOP. But that process happens above my level.

Q In the course of this rulemaking, did you ever receive or were you aware of any suggestion or direction to conduct your review in a certain timeframe?

A As I said before, I believe there were timeframes and deadlines, but I don't remember exactly what they were.

Certainly, as you reminded me, at this point in this process, it looks like my leadership was agreeing to try to get this done within a few days. At that point, we were very close. And there may well have been discussions like that at earlier points in the review. I don't remember the details.

Q Did you ever receive or were you aware of any suggestion or direction to conduct your review in any particular manner?

A No.

Q Did you ever receive or were you aware of any suggestion or direction to approve or move the rule through the review process

or to stand down on any concerns for the sake of moving the rule through?

A No.

Q In your time at OIRA, have you ever received such direction to make sure a rule makes it through the review process?

A Yes.

Q Do you recall which proposals those would include?

A The most common case when that happens is when there is a judicial deadline for review, a court-ordered deadline. And then we try very hard to meet those court-ordered deadlines, and that sometimes requires a very compressed review.

Occasionally, there could also be a very high-profile rule where the administration has made a public commitment to get something done by a particular time. And then we would also be aware of that and do our very best to meet that deadline.

Q Were any of these instances, besides the judicial and court-ordered deadline rules, involving any of the administration's other environmental proposals?

A Yes. Well --

Q And I ask that because we understand that the WOTUS rulemaking -- we've been told by the Army that that was a part of a package of environmental rules. So I'm trying to understand the context in which OIRA was treated in its review in this package of environmental rules.

Mr. Luftig. Okay. Could you limit your question then to the scope of those package of rules?

Ms. Aizcorbe. Absolutely.

With respect to this administration's package of environmental proposals, were you told that any of them needed to be passed through the review process?

Mr. Laity. Can I go offline for a minute?

Ms. Aizcorbe. Sure. Absolutely.

Off the record.

[Discussion off the record.]

Ms. Aizcorbe. We're back on the record.

Mr. Luftig. Can I just clarify, with respect to your question, the focus of today's interview is obviously the Clean Water Act rule. Do I have that right?

Mr. Laity. Clean Water rule.

Mr. Luftig. Clean Water rule.

And so Mr. Laity is happy to address your question as it bears on the Clean Water rule but won't be addressing, sort of, extraneous rules that have nothing to do with the Clean Water rule.

Ms. Aizcorbe. The committee said the general focus of this investigation and interview would be the Clean Water rule and its development, as well as OIRA's processes. The committee does not recognize any germaneness rule in its interviews. You have the ability to answer or not answer any questions as you are comfortable, but with respect to what you're saying, we do not recognize any sort of subject matter limitation in our interviews.

Mr. Luftig. Okay. Well, Mr. Laity is prepared today to address

issues as they relate to the Clean Water rule.

Ms. Aizcorbe. And we've spoken about Mr. Laity's experience at OIRA outside of his review of the Clean Water rule.

So if you are uncomfortable answering that question, you are well within your right not to answer it, but I would ask you then what your justification or reason for not answering would be.

Mr. Luftig. So can you please ask the question again so he can answer it?

Ms. Aizcorbe. Absolutely.

BY MS. AIZCORBE:

Q With respect to the administration's other environmental rulemakings that you have reviewed or that have undergone OIRA review, have you been told or are you aware of any direction or suggestion that those rules would need to be moved through the rulemaking process?

A It is not uncommon for my boss, Howard Shelanski, whom I work for and who gives me direction, to tell me that there is a desire on the part of the administration to get a rule done on a particular schedule. And there have been other rules in this administration and in other administrations where I have received that kind of instruction from the Administrator of OIRA.

Q And would you say in any of those cases that that has impacted the breadth or quality of your review?

A We try really hard to give the best possible quality review that we can to every rule that we do, but I think, depending on how short the timeline is, there is certainly the possibility that we have

to compress the review more than we would like to when we get that kind of instruction.

I would hasten to add that that did not happen in this case. This rule was under review for 5 or 6 months. And you saw that the agency was actually very concerned about how long that it was taking. And I think I communicated that I wasn't particularly distressed by that, and I felt like we gave this a very, very thorough review and that no corners were cut.

