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5 COMMITTEE ON OVERSIGHT AND

6 GOVERNMENT REFORM,

7 U.S. HOUSE OF REPRESENTATIVES,

8 WASHINGTON, D.C.

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12 INTERVIEW OF: JO ELLEN DARCY

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16 Tuesday, March 29, 2016

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18 Washington, D.C.

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23 The interview in the above matter was held at 6480

24 O'Neill House Office Building, commencing at 10:10 a.m.

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1 Appearances:

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5 For COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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7 JONATHAN J. SKLADANY, Senior Investigative Counsel

8 RYAN HAMBLETON, Senior Professional Staff Member

9 CHRISTINA AIZCORBE, Counsel

10 MEGHAN BERROYA, Minority Chief Investigative Counsel

11 BEVERLY BRITTON FRASER, Minority Counsel

12 SEAN BURNS, Minority Counsel

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16 For U.S. ARMY

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18 MEGAN WEIS, Special Counsel to the General Counsel,

19 Office of General Counsel

20 TENNAILE TIMBROOK, Office of the General Counsel

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1 Mr. Skladany. This is a transcribed interview of Jo
2 Ellen Darcy. Chairman Chaffetz requested this interview as
3 part of the committee's investigation of the promulgation of
4 the Waters of the United States Rule.

5 Will the witness please state your name for the record.

6 Ms. Darcy. Jo Ellen Darcy.

7 Mr. Skladany. Thank you. On behalf of the chairman, I
8 want to thank Ms. Darcy for appearing here today and we
9 appreciate the willingness to appear voluntarily.

10 My name is John Skladany and I'm with the committee's
11 majority staff. And I will have everyone else from the
12 committee who is here at the table introduce themselves as
13 well.

14 Ms. Aizcorbe. My name is Christina Aizcorbe with the
15 majority staff.

16 Mr. Hambleton. Ryan Hambleton, majority staff.

17 Ms. Fraser. Beverly Britton Fraser with the minority
18 staff.

19 Mr. Burns. Sean Burns, minority staff.

20 Ms. Berroya. Meghan Berroya, minority staff.

21 Mr. Skladany. Thank you, everybody.

22 The Federal Rules of Civil Procedure do not apply to
23 the Committee's investigative activities, including
24 transcribed interviews, but there are some guidelines that
25 we will follow and I will go over those now.

1 Our questioning will proceed in rounds. The majority
2 will ask questions first for one hour. And then the
3 minority staff will have an opportunity to ask questions for
4 an equal period of time. And we will go back and forth
5 until there are no more questions and the interview is over.

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

10 As you can see, there's an official reporter taking
11 down everything we say to make a written record. So we ask
12 that you give verbal responses to all questions. Do you
13 understand that?

14 Ms. Darcy. Yes, as I nodded my head.

15 Mr. Skladany. So the court reporter can take down a
16 clear record, we will do our best to limit the number of
17 people directing questions at you during any given hour to
18 just those people on the staff whose turn it is. It is also
19 important that we don't talk over one another or interrupt
20 each other if we can help it.

21 We encourage witnesses who appear before the committee
22 to freely consult with counsel if they so choose. And you
23 are appearing today with counsel.

24 Would counsel please state your name for the record?

25 Ms. Weis. Megan Weis, Army Office of the General

1 Counsel.

2 Mr. Skladany. Thank you.

3 We want to -- we want you to answer our questions in
4 the most complete and truthful manner possible. So we'll
5 take our time. And if you have any questions or if you do
6 not understand one of our questions, please just let us
7 know. If you honestly don't know the answer to a question
8 or do not remember, it's best not to guess. Please give us
9 your best recollection and it's okay to tell us if you
10 learned information from someone else. Just indicate how
11 you came to know the information.

12 If there are things you don't know or can't remember,
13 just say so. And, please, inform us who, to the best of
14 your knowledge, might be able to provide a more complete
15 answer. You should also understand that although this
16 interview is not under oath that, by law, you are required
17 to answer questions from Congress truthfully. Do you
18 understand that?

19 Ms. Darcy. Yes.

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

23 Ms. Darcy. Yes.

24 Mr. Skladany. Witnesses that knowingly provide false
25 testimony can be the subject of criminal prosecution for

1 perjury or for making false statements. Do you understand
2 that?

3 Ms. Darcy. Yes.

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

6 Ms. Darcy. No.

7 Mr. Skladany. Finally, I'd like to note that the
8 content of what we discuss here today is confidential. We
9 ask that you not speak about what we discuss in this
10 interview with anyone outside those individuals who are
11 present here today to preserve the integrity of our
12 investigation.

13 That's the end of my preamble. Is there anything that
14 my colleagues from the minority would like to add?

15 Ms. Fraser. No.

16 Mr. Skladany. Thanks. It is now 10:10 and we'll get
17 started with the first hour of questions.

18 Ms. Aizcorbe. Thank you, John.

19 EXAMINATION

20 BY MS. AIZCORBE:

21 Q Ms. Darcy, thank you for joining us today.

22 Can you explain your current role with the Army?

23 A I'm the Assistant Secretary of the Army for Civil
24 Works.

25 Q And who do you report to in this role?

1 A The Secretary of the Army.

2 Q And can you explain the process of how the Army
3 engages with the Army Corps in the execution of their
4 programs?

5 A In my role as the Assistant Secretary of the Army
6 under General Order One I have oversight responsibility on
7 the Civil Works program of the Army Corps of Engineers. And
8 so, I -- I oversee and -- all of the activities that the
9 Civil Works program in the Corps of Engineers would do, the
10 water resources part because the Army Corps of Engineers has
11 a military side as well, but my responsibility is to oversee
12 the Civil Works part.

13 Q And can you explain the process of how the Army
14 typically engages with the Corps during rulemakings?

15 A This -- the rulemaking in question here today is
16 the first that I've been involved in with the Army. And
17 I -- in doing this rulemaking we had regular conversations,
18 briefings, meetings with the Corps of Engineers in both the
19 regulatory, as well as the legislative and the legal branch
20 of the Corps. Mostly with Corps headquarters.

21 Q And you said this was your first rulemaking. Is
22 that your first rulemaking with the Corps --

23 A Yes.

24 Q -- or --

25 A Well -- but in my previous jobs I was not in a

1 position to do a rulemaking. I used to work on the Hill.

2 So --

3 Q Okay.

4 A -- on the other side of the street.

5 Q That's right.

6 A Although I started in the House.

7 Q I did as well. It's a good place to start. Came
8 back.

9 Do you have any experience in fieldwork or developing
10 jurisdictional determinations during your time with the
11 Army?

12 A No.

13 Q And you said you had no background in the
14 rulemaking process prior to your time with the Army. Does
15 that include your time on the Hill?

16 A Right, because the rule makers were the
17 legislative branch. So I had experience only by
18 association, like, knowing what was being proposed. I mean,
19 I started on the Hill in the '90s and we started -- in '93
20 we were writing a Clean Water Rule -- a Clean Water Act back
21 then. So knowing what a rulemaking was -- would entail
22 later on, but never directly involved in the rulemaking.

23 Q Okay. Did you have any involvement in the
24 compensatory mitigation rulemaking? I know that happened
25 while you were with the Army or at least the tail end of it

1 may have been finishing while you were there.

2 A No. No.

3 Q Okay. What is your role or how would you
4 characterize your involvement in the WOTUS rulemaking?

5 A Well, the -- the rule was developed jointly with
6 the Environmental Protection Agency and the Army Corps of
7 Engineers and the Army. And I was the overseer of that
8 development of the rulemaking and actually the final
9 decision-maker in what was eventually or finally going to be
10 included in the rule.

11 Q Did you receive direction from anyone regarding
12 this rulemaking?

13 A Well, the direction came from the President's
14 National Clean Water framework that he announced in April of
15 2011. And one of the tenants of that framework was to look
16 at the existing rules and to make it clearer what was
17 defined in the rule as -- as a jurisdictional audit of the
18 United States as a result of the -- both the SWANCC and
19 Rapanos decisions -- Supreme Court decisions.

20 Q And you said you reported to the Secretary of the
21 Army. Do you also report on rulemakings to the Secretary?

22 A Well, on this one I kept him informed of the
23 status and the progress of what was -- was ongoing.

24 Q Okay. How did you engage with EPA throughout
25 the rulemaking?

1 A We -- well, the staff, as well as myself,
2 engaged -- I would say once we were in development of the
3 rule we would have -- my staff would have regular
4 engagements with -- with EPA. I, myself, would have -- I
5 don't want to say frequent because I'm not quite sure how
6 often we did, but whenever there were decisions to be made
7 or consultations that needed to have myself and -- and the
8 administrator involved, I would either meet with or talk
9 with the administrator. This started before Administrator
10 McCarthy. It started when Ms. Jackson was the administrator
11 of the EPA.

12 Q And when you say, when there needed to be
13 decisions made or consultations, were those regarding the
14 status of the development of the rule or policy decisions or
15 a combination of both?

16 A It was both. It was both.

17 Q Okay. During the rulemaking did you communicate
18 with anyone from the Office of Management and Budget?

19 A Yes. During the -- once we were -- it was at the
20 point where we were going to go into interagency review, you
21 know, talking to them about their review and what we were
22 hopefully going to be proposing and how long -- how long
23 that would take and what -- what additional things they
24 needed from us in the interagency review process.

25 Q Do you recall who you spoke with?

1 A I think it was Howard Shelanski in one of the
2 meetings with he and Gina and myself.

3 Q And you had one meeting with Administrator
4 McCarthy and Mr. Shelanski?

5 A I think it was just one.

6 Q Okay. Did you speak with anybody else from the
7 Office of Management and Budget besides Mr. Shelanski?

8 A I did not directly, no.

9 Q Did you speak with anybody else within the
10 Executive Office of the President outside of OIRA?

11 A Yes.

12 Q And who is that?

13 A The counsel to the president.

14 Q Various individuals within the counsel or
15 individual --

16 A He -- he was the counselor to the president.

17 Q The counselor. And who was that?

18 A Brian Deese.

19 Q And what was the nature of that discussion or
20 consultation?

21 A Again, about what -- the progress of the rule.

22 Q So if you were discussing the progress, that
23 happened further along in the rulemaking or was that also at
24 the same point at which you were consulting with OIRA?

25 A It was at the same time we were consulting with

1 OIRA. I'm trying to remember the specifics, but it was --
2 it actually was all at the same meeting with --

3 Q Okay.

4 A -- Howard and Brian and myself and Gina.

5 Q So Mr. Deese was present at that meeting?

6 A Yes.

7 Q Was anybody else present?

8 A I'm going to go around the room.

9 Q To the extent that you remember.

10 A My counsel, Craig Schmauder, was there with me as
11 well. I think the -- I believe the acting administrator of
12 the Office of Water was also there in that meeting.

13 Q Do you recall who that was?

14 A Ken Kopocis. I think that was all. There may
15 have been one other counsel with Administrator McCarthy,
16 but --

17 Q And you said this was about the time when the rule
18 was going to OMB for interagency review?

19 A It was before -- it was just before it was going.

20 Q Okay. So had it already been sent over to OIRA,
21 to your knowledge?

22 A I don't believe so.

23 Q Okay. Did you have any other communications with
24 the Executive Office of the President outside of this one
25 meeting?

1 A Well, if the Executive Office of the President
2 includes the Council on Environmental Quality --

3 Q Correct.

4 A -- we had conversations with them during the
5 development as well as the interagency review process.

6 Q Could you explain the nature of those meetings or
7 conversations.

8 A Again, it was just mostly an update on where we
9 were and the progress of the rulemaking and -- 'cause it was
10 before we actually went final. So it would have been in
11 that -- I think it was even before. Again, I'm not -- I
12 don't remember exactly, but I think it was between -- I
13 think it was probably during the public comment period
14 because we had the rule -- the rule was out for 90 days and
15 then we extended it to almost 200 days for the public
16 comment period. So I think it was in that time period.

17 Q We understand that in the rulemaking several
18 offices within the Executive Office of the President are
19 consulted to get their --

20 A Uh-huh.

21 Q -- input or advice moving forward. Do you have
22 any knowledge of what CEQ or any of those other offices had
23 weighed in on besides just status of the rulemaking?

24 A The -- not direct, no, because most of what we
25 were developing was within, you know, the -- the Army and

1 the EPA. Most of what it was was an update on where we were
2 and -- and where we thought we would end up before the
3 public -- during the public comment period.

4 Q So you don't recall any concerns being expressed
5 by those offices?

6 A No.

7 Q Okay. When did you first become involved with the
8 WOTUS rulemaking?

9 A Involved with -- well, before -- well, before
10 there was a rulemaking there was a guidance. So I was
11 involved, when I first walked in the door, with the -- with
12 the guidance that was under development in the previous
13 administration and whether or not we -- it was determined
14 whether we would go out with guidance. And we did go out
15 with guidance initially. Then, made a determination that a
16 rulemaking was probably the better way to go. Not only
17 because it would give us more of a -- a record, but also we
18 were getting calls from stakeholders, as well as Congress
19 and others, that rulemaking was the better way to go. And
20 also, the Supreme Court decisions, Justice Roberts
21 recommended that the agencies do a rulemaking.

22 Q And that was around 2009? Is that when you
23 joined?

24 A I started in August of 2009, uh-huh.

25 Q Who in the Army is responsible for overseeing the

1 Corps' regulatory activities?

2 A I am.

3 Q Do you recall what staff were working on the
4 guidance when you joined the Army?

5 A The staff at the Corps at the time that were
6 working on the guidance were in the regulatory division, as
7 well as within the legal division. At the time the Chief of
8 Regulatory -- the head of regulatory was Meg Gaffney
9 Smith --

10 Q Okay.

11 A -- who'd been working on it and it was -- and it
12 was she who -- who, I think, gave me my initial briefing on
13 the Clean Water Rule.

14 Q And when you say "legal," is that within the Corps
15 or --

16 A Within the Corps, yes. As well as within the
17 Army, but within the Corps at the time -- I don't recall.
18 There's been a change in chief counselor at the Corps, but
19 at the time one of the legal folks from the Corps, Lance
20 Wood, who's been working for the Corps on Clean Water for a
21 number of years. He still carries his original Clean Water
22 Act with him, which is yellow and dog-eared, but he can
23 quote it.

24 Q So that's from the Corps. Was anybody within your
25 office or the Army working on the guidance at that time?

1 A Yes. Chip Smith in the -- in my office. And
2 also, I always consult with -- with counsel. So Craig
3 Schmauder would have been involved as well. From the day I
4 walked in the door he's been my counsel.

5 Q Did you assign any other staff to work on the
6 rulemaking or coordinate the rulemaking when you came in?

7 A Within my office?

8 Q Correct.

9 A Not initially, no.

10 Q And any throughout the rulemaking or is the list
11 long?

12 A Well, within my office or the Corps or both?

13 Q Both.

14 A Well, within the -- the Corps, I mean, the deputy
15 commanding general, of course, was aware of what was -- that
16 the rule was going forward and being developed. Within the
17 regulatory section of the Corps headquarters there are a
18 variety of people who worked on the rule. Also, within
19 the -- the chief of regulatory reports to the chief of
20 operations for the Corps in the headquarters. And the chief
21 of operations, since I have got there, has changed.
22 Initially the chief of operations was Mike Enschede. He's
23 since retired. And now the chief of operations is Eddie
24 Belk. And so the chief of regulatory reports to the chief
25 of operations.

1 Q And so that is for the Corps. Did you assign
2 anybody else additional duties or responsibilities within
3 the Army?

4 A Well, the -- I mentioned Chip Smith. His -- his
5 supervisor, Let Mon Lee, would be involved as well just in
6 overseeing the development and the status.

7 Q Was Mr. Lee involved from the time that you
8 arrived at the Army as well?

9 A Pretty much in a -- in his capacity as my deputy
10 for policy and legislation. He came to the Pentagon -- I
11 was there in August. I think he came in September or
12 October.

13 Q You mentioned that Mr. Schmauder served in an
14 advisory capacity to you --

15 A Uh-huh.

16 Q -- in the rule -- in the rulemaking. Can you
17 explain that a little bit more, what his role was with
18 respect to the rulemaking?

19 A Right. He-- because of -- well, this -- I felt as
20 though this rule was a really important and significant rule
21 for the Clean Water Act and for the Army. It was a
22 generational rule. It was going to, for the first time
23 probably since '72 when the bill was passed, you know, be
24 something that was important. Mr. Schmauder not only had my
25 complete support in his role as counsel, but he also has

1 great experience in having worked on previous guidance with
2 EPA. He's also -- I wanted somebody to sort of be the lead
3 for us who was a senior SES and he is a senior SES in the
4 Army. And he has experience, not only in rulemaking, but
5 also with -- with developing previous rules and guidance and
6 is, in my view, a very excellent authority on the Clean
7 Water Act.

8 Q And you said that he has experience in rulemaking
9 and developing previous rules and guidance. Do you -- do
10 you have any idea of exactly some of his more significant
11 contributions?

12 A I believe in -- this is before I got here, but I
13 believe in 2008 he was involved with the EPA in developing
14 the guidance as a result of the Rapanos decision.

15 Q Okay. What was your understanding of his role in
16 this rulemaking specifically? What kind of duties did he
17 have?

18 A He -- he was sort of the lead negotiator for --
19 for the Army.

20 Q And lead negotiator on -- on what types of aspects
21 regarding the rule?

22 A With everything to do with the rule. Especially
23 from the legal perspective. He would also be the one who
24 would get the technical expertise needed from the Corps of
25 Engineers when -- when -- in developing the rule and also in

1 meetings with the Environmental Protection Agency and
2 others.

3 Q Okay. Did you give him any specific direction as
4 to how to do that?

5 A Not specific. Only in that we needed to have a
6 rule that -- that was supportable by the science, that was
7 supportable legally and that was going to be able to be
8 implemented by the Corps of Engineers.

9 Q Were you aware of Mr. Schmauder's background or
10 experience in Army Corps rulemakings or other Corps
11 activities?

12 A Yes. He was a former counsel with the Corps
13 before he came to the Army. So he had experience in that as
14 well.

15 Q Were you aware of what his background was in
16 environmental compliance issues?

17 A Not in compliance, per se. I know he has a wealth
18 of experience in environmental law.

19 Q Had you previously tasked Mr. Schmauder in a
20 similar capacity with respect to any other rulemakings or
21 Corps projects?

22 A He worked on -- it wasn't a rulemaking, but we had
23 a reissued consultation process with the -- with NOAA under
24 our Nationwide Permit Program. And he was involved in that
25 with us for us as well. That was back in '12, I think, or

1 '13. I've been there too long.

2 Q Did instructions to the Army Corps primarily flow
3 through Mr. Schmauder during the rulemaking or did they come
4 directly from you?

5 A Well, probably more through Mr. Schmauder, but I
6 was aware of what was being tasked.

7 Q Are you aware of who developed the timeline for
8 this rulemaking?

9 A I'm not sure what you mean by "timeline."

10 Q We've heard that there were certain deadlines or
11 goals by which the rule would be developed or promulgated.
12 And so --

13 A We didn't have a -- a specific timeline. We did
14 want to be able to get the rule out during this
15 administration, but along the way -- I mean, for example,
16 the 90-day comment period that turned into a 200-day comment
17 period blew any timeline if there ever had been one. So it
18 was very much, you know, dependent upon how long it was
19 going to take us in order to consider the 1.2 million
20 comments we got, how we were going to respond to them. So
21 all of that played into when exactly this was going to
22 actually be able to go final.

23 Q At any point did you receive any instruction about
24 how quickly the Army or Corps should complete its work at
25 any stage in the rulemaking?

1 A Not -- not specifically, no.

2 Q Who primarily advised you throughout the
3 rulemaking?

4 A I would say Mr. Schmauder.

5 Q Did you receive regular updates from your staff
6 about the rulemaking?

7 A Yes.

8 Q And about how frequently would you say that you
9 received updates?

10 A If not weekly, every other week. Also, we -- as
11 part of my -- every week on Monday mornings I have a phone
12 call with Army headquarters -- with Corps headquarters. And
13 then, every afternoon the deputy commanding general and the
14 Director of Civil Works come and meet with me for an hour on
15 everything. And during that development time we will --
16 oftentimes, the rule was one of the subjects that we
17 discussed either on the morning phone call or the afternoon
18 meetings.

19 Q And can you explain again who would have been in
20 those meetings?

21 A On the -- on our morning -- Monday morning phone
22 calls it's the leadership of the headquarters. It would be
23 the Deputy Commanding General for Civil Works, the director
24 for the Works, usually the chief counsel. Oftentimes, the
25 Chief of Regulatory. Also, depending upon the issues,

1 sometimes Mark McCann, who is the head of the budget office
2 for the Corps and headquarters. It could be the chief of
3 emergency management depending upon, you know, during the
4 floods. Every Monday she would give an update on where we
5 were. And so it would depend on the -- the situation of the
6 day, but the leadership was -- was always the focal point of
7 those meetings.

8 The afternoon meetings on Monday, it's the Deputy
9 Commanding General and the Director of Civil Works, myself
10 and my principal deputy and my deputy for Policy and
11 Legislation. So we have that meeting every Monday
12 afternoon, the five of us.

13 Q And who is your deputy for Policy and Legislation?

14 A Let Mon Lee.

15 Q Okay, thank you. And you would say those
16 discussions are similar in what you've discussed or --

17 A Similar to?

18 Q To the Monday morning meetings.

19 A It's -- it's. Yeah, it's a Monday morning, but
20 expanded beyond what you could cover in the first half hour
21 and -- and other things that either the -- the deputy
22 commanding general would want to raise with me face-to-face
23 or something that maybe the chief had wanted to talk about.

24 Q Going back to the updates from your staff on the
25 rulemaking. What were the nature of the types of updates

1 you would receive?

2 A They varied from either, you know, status report
3 of, this is where we are, this is what is a still
4 outstanding issue. They could be just feedback on -- on
5 where we -- whether, you know, the week or two before we had
6 some outstanding issues and how they had been resolved.
7 Usually it was mostly a status update. And then, if there
8 were issues where there was a disagreement or needed a
9 resolution where we might be going toward that and -- and
10 whether or not there would need to be ultimate, you know,
11 decisions made to -- to resolve those differences.

12 Q When the proposed rule was submitted to OIRA had
13 you read the draft regulatory text?

14 A I had. The -- the proposed draft or the draft
15 final?

16 Q Proposed.

17 A Proposed. I had read most of it. I had read the
18 preamble and most of the regulatory text. The rule itself
19 is only like a couple of pages, but it's that preamble.

20 Q Right. So you said you did read the preamble?

21 A Uh-huh.

22 Q Did you have access to the economic analysis at
23 that time?

24 A I -- that was the proposed rule. I'm trying to
25 remember the timeline if -- if we saw that between proposed

1 and final. I don't recall --

2 Q That's fine.

3 A -- exactly.

4 Q With respect then to the draft final rule, did you
5 read the preamble?

6 A I did.

7 Q And the economic analysis?

8 A I read some of the economic analysis. I had folks
9 on my staff read the economic analysis. I read the
10 connectivity report. I read that before the proposal. And,
11 yes, I did read the rule around the preamble.