Q Is OIRA involved in reviewing or directing agencies in how they compile their administrative record for a rulemaking?

A Generally, no. In very limited cases, we might make a suggestion to that effect. And so you actually identified a fairly rare situation, where I suggested to EPA that they include the first peer review of the connectivity report in their administrative record, because I felt, especially given that the second peer review was not going to happen until after the proposed rule had been issued, that that would be helpful to the public to see that this report was actually not at a preliminary -- that it was already very far along in the process of having been developed and peer-reviewed and responded to comments. So I made that suggestion.

But, typically, it's the agency's responsibility, and we don't get very involved in their preparation of the administrative record.

Q We have been informed that the EPA has proposed parts of the WOTUS proposal in the upcoming rulemaking for the nationwide permit program. Are you aware of any discussions or efforts to include WOTUS

in this rulemaking or any other rulemaking packages?

A No. That's not true.

Q What do you mean it's not true?

A The nationwide permits has nothing to do with WOTUS, other than the fact that WOTUS identifies what waters are subject to jurisdiction and, therefore, what waters would require a permit, which could be satisfied by a nationwide or individual permit. The nationwide --

Q I'm sorry to cut you off. I only have about 2 more minutes left --

A Okay.

Q -- so I'm going to keep plowing through.

A Okay.

Q And I ask that -- do you --

A The two have --

Q Do you know that the --

A The two are different.

Q I understand.

Do you know that the EPA did not make that proposal with respect to the 2017 cycle for the nationwide permit program?

A I don't see how they could have.

Q Okay.

A I don't know that for a fact, but it doesn't make any sense to me. They're about two completely different things.

Q Okay.

When were you notified that the committee asked for your interview?

A Asked for my interview?

Q Today. Yes.

A Three or 4 weeks ago. Something in the timeframe of 3 or 4 weeks ago.

Q Do you recall who informed you?

A Matt.

Q Have you been asked to produce documents or emails relating to this rulemaking?

A No.

Q Have you produced any emails or documents relating to your work on this rulemaking?

A No.

Q Were --

A I'm sorry. I'm answering in regard to after the time when I became aware that the committee was wanting to interview me. I don't remember -- we've had various requests, FOIA requests and other requests, for documents about this rulemaking in the past, and I don't remember much about -- those things happen so much they go in and out.

So I might very well, at some point in the past year or in earlier years, been asked to produce documents about this rule, but not in preparation for this meeting.

Q And not related to the committee's investigation?

A Yes. Correct.

Q Did you --

Mr. Luftig. I'm sorry. Just to clarify, would you know if it was in response to the committee's investigation?

Mr. Laity. No.

BY MS. AIZCORBE:

Q Have you been asked to produce any documents related to this rulemaking since July of this last summer?

A I can't recall, but I may well have been.

Q Who would have searched for these documents if you had received such a request?

A I would search if I received such a request. If they were documents in my custody, basically documents that I either wrote or received and that were recent enough that they hadn't been deleted from our system.

If they were documents involving other people or if they were older documents that wouldn't be immediately accessed, that would be archived, then I would give the person requesting them information so that they could seek them from some other source.

Q Were you given any instruction on how to -- or were you given any instruction in preparation for today's interview?

A Yes.

Q From whom?

A From my counsel here.

Q And what instructions were you given?

A They told me, first of all, to tell the truth; second of

all, to tell the truth; third of all, to tell the truth. And then, after that, they told me to answer the questions asked, to think carefully about the questions, and that it was okay for me to ask you for clarification if I didn't understand some question. Very similar, actually, to what Jon read at the beginning of the process.

Q And just to clarify, you do not recall producing any documents in the last 8 months related to your work on this rule? As you mentioned, you all are very busy over at OIRA, so --

A Seeing that you have all these emails, I may very well have been the source of some of these emails. I don't recall the process for how these emails were gathered, and I might very well have been involved in that. But I wasn't really aware of the committee's investigation until recently, when I was informed that I might have to come and meet with the committee.