12 Q Did you read or review the technical support
13 document that the EPA produced?

14 A No. The economic part of it I did, but not the
15 technical one.

16 Q And you said you read the connectivity report
17 before the proposed rule was issued?

18 A I think -- I'm trying to remember. I think it was
19 after the proposed rule because it was when -- part of the
20 public comment period was on the connectivity report and the
21 fact that the Science Advisory Board had not made its final
22 determination. So, it was between then and the final
23 determination of the Science Advisory Board and the
24 connectivity report. I don't remember the exact.

25 Q That's fine. The chief of the Corps regulatory

1 program informed the committee that she met with you on four
2 separate occasions regarding the rulemaking. Did you take
3 any meetings directly with the Corps besides these four
4 meetings?

5 A Oh, I think I had more than four meetings.

6 Q She mentioned specifically November 29th, 2014,
7 January 29th, 2015, which was a hearing prep, and then two
8 in March of 2015. So maybe something stood out about those
9 four meetings that were different from others, but if you
10 can explain.

11 A Well, I think -- I'm thinking I had meetings with
12 the Corps and, in particular, regulatory folks before those
13 four meetings. I mean, in the development of the -- of
14 the -- of it. And I think I met with them too even before
15 when we were doing the guidance. You know, making a
16 determination about the guidance versus a rule we had to
17 make a decision and I sought their input on whether -- you
18 know, what the difference was, you know. What -- what was
19 the benefit, you know. Pros and cons of guidance versus
20 rule and that kind of thing. And so, I think that would
21 have predated those dates, but I don't know for certain.

22 Q Do you recall who those previous meetings were
23 with?

24 A It would have been with Jen Moyer and Dave Olson,
25 who is also in the regulatory program. I'm not sure if he's

1 her deputy or not. Probably Lance Wood. I think the other
2 subsequent meetings that you talked about I think David
3 Cooper, who's the chief counsel for the Corps, would have
4 been in some, if not all of those meetings.

5 Q So you don't recall what would have set these four
6 meetings aside besides the previous meetings?

7 Ms. Berroya. I'm sorry, are we asking her what set the
8 meetings aside for Ms. Moyer? I'm just confused by the
9 question.

10 Ms. Aizcorbe. I'm trying to clarify Ms. Moyer's
11 statement.

12 Ms. Berroya. So you want this witness to clarify
13 someone else's statement?

14 Ms. Aizcorbe. If you have questions you can address
15 them in the next hour.

16 BY MS. AIZCORBE:

17 Q I'm just trying to understand why we're hearing
18 from some people that there were only four meetings and
19 you're saying that there were previous meetings. So, if
20 there's anything that you can do to elucidate what was
21 different.

22 A About those four?

23 Q Correct.

24 A I think -- could you just tell me the first one,
25 the date.

1 Q Sure. November 29th of 2014.

2 A Of '14?

3 Q 'Fourteen, yeah.

4 A That was probably because we were -- well, in
5 November of 2014 was once the -- was it 2014 that the public
6 comment period would have closed? But I -- I -- I'm going
7 to say, I'm certain I've had meetings before that in the
8 development of the proposed rule. And again, the people I
9 would have had in those -- would have been in those meetings
10 would have been Jen or her predecessor. And probably David
11 Olson and Des, who's last name I don't recall, but she's in
12 the regulatory program as well and counsel. Usually with
13 Lance Wood or there's another new counsel in that office
14 who's named David whose last name I don't recall, but --

15 Q And you said that there were enough of those other
16 meetings that you wouldn't be able to identify approximately
17 how many times you met with the Corps?

18 A No, because I -- I mean, I'm thinking of this all
19 the way back to the beginning, you know, as the guidance,
20 going to the rule, to the proposed rule, all of those.
21 So --

22 Q If we limit it just to the rulemaking, does that
23 make it easier?

24 A Let's see, time-wise. Well -- but see, the -- the
25 guidance was -- was -- was developed and -- and had been --

1 had been proposed. While that was ongoing, the rulemaking
2 began as well. So some of it was going on simultaneously,
3 you know.

4 Q So there was crossover?

5 A Yeah. Yeah.

6 Q Okay.

7 A And that's why I -- I can't say exactly, you know,
8 this stopped and that started.

9 Q Besides what we've already spoken about, the
10 documents that you've read that were included in the rule,
11 what documentation or science did you consider in making
12 decisions throughout the rulemaking?

13 A Well, the connectivity report, which was -- again,
14 was reviewed by the Science Advisory Board and -- and
15 independent external peer reviews as well I believe. That
16 would have been -- that, as well as -- that was the most --
17 that was the scientific basis mostly for the rule. So it
18 was that that I read.

19 Q Did you read the external peer reviews or did you
20 just have them summarized?

21 A I did not. I did not.

22 Q Did anybody discuss them with you?

23 A In talking about the connectivity report, the fact
24 that it had been externally peer reviewed and the Science
25 Advisory Board had reviewed it was summarized to me, but --

1 but not -- but as I said, I didn't read that.

2 Q Were you aware of the team of eight interagency
3 staff who worked on this rule?

4 A I heard about them.

5 Q Okay. Do you know who set this team up?

6 A I believe -- well, it was EPA and -- and Army. It
7 was -- I believe it was Craig Schmauder and probably Greg
8 Peck from EPA. He was the Chief of Staff of the Water
9 office.

10 Q Do you know the team's purpose?

11 A It was to walk through issues and try and reach
12 consensus or agreement on outstanding issues.

13 Q Did you provide any direction as to the scope of
14 what the team was doing?

15 A No. Just the similar direction that I mentioned
16 earlier which was getting a rule that was scientifically
17 based and was supportable by the science and was
18 implementable for us.

19 Q Were you aware that the team stopped meeting
20 between November of 2014 until around mid January of 2015
21 while the final draft was being developed?

22 A I didn't -- I didn't know that they were not
23 meeting. It just seems like that's the time frame of
24 holidays when people aren't around, but I didn't know that
25 they had been directed to stop or -- or if they had been

1 directed to stop. I don't know that.

2 Q Were you consulted about when the EPA and Army
3 were beginning to draft the final rule?

4 A Yes. As I said, I was consulted throughout the
5 whole process.

6 Q Okay. Did you ever discuss OIRA's involvement in
7 the development of the WOTUS guidance or rule?

8 A Only insofar as the -- the -- OIRA's -- the
9 process for doing a rulemaking involved that office of OMB.

10 Q Not when they were being contacted or --

11 A No. It's just that, you know, that's part of the
12 process. So, you know, once we had a rule that we thought
13 was good to go, that was the next step in the process was
14 sending it to OIRA.

15 Q Right. You didn't make any decision about when
16 they were going to be consulted or who was going to be
17 consulting with them?

18 A No. Just that they were part of the process that
19 we had to do.

20 Q You're not aware of any decisions to stop inviting
21 OIRA or any other OMB staff to meetings or discussions
22 regarding the guidance or the rule?

23 A No.

24 Q How many meetings did you take with the public
25 during the rulemaking?

1 A Meaning anyone outside of the federal government?
2 Is that, by "public" --

3 Q Correct.

4 A I would -- I -- it's not that I couldn't tell you.
5 I don't know how many. There are many, you know, interested
6 stakeholders who I met with or staff met with and all the --
7 so, I -- the number would be a guess.

8 Q You personally did take some of those outreach
9 meetings though?

10 A Yes.

11 Q How did you decide who to meet with?

12 A Usually it was -- actually, some of the meetings I
13 took were with groups of stakeholders. I can remember one
14 with a number of representatives from environmental groups.
15 You know, not just one group, but you know -- and I remember
16 that taking place at the Pentagon.

17 It was usually, you know, interested stakeholders who
18 had, you know, concerns that, you know, we needed to hear
19 from. I mean, we heard from everyone throughout. Not only
20 all the webinars and public outreach, but -- and people
21 through the public comment period had an opportunity, but as
22 far as -- usually it was a recommendation for, you know,
23 having face-to-face input with different stakeholders.

24 Q We understand that the agencies undertook an
25 extensive outreach effort during the rulemaking. So clearly

1 you didn't sit on all 400 plus of those meetings, correct?

2 A Did not. Did not.

3 Q Do you recall -- you mentioned that one of the
4 meetings you took was at the Pentagon with environmental
5 stakeholders. Do you recall who or which groups were
6 represented at that meeting?

7 A As I said, it was a group of them. There were a
8 lot of people in that conference room. Representatives
9 again from -- I think it could best be characterized as an
10 environmental coalition.

11 Q That's fine. Do you recall meeting with any
12 congressional offices or delegations regarding the rule?

13 A No. Only in hearings, you know. I mean, there
14 were several hearings on the rule.

15 Q Do you recall taking any meetings with the public
16 without the Corps present?

17 A Yes. I mean, the Corps is not always present.
18 Often it's just me, so.

19 Q So at the meeting as an example of what you were
20 describing earlier --

21 A With -- with the, like, environmental coalition?

22 Q Correct.

23 A Maybe my deputy was there or maybe -- my deputy
24 for Policy and Legislation might have been there.

25 Q Did you, at any point, give direction to Mr.

1 Schmauder or other Army or Corps participants on what to
2 discuss or not discuss at outreach meetings?

3 A No.

4 Q Did you discuss the public outreach effort with
5 the EPA at any point?

6 A Yes.

7 Q And what was the nature of those conversations?

8 A Just mostly how they were going, what we were
9 hearing, who was involved. You know, how -- you know, were
10 we getting -- were the outreach efforts being -- you know,
11 were we getting to enough people. Was there a better way to
12 do it. One of the thinking when we started to do the
13 webinars was we thought that maybe we could reach more
14 people. And more people around the country, not just
15 Washington.

16 Q We understand that some meetings took place that
17 were categorized as "attorney only" or "principal plus one"
18 meetings. Could you explain the nature of these types of
19 meetings?

20 A I would think probably the -- the principal plus
21 one, those -- I get those requirements all the time when I
22 have to go someplace. I can't bring a whole cadre of people
23 with me for support. Those would probably be -- I think a
24 way to characterize them would probably be meetings where
25 the -- we needed to make some final decisions on -- on

1 issues that had been debated and considered by everyone.

2 Q Do you know anything about the attorney only
3 meetings that took place during the rulemaking?

4 A I don't know what that -- I don't know what that
5 refers to.

6 Q Okay. Do you know whether the agencies conducted
7 outreach with individual states? I know you mentioned there
8 were webinars, but do you recall individual meetings?

9 A Well, I think there were, but I couldn't tell you
10 for sure, like, which state met with whom.

11 Q You wouldn't have been in those meetings?

12 A I was not in those meetings.

13 Q So you're not aware as to whether those types of
14 meetings would have been held with all 50 states or just a
15 handful of states?

16 A I -- I don't believe there was a meeting held with
17 all 50 states. I don't -- it would have probably had to
18 have been individual states with individual representatives
19 from each of the agencies. So, I don't know.

20 Q Who from the Army or the Corps would have been
21 responsible for managing or participating in those types of
22 meetings?

23 A From the Army I would have relied on Mr. Schmauder
24 to --

25 Q Okay.

1 A Not him personally, but perhaps assigning someone
2 to be a representative. And on the Corps it would probably
3 have been the chief of regulatory.

4 Q Okay. Do you know how local governments were
5 consulted in the course of the rulemaking?

6 A I think those were some of the outreach efforts
7 that were done with municipalities. I think some of it was
8 done through the Council of -- you know, the Council of
9 State Legislatures. And I think there was an outreach done
10 with ECOS which is Environmental Council of State
11 Associations.

12 Q Okay.

13 A And -- 'cause they represent states as well on the
14 environmental regulatory side.

15 Q Are you aware of Executive Order 13132 on
16 federalism?

17 A Yes.

18 Q Can you explain the agency's certification that
19 the rule does not have federalism implications?

20 A I know that we did an analysis, and I don't recall
21 the date of the -- the -- the document, but saying that --
22 that this rule complied with the requirements of that
23 executive order.

24 Q And when you say, "We did an analysis," who -- who
25 are you referring to?

1 A We, the Army.

2 Q Did the Corps participate in that analysis?

3 A I can't say for certain.

4 Q Do you know whether the Army did?

5 A I would be assuming we did. I can't say for
6 certain.

7 Q Okay. I'm going to introduce the first document
8 into the record. This is a copy of responses to questions
9 for the record from the Senate Committee on Environment and
10 Public Works from September 30th, 2015. We'll mark it --
11 oops, sorry. I have to mark it an exhibit.

12 Mark it Exhibit 1.

13 [Darcy Exhibit 1 was marked
14 for identification.]

15 Q Just take a look at it and let me know if you're
16 familiar.

17 A Uh-huh.

18 Q So, I'm sorry, did you say you are familiar with
19 this document?

20 A Yes, I am.

21 Q Okay. Can you explain where the answers in this
22 document came from?

23 A These questions were for the record from the
24 hearing that -- that was held in September. The answers to
25 the questions are developed by my office --

1 Q And who in your office --

2 A -- in conjunction -- in consultation with the
3 Corps of Engineers.

4 Q And who in your office would have helped draft or
5 consult on these answers?

6 A It would have been -- well, while I'm looking at
7 associate. It would have been my economists on this first
8 one 'cause within -- within my office I have three, sort of,
9 work groups and one of them is planning and -- and programs
10 and the -- our economists are in that branch of our office.
11 So it would have been those people. All -- all having input
12 into it. The -- the Policy and Legislation would have had
13 input into these answers, as well as legal.

14 Q Okay. So no specific one person who helped
15 substantially?

16 A Not one person, no.

17 Q Okay. I'm going to direct you to page ten,
18 subsection A. There was a question from the committee on
19 how the agency certified that the rule "will not have
20 substantial direct effects on states, on the relationship
21 between the national government and the states, or on the
22 distribution of power and responsibilities among the various
23 levels of government." In your answer you restate some of
24 the rule text. And then say that "state and local
25 governments were consulted at the onset of rule development

1 in 2011."

2 A Uh-huh.

3 Q "And following the publication of the proposed
4 rule in 2014." Regarding these meetings, could you
5 elaborate a bit on what those consultations looked like.

6 A What they -- because I was not personally involved
7 in them, I could not -- I don't feel comfortable speculating
8 on what exactly it would be.

9 Q Okay. Do you know what was evaluated in making
10 this determination? Specifically, the certification for the
11 executive order compliance.

12 A I do not.

13 Q Okay. Are you aware of the rule's certification
14 that it would not have a significant economic impact on a
15 substantial number of small entities under the Regulatory
16 Flexibility Act?

17 A Yes, I saw that document.

18 Q Okay. Were you involved in any discussions
19 regarding this certification? I'm no longer -- and just to
20 be clear, I'm no longer --

21 A Okay. No, I was not.

22 Q But keep this out because I will refer to it later
23 if we get to it again.

24 You said, were you aware of any discussions regarding
25 the small business certification?

1 A I was aware of the discussions, yes.

2 Q Okay. But you were not involved in any of those?

3 A Not personally.

4 Q Are you aware that the U.S. Small Business
5 Administration Office of Advocacy submitted a formal comment
6 to Major General Peabody and Administrator McCarthy
7 asserting that the agencies improperly certified this rule?

8 A I was made aware of that, yes.

9 Q Did you read the comment letter?

10 A I did.

11 Q Okay. Did you discuss Advocacy's comments with
12 anybody at the Corps?

13 A I don't believe so.

14 Q That would include Major General Peabody, correct?

15 A Yes.

16 Q Okay. Did you discuss them with the EPA at all?

17 A I did not.

18 Q Who shared the letter with you?

19 A I believe it was counsel.

20 Q When you say "counsel," is that Mr. Schmauder?

21 A Mr. Schmauder.

22 Q Okay.

23 A Uh-huh.

24 Q Do you know who made the decision to use the
25 existing regulation as a baseline instead of current

1 practice for purposes of the rulemaking?

2 A I don't know what you mean by "existing
3 regulation."

4 Q In its comment letter Advocacy talks about using
5 an incorrect baseline to determine the Agency's obligations
6 under the RFA, Regulatory Flexibility Act. And a different
7 cost baseline was used for determining the cost and benefits
8 for the rule. Agencies used the existing regulatory scheme
9 instead of current practice in one calculation and then when
10 we were reading the economic analysis, agencies used current
11 practice instead of the former baseline. So I was just
12 wondering what your awareness was of who was making that
13 decision as to which baseline was being used?

14 A I -- I don't know.

15 Q Okay. Do you know how the Corps was involved in
16 the development of the rule's costs?

17 A The -- I believe most of the -- the cost benefit
18 analyses was done by the EPA.

19 Q Okay.

20 A And the Corps was informed about how that was
21 being developed.

22 Q And that would have been coordinated through Mr.
23 Schmauder; is that correct?

24 A I believe so. I'm trying to think of the sequence
25 of when that -- the -- the economic analysis was being -- he

1 would have been informed of it. I don't want to say exactly
2 how involved he would have been in that development.

3 Q Is that the same case of the Army? Are you aware
4 of the Army participating in the development of the cost or
5 benefits for the rules -- for the rule?

6 A We -- I think it would be more accurate to say
7 that we were informed of as opposed to being the actual
8 developers of the analysis.

9 Q Okay. And when you say "we" you're referring to
10 the Army?

11 A And the Corps.

12 Q And the Corps. Would you disagree with the
13 Advocacy -- the Office of Advocacy that the rule imposes
14 direct costs on small businesses?

15 A I would.

16 Q And why is that?

17 A Well, the -- the direct cost on small businesses
18 is -- is something that is -- because of the nature of the
19 rule and because of the individual nature of individual
20 permits that it would result from a jurisdictional
21 determination, I don't think that it could be categorically
22 said that small businesses would be adversely impacted by
23 these costs.

24 Q The final rule text provided that the rule may
25 result in direct costs from other programs as a result of

1 implementation. Can you explain or elaborate on that
2 statement.

3 A Could you say it again? I'm sorry.

4 Q Sure. And I have the text here if you want to
5 look at it, but the final rule provides that the rule may
6 result in direct costs from other programs as well as a
7 result of implementation. I was just asking if you could
8 elaborate on that statement because you just mentioned that
9 the direct costs that the rule would impose, if any, are not
10 the nature that you would consider to rise to the level of
11 saying that there would be direct costs on small businesses
12 or that small businesses would shoulder any direct cost from
13 implementation of the rule. So I see -- I have a little bit
14 of a conflict there between what's in the rule and what
15 you're saying. So I'm just trying to make sure we
16 understand.

17 A The indirect -- indirect costs as a result of
18 getting a -- a permit I guess is where we're going with
19 this. I'm not quite sure, but there -- because of other
20 programs, "other programs" meaning other requirements
21 outside of requirements that a permit from the Army Corps of
22 Engineers could possibly have, are -- one is -- I'm trying
23 to think of an example to give you. Where the -- the
24 granting of a permit under this rule could possibly impact
25 an -- an endangered species. And perhaps mitigation for the

1 impact of that endangered species would be a cost to the
2 applicant, but that is -- you know, as -- as related to the
3 rule because that would be, you know, a cost that is a cost
4 of mitigation for your ability to go forward with your
5 project.

6 Q So that would be a cost, but you're saying it
7 would be an indirect cost --

8 A Uh-huh.

9 Q -- is that correct?

10 A It's indirect cost related to the rule and the
11 permit.

12 Q Are you aware of anything within the Regulatory
13 Flexibility Act that requires that the agency's calculation
14 be a direct cost?

15 A I don't know.

16 Q Okay.

17 A I couldn't -- I can't answer that.

18 Q Okay. Do you disagree with the Advocacy's
19 recommendation that -- or let me back up.

20 Do you disagree with the Office of Advocacy statement
21 that the rule have a significant economic impact on small
22 businesses?

23 A I do.

24 Q And why is that?

25 A Well, I -- I think that the -- the impact on small

1 businesses, as I said earlier, is not significant and
2 that -- that the -- the costs that were evaluated that were
3 potential costs of the -- the rule would be outweighed by
4 the benefits.

5 Q Did you express your disagreement with anyone at
6 the EPA?

7 A About?

8 Q About whether the rule would have a significant
9 economic impact or --

10 A No.

11 Q Okay. Were you involved in any response to the
12 Office of Advocacy?

13 A I was not.

14 Q Okay. Were you aware of efforts to conduct
15 informal outreach to small businesses to satisfy the
16 obligation to obtain input from the small business
17 community?

18 A I believe there was outreach, but I personally
19 was -- was not involved in it.

20 Q We are aware of one 2011 informal small business
21 outreach meeting conducted by the Army Corps and EPA. Were
22 you involved in that effort?

23 A I was not personally involved in that meeting.

24 Q Okay. Do you know who from the Army or Corps led
25 that effort?

1 A I would only be speculating. I don't know who for
2 sure who organized the meeting.

3 Q Okay. Considering the comments received by the
4 small business stakeholders and the Small Business
5 Administration, at any point did you question the EPA's
6 certification?

7 A I did not.

8 Q Shift gears a little bit to the comment period.

9 A Uh-huh.

10 Q How were you typically involved during review of
11 public comments for rulemaking? I know you mentioned this
12 was the only one you've been involved with, but to the
13 extent that you are aware of how that is typically treated
14 by the Army in Corps rulemakings that would be helpful to
15 know.

16 A Again, it was my first rulemaking, but the
17 comments -- because of the volume of the comments, you know,
18 1.2 million comments received, the responses to the comments
19 were sort of divided between the agencies and responded to
20 them, you know, as best we could. And I think we were
21 looking at the ones that more specifically related to Corps
22 programs as opposed to EPA's, but the -- but both agencies
23 responded to the comments.

24 Q This is the first we're hearing that there was any
25 division of the comments. Can you explain a little bit

1 about maybe who may have been involved in that effort.

2 A I think the chief of regulatory was involved in
3 looking at sort of the categories within the comments and --
4 and which agency was best equipped to respond to those
5 comments.

6 Q Did you read or review comments received on the
7 WOTUS rulemaking?

8 A I was given an example here and there of what a
9 comment would be, but I didn't -- I did not review the
10 comments.

11 Q Okay. Did staff involve you or inform you about
12 the status of their review of public comments?

13 A Yes. Again, that was during the, you know, how's
14 it going? How many have we gotten? You know, throughout
15 the whole almost 200 days.

16 Q So that would have been primarily Mr. Schmauder?

17 A Yeah.

18 Q Or the Corps?

19 A Yes, and informed by the Corps.

20 Q Okay. Are you aware of who made the decision not
21 to recirculate the rule for a second round of public comment
22 after changes were made to the draft final rule?

23 A To recirculate it after public comment? I'm not
24 sure who requested the recirculation.

25 Q Okay. Did you provide any direction to the Corps

1 or Army about its review of comments?