So, you know, we have FOIA requests and we have other reasons why people, you know, may -- you know, like, counsel may be asking me something. So I may well have produced these, but I wasn't really focused on that they were for the committee.

Q Thank you.

Ms. Aizcorbe. We can go off the record.

[Discussion off the record.]

Mrs. Bamiduro. Jim, I will wrap up briefly since I know that you've got a hard stop of 5 o'clock.

In the last hour, you were asked about, in connection with exhibit No. 9, the length of time of the OIRA review for the proposed rule,

and I believe you had said that it had gone over 90 days. Is that correct?

A Yes.

Q Is there anything particularly troubling about the length of the review for the proposed rule, in your opinion?

A We always try hard to meet 90 days. And so we always do feel additional pressure to try to finish quickly if it goes beyond 90 days. That is what it says in our Executive order, but it is, unfortunately, not unusual that we do go beyond 90 days.

And I felt, as I explained, that sort of, within reason, that it was important to take the time to do it right and to make sure that all agency concerns were aired and that issues were worked out. So we did the best we could to keep it moving expeditiously.

Q In regard to the 2008 mitigation rule, which you discussed, I believe you said that your interaction with the agencies was a bit more decentralized in juxtaposition to what you described for the WOTUS rule. Is that right?

A Yes.

Q Was there anything inappropriate about having a more centralized point of contact for the WOTUS rule?

A No.

Q I think in the last hour you talked about agencies' requirements under SBREFA once they certify that there is no significant impacts on a significant number of small entities, and once they make that certification, their obligations end. Is that your

understanding?

A Yes.

Q But here, the agencies went beyond that and conducted, to use your word, a SBREFA-like review. Is that correct?

A Yes.

Q What was the point of doing that, as far as you understand it? Was it to gain information about the concerns being raised by the small entities?

A Yes.

Q Is it your understanding that the information that the agencies received in the process of conducting that SBREFA-like review were considered before promulgating the final rule?

A Yes.

Q With regard to exhibit 11, which was raised in the last hour, I believe there were questions about whether Mr. Schmauder went back to talk about concerns that had been raised by the Corps. Do you have any reason to believe that Craig was not having an appropriate level of contact with the Corps to discuss their concerns with regard to WOTUS?

A No, not at all. In fact, I assumed that he was communicating with all of the appropriate people within his agency on a regular basis.

Q And why do you assume that?

A Because I had been told that he was the appropriate person to deal with. And I knew that the Corps staff had been involved in

the development of the rule, and so I assumed that -- it just made sense to me that, you know, he would be the point of contact and he would handle the appropriate communication within his agency. And that's not unusual.

Q I believe in the last hour, with regard to exhibit 13, you indicated that you had heard that the changes that were made to the previously agreed upon text were done at the initiation of the Administrator of the EPA. Is that correct?

A Yes.

Q As the Administrator and the final policy decisionmaker, is she the appropriate person to decide if she wants to make changes to a rule that's being promulgated by her agency?

A Yes.

Q And is she within her prerogative to make those changes at that time that she deems appropriate?

A Yes.

Q At any point in time during OIRA's review, did you feel like you did not have an adequate -- I'm sorry. Let me rephrase. Did you feel like you had inadequate time to review the rule?

A No.

Q Did you ever feel rushed?

A As these emails show, toward the end, we were under pressure to wrap up a review that had gone on for more months than it should have quickly. And I did work on a couple of weekends, but I felt that's actually pretty normal at OIRA and I didn't feel that was inappropriate.

As I've said numerous times now this afternoon, I did not feel any pressure to cut corners or shortchange a review in any way, nor did I do that.

Q And so is it fair to say that OIRA did not conclude its review of the rule prior to it being ready and comfortable to conclude its review of the rule?

A Yes. Absolutely.

Q Do you stand by the ultimate conclusion that the rule was consistent -- the WOTUS rule was consistent with statutes here?

A I do, and with our Executive order authority, which is actually the determination that we make.

Mrs. Bamiduro. Thank you. We can go off the record.

[Whereupon, at 4:52 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