2 A Only that we wanted it to be thorough and
3 inclusive.

4 Q Okay. Were you aware of whether the Corps had
5 finished their review of comments before the rule was
6 finalized?

7 A I believe that we completed the review of public
8 comment.

9 Q And why do you have that opinion? Were you told
10 at any point that the review had been completed?

11 A Yes, because we wouldn't have gone forward with
12 the final rule if we hadn't completed the final comment.

13 Q Do you recall who informed you that the review was
14 complete?

15 A Not -- no, not a particular person.

16 Q Okay. Are you aware of the status of the EPA's
17 review when you signed the rule?

18 A Yes. Again, that we thought the public comment
19 period had been completed -- the review of the public
20 comment period.

21 Q So the same for the EPA, do you recall whether
22 anybody informed you that their review had been completed?

23 A No.

24 Q There was just an opinion that you had?

25 A Yes, because that's why we were moving forward

1 because we were finished with the comment period review.

2 Q So nobody specifically told you that the review
3 was finished?

4 A I'm trying to recall if Greg did, but I --

5 Q Okay.

6 Ms. Berroya. I'm sorry, I couldn't quite hear that
7 response.

8 Ms. Darcy. I said, I think probably Craig -- Craig
9 Schmauder.

10 Ms. Berroya. Thank you.

11 Ms. Darcy. Sorry, I had my hand over my mouth.

12 BY MS. AIZCORBE:

13 Q At any point did you inquire how the agencies
14 completed their review in the time between the comment
15 period closing and the draft final rule was sent to OMB? As
16 you said, it was a lot of comments. So we're just looking
17 for --

18 A For.

19 Q -- the fact that it only took several months for
20 the entirety of the pool of comments to be reviewed.

21 A Well, we had -- there were a lot of people
22 involved in the review process and also in the organization
23 of the comments. The EPA hired a contractor to sort of
24 oversee that. And that -- that contractor oversaw not only
25 the volume, but helped in looking at where the best place to

1 respond to when I referred to, you know, some were answered
2 by EPA, some were answered by the Corps. And that -- I
3 mean, the public comment period closed in November and we
4 didn't initially move to April. So that was six months time
5 for review.

6 Q Did the contractor review the set of comments that
7 the Corps was responsible for or did they just handle the
8 EPA section?

9 A I believe they oversaw the entire public comment
10 period -- review, but I -- but I personally could not say
11 yes -- yes for sure.

12 Q Did you discuss how the comments would be
13 incorporated or addressed in the final rule with anyone?

14 A We discussed how they would be incorporated in
15 that, you know, hearing from the public in response to what
16 we asked for. For example, in the public review we asked
17 for comments on the issue of Other Waters, which was not
18 directly addressed in the rule, and asked for public to
19 comment on how Other Waters should be dealt with in the
20 rule. And so, the public commented on that extensively. So
21 we incorporated, hopefully, a response to address their
22 concerns in the final rule.

23 Q And who did you discuss that with?

24 A Administrator McCarthy.

25 Q Okay. Did you discuss it with anybody at the

1 Corps or were those discussions about how comments would be
2 addressed in the final rule at a higher level above the
3 Corps?

4 A In relation to how the public comments were going
5 to be incorporated I had a discussion about what we couldn't
6 consider and what the impact would be on our regulatory
7 program at the Corps.

8 Q Okay. And that would have been with Ms. Moyer?

9 A Yes.

10 Q Okay. Did you speak with the EPA about how they
11 ultimately incorporated comments?

12 A Well, we jointly, you know, incorporated the
13 comments. So I'm not sure what -- where you're going. If
14 you mean --

15 Q My first question was --

16 A Okay.

17 Q -- about a plan to incorporate or how you were
18 going to approach it and now I'm asking when the final rule
19 was developed and went to OMB and some changes were made we
20 understand. Was that all done together with -- between you
21 and the EPA or did the EPA make the changes and then get
22 your sign off?

23 A No, they were done jointly.

24 Q Okay.

25 A I mean, we had -- we agreed to making the changes

1 that were made.

2 Q Okay. Did you review the summaries of the public
3 comments produced by the Corps?

4 A I did -- yes, I reviewed -- I recall reviewing one
5 of the summaries of the comments.

6 Q We understand that the Corps discussed their
7 comment summaries with you and Mr. Schmauder. Do you recall
8 whether you took any action or Mr. Schmauder took any action
9 after this discussion with respect to those summaries?

10 A Well, the final rule was reflective of many of
11 the -- the public comments that were received, so.

12 Q Would you have discussed those summaries then with
13 the EPA after that meeting?

14 A Yes, because that would be the ultimate way that
15 we would get to the decision about what was included and
16 what was not.

17 Q We were informed that the Corps' standard process
18 involves addressing substantive comments in a rule's
19 preamble, but that Mr. Schmauder and Mr. Peck ultimately
20 decided comments could be addressed later in the process for
21 WOTUS. Specifically, while the rule was in interagency
22 review at OMB. Were you aware of this decision to continue
23 addressing comments at a later period?

24 A Well, continuing to address comments from -- yes,
25 indeed because we -- we -- the final rule reflects comments

1 not only from the public, but from the Corps that changes
2 were made to the final rule. So we were continuing to
3 evaluate those.

4 Q With respect to the public comments received
5 during the comment period that was extended several times,
6 were you aware that those -- that comment review and
7 addressing those comments was ongoing during interagency
8 review?

9 A It was -- it was going to be ongoing 'til it
10 was -- yeah, it was final -- until the rule was final we
11 were going to continue to evaluate. And, in some instances,
12 reevaluate some decisions that we had made already.

13 Q So you're aware that changes could have been made
14 to the preamble after that interagency review process?

15 A Yes.

16 Q Okay.

17 Ms. Aizcorbe. Do you have anything else?

18 I think we can go off the record.

19 [Brief recess taken from 11:10 to 11:18 a.m.]

20 Ms. Fraser. It's 11:18. We can go back on the record.

21 EXAMINATION

22 BY MS. FRASER:

23 Q Good morning again, Assistant Secretary Darcy.

24 A Good morning.

25 Q So I wanted to talk to you briefly about some of

1 the things that had been discussed in the last hour
2 regarding your roles and your responsibilities in the
3 development of the WOTUS rule. And I wanted to talk about
4 your designation of Mr. Schmauder as your principal liaison
5 to everyone else in this rule.

6 Now, you mentioned that the reason that you selected
7 Mr. Schmauder was because he had experience with EPA with
8 guidance and rulemaking; is that right?

9 A Yes.

10 Q And that he also had substantial Clean Water Act
11 experience, right?

12 A Yes.

13 Q Before you met Mr. Schmauder or before Mr.
14 Schmauder worked with you in 2009, had you ever worked with
15 him before?

16 A I had not worked with him before. I had met him
17 before.

18 Q You had met him before. Was it in professional
19 circumstances?

20 A Yes.

21 Q Okay.

22 A Yes.

23 Q Okay. Did it have anything to do with your work
24 on this Clean Water issue when you were in the Senate?

25 A Not on Clean Water, no.

1 Q Okay. One of the things that you tasked Mr.
2 Schmauder with, you mentioned in the last hour, was that you
3 gave him instructions regarding interactions between your
4 office and the Corps.

5 A Uh-huh. Yes.

6 Q Could you elaborate a little bit more about what,
7 you know, some of those instructions were.

8 A Well, in meetings and as my lead for the Clean
9 Water Rule --

10 Q Uh-huh.

11 A -- he would often be in contact with the Corps for
12 seeking their technical expertise and their experience on --
13 on issues that were being debated and discussed with EPA --

14 Q Okay.

15 A -- in development of the rule and -- and often,
16 some of the technical background that they'd bring to actual
17 implementation of our regulatory program.

18 Q Okay. And as part of that communication between
19 Mr. Schmauder and yourself, would it also be part of his
20 duty to relay to you any concerns or questions that the
21 Corps may have had --

22 A Yes.

23 Q -- regarding the development of the rule?

24 A Yes, and he did that.

25 Q And he did that?

1 A Uh-huh.

2 Q Do you recall any specific concerns that had been
3 raised by Mr. Schmauder from the Corps during the
4 development of the rule?

5 A There were concerns about the -- how the Adjacent
6 and Other Waters determinations would be made, whether they
7 would be made by rule or made by case-specific
8 determinations of significant nexus.

9 Ms. Berroya. One quick second. Why did you determine
10 that it would be beneficial to have a lead or a liaison on
11 the WOTUS rule?

12 Ms. Darcy. Well, it's -- not only because it's
13 complicated, but having one -- one person responsible to me
14 for everything that was going on with the development of the
15 rule, you know. I -- I'm -- I have a lot of things going on
16 in the course of a day or a month and this was one of them.
17 Not everything that -- that the responsibilities of the job
18 have. And having Craig be the person to be able to bring me
19 both, you know, what was -- what the Corps' concerns were
20 and what EPA's concerns were. And he was -- and I -- I
21 value his -- not only his judgment, his professionalism, but
22 his ability to negotiate. And that's part of what was
23 involved in this development.

24 Ms. Berroya. Is it fair to say that as Assistant
25 Secretary of the Army you personally couldn't attend every

1 meeting relating to WOTUS? You couldn't read every comment?

2 Ms. Darcy. That is correct.

3 Ms. Berroya. So you needed to task someone who could
4 spend a higher percentage of their time immersed in the
5 WOTUS rulemaking than you could be?

6 Ms. Darcy. Yes.

7 Ms. Berroya. And you needed someone to filter up the
8 most critical information to you and keep you apprised on
9 the rulemaking?

10 Ms. Darcy. That's -- that's a great characterization
11 of what was happening, yes.

12 Ms. Berroya. And was Mr. Schmauder that person?

13 Ms. Darcy. He was.

14 Ms. Berroya. And did you feel as though in the course
15 of the WOTUS rulemaking Mr. Schmauder did, in fact, keep you
16 regularly apprised?

17 Ms. Darcy. Yes.

18 BY MS. FRASER:

19 Q And so how often would you meet with Mr. Schmauder
20 so you could keep yourself apprised?

21 A During the final stages of development, in
22 particular, if it wasn't a meeting every week, there were
23 times during the course of the day he would come to my
24 office or -- or call or ask for time on the calendar to come
25 and do an update of the -- of, you know, the status. So it

1 was -- it was regular. "Regular" being at least once a
2 week, if not daily.

3 Q Terrific.

4 Ms. Berroya. Did you limit your updates about WOTUS to
5 Mr. Schmauder or were you available to be receiving
6 information from other folks in the Army or Army Corps
7 should they want to talk to you?

8 Ms. Darcy. Yes. I had meetings with the Corps, some
9 of them that were mentioned earlier, whenever I needed to
10 have either an update or a clarification or hear what the
11 Corps' concerns were vis-a-vis something that may not have
12 been agreed to by -- by EPA.

13 Ms. Berroya. So the fact that you designated Mr.
14 Schmauder to be your liaison did not prevent other folks
15 from reaching you with their perspective directly?

16 Ms. Darcy. No, it did not.

17 BY MS. FRASER:

18 Q And you mentioned in the course of some of those
19 meetings you met with Lance Wood --

20 A Uh-huh.

21 Q -- Meg Gaffney Smith. You also mentioned Eddie
22 Belk, chief of operations.

23 A Uh-huh.

24 Q And how often would you say those types of
25 meetings took place with those folks in the Corps?

1 A Well, toward -- again, in the time continuum here
2 from guidance rule, I mean, it's years.

3 Q Right.

4 A So the -- the meetings would take place when
5 the -- when there are issues that needed to be discussed
6 and -- and considered by me.

7 Q Uh-huh.

8 A And I'm thinking, in particular, Eddie Belk. He
9 was new to the -- to this -- his position. So I think I
10 probably only met with Eddie as participant in a meeting
11 maybe twice on the rule -- on the rule itself.

12 Q Okay. In the last hour there was a discussion
13 about the team of eight.

14 A Yes.

15 Q And you mentioned that you were in fact familiar
16 with them.

17 A Uh-huh.

18 Q Did you ever participate directly in any meetings
19 with the team of eight?

20 A No.

21 Q And is -- is it Mr. Schmauder who participated in
22 those meetings?

23 A Yes.

24 Q And did he update you on what happened in those
25 meetings?

1 A Yes.

2 Q And did he update you pretty much when they
3 happened or was that a set time for you and him to talk
4 about what happened in those meetings?

5 A It was -- it wasn't necessarily a set time. There
6 were -- usually after the meetings he discussed, you know,
7 what was -- what was accomplished, what wasn't, what needed
8 to still be done. And again, a status update. And, you
9 know, he would do that when -- as necessary and, you know --

10 Q And as part of his updates on those meetings,
11 would he discuss with you whether or not there had been any
12 differences that had been raised between, let's say, the
13 Army's position, the EPA's position, perhaps the Corps'
14 position?

15 A Uh-huh.

16 Q That had been discussed in those meetings?

17 A Yes.

18 Q And as part of those updates, did he ever seek for
19 you to help resolve any of those issues?

20 A Yes. That's my job to make the decisions at the
21 end of the day.

22 Q And you, in fact, resolved many of those issues;
23 is that right?

24 A Yes.

25 Q Now, I just want to step back briefly to the prior

1 discussion about the interagency review process with OMB.

2 You mentioned that you spoke with Administrator
3 Shelanski and you mentioned it was a single meeting.

4 A Yes. The one I referred to earlier, yes, that
5 meeting.

6 Q And just so that I remember correctly, was that
7 toward the end of the rulemaking that that happened?

8 A I believe it was between the proposed rule and the
9 final rule.

10 Q Okay. So that was within a year's period --

11 A Yes.

12 Q -- between 2014 and 2015?

13 A Yes.

14 Q Do you remember the nature of the discussion with
15 him?

16 A Again -- again, it was with -- with he and
17 Administrator McCarthy and -- and Counsel to the President,
18 Mr. Deese, and myself. And it was about the progress on the
19 rule and how we were going to go forward with the rule.

20 Q Okay.

21 Ms. Berroya. In other words, the conversation that
22 took place at that meeting with Mr. Shelanski and others
23 related to an update on the WOTUS rulemaking?

24 Ms. Darcy. It was more of an update, but, yeah. An
25 update and then what the path forward would be.

1 Ms. Berroya. Were you receiving direction at that
2 meeting about --

3 Ms. Darcy. No.

4 Ms. Berroya. -- how the rulemaking should be
5 proceeding?

6 Ms. Darcy. No.

7 Ms. Berroya. You were just providing an update.

8 Ms. Darcy. Right. Within those federal agencies.

9 BY MS. FRASER:

10 Q You also mentioned that at various points in the
11 rulemaking, similar to your meeting with Mr. Shelanski, you
12 also met with the Council of Environmental Quality for the
13 White House.

14 A Uh-huh.

15 Q And during your meetings with the CEQ or any other
16 agency within the White House, did you receive specific
17 instructions as to what the ultimate outcome of this rule
18 should be?

19 A No.

20 Ms. Berroya. In your conversation with my colleagues
21 of the majority during the last hour there was a discussion
22 about a timeline or a goal for the rulemaking. Do you
23 recall a set timeline or a goal for completion of the
24 rulemaking being set?

25 Ms. Darcy. The goal was to get a rule done within this

1 administration which -- which, you know, gave us a little
2 bit of latitude, but there was not -- there -- there was not
3 given a, it has to be done by X date or whatever. What we
4 did was look at the time that it would take not only to hear
5 from the public, to do the public comments, to get it in the
6 register, to get it final, there's a progression. And we
7 just looked at a timeline -- not a timeline, but the
8 progression of steps that needed to be taken in order for us
9 to get to a final rule and have it be finalized.

10 Ms. Berroya. Did any time frame for completion of the
11 rule dictate the substance of the rule?

12 Ms. Darcy. No.

13 Ms. Berroya. Or the manner in which the rule was
14 completed?

15 Ms. Darcy. No.

16 BY MS. FRASER:

17 Q Now, during the course of the development of this
18 rule, your office, the Office of the Assistant Secretary,
19 you conducted an environmental assessment prior to the
20 finalization of the rule; is that right?

21 A Yes.

22 Q And the document that was produced was over 100
23 pages of analysis; is that right?

24 A The EA was about that I think, uh-huh.

25 Q Who was given primary responsibility for

1 conducting that environmental assessment?

2 A Initially it was --

3 Q Initially.

4 A -- Chip Smith in my office.

5 Q Okay. Who assigned that responsibility?

6 A I did, through my deputy for Policy and
7 Legislation.

8 Q Okay. Is there a reason that Mr. Smith was
9 selected to be tasked with the development of the EA?

10 A He -- his responsibility and part of his portfolio
11 is this regulatory program within my office. So he had some
12 experience in doing this in the past.

13 Q Okay. So he had already, in your estimation,
14 completed an environmental analysis some time prior to your
15 coming to the office; is that right?

16 A I believe that he had, yes.

17 Q Okay. Do you recall when he was assigned the --
18 the task of completing the EA?

19 A I don't know exactly when, but it was -- I don't.
20 It would have been at the beginning of the development of
21 the rule because that was going to eventually have to be
22 part of any rulemaking.

23 Q Okay. And just so we can establish a time frame,
24 the beginning of the development of the rule, would you say
25 it would be some time just after you got to your office in

1 2009 or some time much later than that?

2 A No, because we were in the guidance phase then.
3 The rulemaking came after the -- the guidance had been
4 developed. So it would have been 2012 -- I don't, you
5 know --

6 Q Around 2011, 2012 would be reasonable?

7 A Right. Because it was after the -- we did the --
8 the President's Clean Water framework.

9 Q Okay. This committee spoke with Mr. Smith
10 previously. Mr. Smith mentioned that he had been removed
11 from completing the assignment of completing an
12 environmental assessment and that a Mr. Gib Owen prepared
13 the final assessment. How do you evaluate that statement?

14 A He -- Mr. Smith said that he was not -- didn't
15 believe that he could do an EA. That he -- his personal
16 belief was that an environmental statement, an EIS, needed
17 to be done. I did not agree with that. And, therefore, I
18 reassigned the task of the EA to Mr. Owen.

19 Q Had long had Mr. Smith had the assignment to
20 complete the environmental analysis when he made the
21 decision that he could not complete it?

22 A Again, I'd be speculating, but it was -- it was --
23 it was a while. It was several months at least.

24 Q Several months?

25 A Yes.

1 Q So if he started -- if he received the assignment
2 in -- in 2011 or 2012, at the time that he indicated to you
3 that he will not be able to complete an environmental
4 assessment, was that about 2015?

5 A It was 20 -- well, if the public comment was -- it
6 was either in late '14 or '15.

7 Q 2015?

8 A Actually, it was probably the beginning of '15.

9 Q So at minimum Mr. Smith had had the assignment for
10 several years; is that right?

11 A Well, I -- I can't say for sure. If -- it was a
12 long time, but to say he started it in 2012, I just -- I'm
13 just not comfortable putting that -- that date out there.

14 Q That's fine.

15 Ms. Berroya. Would you have expected Mr. Smith to have
16 completed it -- an EA by the time he informed you that he in
17 fact needed to do an EIS?

18 Ms. Darcy. Yes. I think it would have been -- the --
19 the ongoing development of an EA would have been near
20 completion, but for the final decisions that were made in
21 the final rule. You know, if -- if adjustments needed to be
22 made in -- in order to do the evaluation on the final rule,
23 but the -- the -- you know, the basic environmental
24 assessment should have been well underway, if not, near --
25 the near completion, you know, would be -- what would

1 complete it would be the actual final rule, not the -- the
2 framework for the whole EA.

3 BY MS. FRASER:

4 Q Okay. Now, you mentioned that Gib Owen completed
5 the final EA.

6 A He did.

7 Q Can you speak to Mr. Owen's background.

8 A He came to our office a couple of years ago.
9 Before that he was with our -- he was at headquarters for
10 the Corps. And before that he was with the New Orleans
11 district. He has an environmental background. He had done
12 EAs before. He also, in preparing this EA, reached out to
13 some other experts of -- who had done EAs in the Corps of
14 Engineers. He also in the development of the EA and the
15 finalization of the EA consulted with other experts on -- on
16 the -- on NEPA and environmental impact statements within
17 the administration in order to be assured that we were doing
18 our due diligence on making sure the EA was what it needed
19 to be in order to support the rule.

20 Ms. Berroya. Stepping back for just one second. You
21 mentioned that you would have expected Mr. Smith's EA to be
22 near completion at the point that he told you an EIS was
23 required, correct?

24 Ms. Darcy. Correct.

25 Ms. Berroya. Do you know whether an EA was near

1 completion by Mr. Smith at that point?

2 Ms. Darcy. I believe that the draft EA that he
3 provided to his supervisor and to Mr. Schmauder was
4 characterized by him as being about 85 percent complete.
5 The evaluation of that EA by his supervisor and Mr.
6 Schmauder was that it was not near complete.

7 Ms. Berroya. Who was Mr. Smith's supervisor at the
8 time?

9 Ms. Darcy. Let Mon Lee who is my principal deputy for
10 Policy and Legislation.

11 BY MS. FRASER:

12 Q Okay. So do you know whether or not the product
13 that Mr. Gib Owen and the team that he put together, whether
14 or not any of the information that Mr. Smith had worked up
15 until then had been used in their environmental assessment?

16 A I believe some of it had been because there was a
17 lot of background information in the EA. I -- I could not
18 comment as to the comparison between the two and what --
19 what exactly was in one and not the other.

20 Q When you tasked Mr. Owen with completing the
21 environmental assessment, did you direct him and his team to
22 come to a particular conclusion?

23 A No. I said that we needed -- the environmental
24 assessment for the Clean Water Rule was being developed by
25 us -- by us, the Army, and that that was his task, to work

1 with the experts to develop the EA for -- for the rule.

2 Ms. Berroya. Did you relieve Mr. Smith of his
3 responsibility for creating an EA or an EIS because he
4 informed you that an EIS was required?

5 Ms. Darcy. No. I -- I made the decision because he --
6 he said he -- he could not do an EA and because he no longer
7 felt that he could do that. And, you know, I -- and I
8 assigned the -- the task to -- within my management scheme
9 of -- to someone else who was able to do that.

10 BY MS. FRASER:

11 Q Now -- just stepping forward a little bit.

12 Now, according to our understanding, one of the reasons
13 that you do an EA is because of the National Environmental
14 Policy Act; is that right?

15 A Right. We have to do an EA.

16 Q And so one of the purposes of doing it is to
17 document potential environmental impacts --

18 A Correct.

19 Q -- of the proposed rule, right?

20 A Yes.

21 Q And another purpose is to determine whether or not
22 you do an environmental impact statement, the EIS, right?

23 A Correct.

24 Q Now, is it your understanding that pursuant to
25 NEPA, if an agency determines that there's no substantial

1 effects on the environment after drafting the EA that there
2 is no further need to do an EIS?

3 A Correct. As a result of an EA you have to do a
4 Finding of No Significant Impact, a FONSI. And that's what
5 the determination is at the end of an EA.

6 Q Okay. Is it your understanding that under Section
7 511(c) of the Clean Water Act that it exempts most EPA
8 actions from NEPA?

9 A Yes.

10 Q Okay. Now, the EA that was completed, the EA
11 FONSI, it concluded that the adoption of the rule was not a
12 major federal action that significantly effected the quality
13 of the human environment with the meaning of NEPA; is that
14 correct?

15 A Yes.

16 Q Can you explain the process by which this
17 determination was reached?

18 A Well, the Finding of No Significant Impact is that
19 you have to look at the -- what the proposed rule is going
20 to impact. And the -- the keyword there is the impact of
21 the human environment and that there's no adverse impact.
22 And you look at all the factors going into the rule whether,
23 you know, the -- the -- and because of this rule, because
24 what the intent is is protection of the environment,
25 protection of the water quality, those -- that is evaluated

1 in addition to what other positive benefits there are from
2 the implementation or the actual finalization of the rule.

3 Q You mentioned a few minutes ago that you did not
4 give any instruction as to what the outcome of the EA should
5 be, but did anyone from the administration communicate what
6 the outcome of the environmental assessment should be?

7 A Tell me that? No.

8 Q Okay. Do you know if they told anyone on your
9 staff what the outcome should be?

10 A I don't -- I wouldn't -- I'd be speculating.

11 Ms. Berroya. Do you have any reason to believe that
12 that was communicated to anyone on your staff?

13 Ms. Darcy. No.

14 BY MS. FRASER:

15 Q Now, there are some concerns that were mentioned
16 by Corps staff that said that the rule should not have been
17 promulgated without an EIS. How do you respond to that
18 claim?

19 A I think that that is the opinion I think of their
20 counsel. It's also an opinion that is based not on the
21 full, final rule. There were some changes made, some
22 additions to the final rule that, in my view, made it
23 clearer as to what Waters of the United States would be
24 jurisdictional. And in doing so, I think that that helped
25 to make an EA the most justifiable way to go for the final

1 rule.

2 Q And since you mentioned that, could you discuss
3 what some of the changes were that were made to the final
4 rule that you helped -- that you felt, you know, helped
5 support a conclusion that no EIS was necessary.

6 A There were several changes to the final rule
7 that -- that were not in the proposed rule or even in the
8 draft final rule. Some of which addressed concerns that the
9 Army Corps of Engineers had raised. One of them was a
10 grandfathering provision that was included in the preamble.

11 There had been no grandfathering provision in the -- in
12 the proposed rule ever and we felt it was important to have
13 that specifically in the preamble so that the stakeholders
14 would know exactly what the status is of their current
15 jurisdictional determinations before the rule and after the
16 rule. So we made it clear what the status would be once the
17 rule was finalized of those jurisdictional determinations.
18 And it also helped to inform the field about how they would
19 be able to deal with the existing or the pending
20 jurisdictional determinations.

21 We also made a change to the Other Waters and the
22 Adjacent Waters provision providing additional clarity.
23 What we heard in the public comment period repeatedly and
24 extensively was that there needed to be a bright line in
25 this rule. Part of the -- the reason we started to do the

1 rule in the first place was that there was ambiguity with
2 respect to what a significant nexus meant as Justice Kennedy
3 outlined in the Rapanos decision. So we needed to be
4 able -- and we heard from the public that, you know, we
5 needed to be clear what's in and what's out.

6 So based on the connectivity report and the science it
7 contained therein, we made some determinations about how far
8 out you could go in determining what water was
9 jurisdictional under the rule. And as a result of this last
10 and going to the final rule we put a provision in that
11 allowed for a case by case, significant nexus determination
12 to be made from waters that were outside of those that were
13 jurisdictional by the rule.

14 We had, you're in if you're within 100 feet of
15 navigable water of the United States. Out 1,500 feet you
16 were in. If you -- and this is oversimplifying, but because
17 it relates to adjacent waters, neighboring waters and other
18 waters of the United States, but a significant nexus
19 determination on a case-by-case basis could be made if that
20 Other Water body was within 4,000 feet of the navigable
21 water or within the 100-year flood plain, whichever was
22 greater.

23 So those were additions that were made to make -- to
24 respond to public comment about needing a bright line and
25 needing to be clear and it was one of the concerns that was

1 raised by the Corps of Engineers as one of the things that
2 they thought needed -- didn't go far enough.

3 Q So those were some of the concerns that were
4 raised?

5 A Uh-huh.

6 Q Now, you were aware that there were some other
7 concerns that had been raised by Corps staff, right?

8 A Yes.

9 Q And in the course of the development of this rule,
10 did you have an opportunity to consider those concerns?

11 A Yes, I did. I considered all of the issues raised
12 by the Corps.

13 Q And after considering those concerns you made an
14 ultimate decision as to which concerns you would be -- that
15 would be included in the final rule?

16 A Yes. That's my job.

17 Q That is your right as a policymaker; isn't it?

18 A Correct.

19 Q And despite the finding by your office that an EIS
20 was not necessary, there were certain Corps employees,
21 including Mr. Smith, who believed otherwise; is that right?

22 A That's right.

23 Q Do you stand behind the Army's determination that
24 there is no significant impact on the environment that would
25 necessitate an EIS?

1 A I do.

2 Ms. Berroya. And just to make sure that this is clear,
3 Mr. Smith was not asked to stand down from his duties of
4 drafting an EA because of his belief that there was a
5 significant impact on the environment; is that correct?

6 Ms. Darcy. That's correct.

7 Ms. Fraser. I want to talk to you, Assistant
8 Secretary, now specifically about Mr. Smith. My colleague
9 just alluded to some questions about him.

10 I'd like to have this marked. I think it's going to be
11 Exhibit 2.

12 [Darcy Exhibit 2 was marked
13 for identification.]

14 BY MS. FRASER:

15 Q Now, Mr. Smith made some statements during his
16 interview with the committee regarding the reasons that he
17 was removed from completing the EA. Let me read you the
18 following exchange. Page 19, last line.

19 A At the bottom of the page?

20 Q Nineteen, last line.

21 A Okay.

22 Q Okay.:

23 "QUESTION: We previously spoke to you about your
24 change of duties during the course of the rulemaking,
25 specifically that Ms. Darcy removed you from working on the

1 rule on Clean Water issues. You mentioned that part of her
2 reasoning for your removal was your recommendation of an EIS
3 instead of a FONSI. How did Ms. Darcy communicate this
4 specific justification to you?

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

13 BY MS. FRASER:

14 Q Secretary Darcy, how do you respond to this
15 statement?

16 A In a face-to-face meeting with Mr. Smith after the
17 EA had been completed I told him that I was looking at how
18 to look at the -- the workload within our office and who
19 would be responsible for what regarding the Clean Water Rule
20 and that I needed to think about that. After that meeting,
21 he sent e-mails to both EPA -- two separate e-mails to EPA
22 saying that -- that he was now the single point of contact
23 for the rule in my office and that Mr. Schmauder was not. I
24 said none of those things. So I lost confidence in him as a
25 result of the e-mails that he sent that did not represent

1 me, my office or what the conversation said.

2 Q How did you become aware that he had sent those
3 e-mails that were different from what you spoke of?

4 A Someone within my office had made me aware of
5 them.

6 Q And when you realized that these e-mails had been
7 sent containing the incorrect information, did you again
8 speak with Mr. Smith?

9 A It was then that I had told him that I had lost
10 confidence in him.

11 Ms. Berroya. And the statements by Mr. Schmauder in
12 Exhibit 2, he states that, "She was disappointed in my
13 recommendation." And the "she" he's referring to you is.

14 Ms. Darcy. Is me, okay.

15 Ms. Berroya. Did you in fact inform Mr. Smith that you
16 were disappointed in his recommendation?

17 Ms. Weis. Meghan, you said the statement by Mr.
18 Schmauder. Do you mean the statement by Mr. Smith?

19 Ms. Berroya. Oh, I'm sorry. Thank you. Let me start
20 again.

21 In Exhibit 2, which is statements to this committee by
22 Mr. Smith, he stated that, quote, "She was disappointed in
23 my recommendation." And the "she" he's referring to is you.

24 Did Mr. Smith -- did you inform Mr. Smith that you were
25 disappointed in his recommendation?

1 Ms. Darcy. I'm not sure that's -- those are the exact
2 words that I used, but I did say that I had lost confidence
3 in his ability to support me, especially after the e-mails,
4 because that's not what I said.

5 Ms. Berroya. Did you inform Mr. Smith that you were
6 disappointed in his recommendation of an EIS instead of a
7 FONSI?

8 Ms. Darcy. I don't honestly know if those are the
9 words I used. I do remember saying that I lost confidence
10 in his ability to support the position on the rule and this
11 was after the -- that -- again, this was after the --
12 e-mails.

13 BY MS. FRASER:

14 Q Mr. Smith also made some statements that he was
15 retaliated against in his employment. I'd like to direct
16 your attention to Exhibit 2, page 21. Let's look at the
17 following exchange:

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

22 ANSWER: Performance rating.

23 QUESTION: And --

24 ANSWER: I've been in the Assistant Secretary's office
25 since 1996, so I've been rated -- however many times that

1 would be. Nineteen? Nineteen times. Somebody can do the
2 math. And all of my ratings but two have been the highest
3 possible. We have a scale of one to five, five being
4 exceptional. All but two were exceptional. And the two
5 that were not exceptional, down to four, pertain to this
6 rule.

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

15 QUESTION: That's what Mr. Lee told you?

16 ANSWER: Yes."

17 Q Secretary Darcy, how do you respond to those
18 statements?

19 A I don't know what Mr. Lee said to him. So I -- I
20 can't respond to that statement.

21 I can respond that, yes, his rating did go down to a
22 four. And -- and a four is still excellent within our
23 rating system. So going from a five to a four is a small
24 gradation of a -- of a downgrade if you want to view it that
25 way.

1 The fact that what my previous deputy did was in a
2 previous rating, not this most recent one, was, I think, two
3 before that and at that time that's who his principal -- no.
4 He was intermediate rater. I think he was his intermediate
5 rater at that point, but if those were -- if those were the
6 reasons given by those two supervisors is -- that's
7 something that I -- you know, I'm -- I'm not aware that Mr.
8 Lee said that it was because of the EIS recommendation.
9 This is the first I've seen of that here.

10 Ms. Berroya. Do you know whether Mr. Lee in fact said
11 those words?

12 Ms. Darcy. I do not know.

13 Ms. Berroya. Do you know who's responsible for Mr.
14 Smith's rating?

15 Ms. Darcy. This most recent one, Mr. Lee would be his
16 intermediate rater. I would be his senior rater. Everyone
17 in my office, of the 23 people, I'm their senior rater, but
18 there's an intermediate rater.

19 Ms. Berroya. Did you direct that Mr. Smith's rating be
20 a four?

21 Ms. Darcy. I didn't direct that. I -- I concurred
22 with it.

23 Ms. Berroya. Did you concur with the review of Mr.
24 Smith in part because of the EIS recommendation?

25 Ms. Darcy. I'm not sure I understand the question.

1 Ms. Berroya. Did the EIS recommendation for Mr. Smith
2 play a role in your decision to concur with the four rating
3 or was it irrelevant to Mr. Smith's rating in this recent
4 round?

5 Ms. Darcy. I don't think it -- it was -- I think it
6 was relevant, but it wasn't the controlling factor in --
7 there's several categories within which we have to rate
8 performance depending on the goals and objectives that
9 the -- that the individual employee sets up for themselves
10 at the beginning of a year. And it is their performance
11 that -- that results in that rating. And in that particular
12 year, one of those performance goals, I forget which one it
13 was, but one of it was -- I think it had to do with
14 collaborating and -- and that. And I think that's the one
15 where it was down to a four. And so, therefore, the overall
16 rating came down to a four because you weighted on a
17 percentage.

18 Ms. Berroya. Can you explain the relevance of the EIS
19 recommendation to this review for Mr. Smith?

20 Ms. Darcy. Well, it was within that calendar year of
21 the review time, but the fact that the EIS versus an EA was
22 his -- his professional judgment and -- and I didn't agree
23 with it. I respected that about him. I mean, he -- he said
24 he thought an EIS was necessary. I didn't agree, but that
25 didn't mean that I didn't value his -- his input.

1 But again, the -- the misrepresenting me to the federal
2 agencies was sort of -- it's just not acceptable and that's
3 how I lost confidence in him. And I did -- and -- and in
4 this it was just for the implementation of the rule, this
5 Clean Water Act, as well as his regulatory responsibilities,
6 tribal responsibilities. His job remained the same but for
7 the implementation of the rule.

8 Ms. Berroya. So I just want to make sure I'm
9 understanding your statements today. You're saying that
10 you -- you respect his position that he believed an EIS
11 recommendation should be made because that is his
12 professional judgment and he shared it with you?

13 Ms. Darcy. Uh-huh.

14 Ms. Berroya. So did his decision to share it with you
15 impact his review or is it -- or did it not and it was, in
16 fact, other factors, specifically his misrepresentation of
17 you in e-mails?

18 Ms. Darcy. It was the other factors.

19 Ms. Berroya. Okay. So his EIS recommendation did not
20 impact your decision to concur with his review rating in
21 this term, is that fair?

22 Ms. Darcy. I think I'd say that, you know, to --
23 making an evaluation of performance you have to consider
24 everything together. And, you know, his recommendation on
25 an EIS versus an EA was his professional judgment. Again,

1 which I respected, but I have to consider everything. And
2 it's not that that was in a box by itself and I couldn't,
3 you know, look at that. I mean, you have to consider
4 everything, but it was -- it was not because of that sole
5 recommendation on his part. He recommends lots of things to
6 me on his tribal responsibilities, as well as other things
7 that I -- that I agree with and take those recommendations
8 and implement them. It's just this is one instance where I
9 did not.

10 BY MS. FRASER:

11 Q Now, Mr. Smith still works for the Army, right?

12 A He does.

13 Q In fact, he still works for you?

14 A He does.

15 Q Has there been any reduction in his pay?

16 A No.

17 Q Was he demoted?

18 A No.

19 Q Was he reassigned to any other departments?

20 A No.

21 Q Does he still perform work that's related to the
22 mission of the Civil Works Department?

23 A Yes.

24 Q Do you have anyone -- do you or does anyone in
25 your department -- let me withdraw that question. Let's go

1 to another topic.

2 A Okay.

3 Q Let's talk about tribal consultations. So are you
4 familiar with Executive Order 13175 --

5 A Yes.

6 Q -- that talks about consultation and coordination
7 with tribal governments?

8 A Yes.

9 Q Now, according to the executive order -- do you
10 think you would need the order --

11 A Sorry?

12 Q -- to refresh your recollection?

13 [Darcy Exhibit 3 was marked
14 for identification.]

15 BY MS. FRASER:

16 Q Now, according to the executive order, subsection
17 B states: "To the extent practicable and permitted by law,
18 no agency shall promulgate any regulation that has tribal
19 implications, that imposes substantial direct compliance
20 costs on Indian tribal governments, and that is not required
21 by statute, unless" -- sorry. "One, the funds to cover the
22 costs are provided by the federal government; or the agency,
23 prior to the formal promulgation of the regulation,
24 consulted with tribal officials early in the process of
25 developing the proposed regulations."

1 Secretary Darcy, as far as you are aware, does the
2 executive order have additional requirements regarding when
3 a tribal consultation should occur or is this it?

4 A I believe this is it. I don't think there's --
5 this has been amended since it was established. So, no. I
6 don't think there are additional --

7 Q Now, during his last visit Mr. Smith was asked as
8 to his knowledge whether or not any tribal consultations
9 were conducted during this rulemaking and his answer was,
10 "No." I'm sorry, something weird is happening. My voice is
11 going.

12 Ms. Berroya. Do you need a minute?

13 Ms. Fraser. I do.

14 [Brief recess taken.]

15 Ms. Fraser. Back on the record.

16 BY MS. FRASER:

17 Q So, Mr. Smith had been asked whether or not there
18 had been any tribal consultations conducted in this
19 rulemaking and he responded "No." How do you respond to
20 that? Are you aware of whether or not any tribal
21 consultations took place?

22 A There were tribal consultations and I believe that
23 we even -- or EPA in a May 2015 document documented the
24 consultations that had been conducted throughout the
25 rulemaking. I remember reading that document -- the tribal

1 consultation document. And May 15th stands in my head. And
2 it documented the tribes that had been consulted with, the
3 webinars, the meetings, as well as the public comments that
4 were received during the public comment period.

5 Q Do you have any independent sense of how many
6 tribal consultations had been conducted by the EPA?

7 A I don't. I just recall that, reading the
8 consultation document, that we had received comments from
9 more than 23 tribes. That's the number that sticks in my
10 head.

11 Q And those are the EPA consultations, right?

12 A Right. And they were -- many of them were done
13 jointly with the Army.

14 Q Do you recall whether or not your agency and your
15 office -- whether or not your office participated in any
16 consultations?

17 A I believe that we did, but which specific ones I
18 would have to go back and -- and check with -- with staff
19 about when those were and what the format of them was.

20 Q Who in your staff would be involved in tribal
21 consultations in a rulemaking?

22 A Mr. Smith.

23 Q And do you know who else?

24 A I don't know if counsel would have been involved
25 in some of those, but that would be the only other person, I

1 believe, within our -- within my small office that would be.

2 Ms. Berroya. Would you expect to be involved in the
3 details of knowing who in particular was involved in tribal
4 consultations?

5 Ms. Darcy. No. However, we do within the Corps have a
6 tribal liaison at headquarters and we also have a tribal
7 liaison in all of our district offices. And so I would
8 expect that they would have been involved in -- in these
9 consultations.

10 [Darcy Exhibit 4 was marked
11 for identification.]

12 BY MS. FRASER:

13 Q Secretary Darcy, I'd like to draw your attention
14 to Exhibit 4. And that's a copy of the rule.

15 A Uh-huh.

16 Q Drawing your attention to 37103. It states: "The
17 agencies began consultation with federally-recognized Indian
18 tribes on the Clean Water Rule defining 'Waters of the
19 United States' in October 2011. And that the consultation,"
20 quote, "continued in stages over a four-year period until
21 the close of the public comment period in November of '14."

22 Do you have any reason to doubt the representation of
23 the tribal consultation period that was put forward in this
24 rule?

25 A No.

1 Q Is there anything improper about EPA's delineation
2 of the tribal consultation period?

3 A No.

4 Q Is it your belief that it's appropriate for EPA,
5 as the final authority on Clean Water matter, to define the
6 period of consultation?

7 A Do I agree that they should -- I'm sorry, should
8 or --

9 Q Should.

10 A Yes.

11 Q Okay. The rule states further, page 37103, that
12 "In 2011, close to 2,000 tribal representatives and more
13 than 40 tribes participated in the consultation process
14 which included multiple webinars and national
15 teleconferences and face-to-face meetings." Do you have any
16 reason to believe that this is not an accurate statement?

17 A No. No, I do not.

18 Q Okay.

19 [Darcy Exhibit 5 was marked
20 for identification.]

21 I'd like to draw your attention to Exhibit 5 you
22 now have. It's entitled, Final Summary of Tribal
23 Consultation for the Clean Water Rule. Are you familiar
24 with this document, Secretary Darcy?

25 A Yes. Uh-huh.

1 Q I'd like to draw your attention to page four. It
2 says that, "On October 12th, 2011 EPA sent a Tribal
3 Consultation Notification letter to all federally-recognized
4 tribal leaders, via e-mail and mail, inviting tribal
5 officials to participate in consultation and coordination
6 events and provide comments to EPA in coordination with
7 Army."

8 Is there any reason the statement is not true?

9 A No.

10 Q Page four of the document continues. "In the
11 course of this consultation, EPA coordinated with Army, and
12 Army jointly participated, in aspects of the consultation
13 process."

14 Based on your experience with the WOTUS rulemaking, is
15 that an accurate statement?

16 A Yes.

17 Q On page seven of the document it continues. "On
18 May 21st, 2015, EPA's Office of Internal Tribal Affairs
19 confirmed the adequacy of the agencies' tribal
20 consultation."

21 Is there any reason to doubt that conclusion?

22 A No.

23 [Darcy Exhibit 6 was marked
24 for identification.]

25 Q I'd like to draw your attention to Exhibit 6. The

1 document entitled, EPA's Policy on Consultation and
2 Coordination with Indian Tribes. Under section one, Policy
3 Statement, it reads: "Consultation includes several methods
4 of interaction that may occur at different levels." That's
5 page one. The policy further states on page seven that,
6 "There's no single formula that constitute what appropriate
7 coordination is."

8 Now, as the lead agency it would be EPA's policy that
9 would govern the consultations, right?

10 A Under this, yes. Under Civil.

11 Q And according to EPA's policies, that would
12 include webinars, teleconferences, face-to-face meetings,
13 that all constitute appropriate forms of tribal
14 consultation; is that right?

15 A Yes.

16 Q Now, as far as you are aware, did Mr. Smith
17 participate in conducting or preparing material for tribal
18 consultations during the consultation period, which was
19 defined by this document as October 2011 through November
20 2014?

21 A I don't -- I do not have any documentation that he
22 would have prepared for these, but as the tribal
23 representative for my office I would assume that he did.

24 Q And it would not surprise you if he, in fact, had
25 participated in some of these tribal outreaches?

1 A No.

2 Q In order for Mr. Smith to participate in tribal
3 outreaches does he have to sometimes travel?

4 A Yes.

5 Q Would you have to approve that travel?

6 A His supervisor approves -- approves that travel,
7 but you know, most recently, he traveled with me to Navajo
8 Nation a couple of months ago.

9 Q A couple of months ago?

10 A Uh-huh.

11 Q Was that also for a tribal consultation event?

12 A No. It was just for outreach with the Navajo
13 Nations. We're doing some projects on -- on their land.

14 Q But not related to this rule?

15 A Not related to the rule, no.

16 Q Okay.

17 Ms. Berroya. In the last hour in conversations with my
18 colleagues in the majority, they referenced Ms. Moyer's
19 recollection of having four meetings with you in preparation
20 for the WOTUS rulemaking. Do you recall that?

21 Ms. Darcy. Yes. Uh-huh.

22 Ms. Berroya. Is it fair to say that you cannot speak
23 to Ms. Moyer's recollection of the number of meetings she
24 had with you?

25 Ms. Darcy. Well, I think in the earlier questioning I

1 had thought that it was more than that, you know.
2 Especially in the development of the guidance of the
3 rulemaking and all the way up to the federal rulemaking. So
4 I'm -- it was more than four from where I sit. And it might
5 have been a different configuration of meetings and the
6 people in the meeting, but regarding this -- this issue I
7 think it was more than that.

8 BY MS. FRASER:

9 Q More than four meetings --

10 A Yes.

11 Q -- including Ms. Moyer?

12 A Yes.

13 Q But also meetings including other members of Corps
14 staff?

15 A Yes.

16 Q And in those meetings, just to clarify, issues
17 regarding their technical expertise on this rule were
18 discussed --

19 A Yes.

20 Q -- as well as their concerns, right?

21 A Yes.

22 Q And during those meetings, or at least some time
23 subsequent to those meetings, those concerns were in fact
24 considered?

25 A Yes.

1 Q And to the extent that you determined, were
2 included in the final rule?

3 A Yes.

4 Ms. Fraser. We can go off the record.

5 [Lunch recess taken from 12:15 to 1:08 p.m.]

6

7

1 A F T E R N O O N S E S S I O N

2 Ms. Aizcorbe. We can go on the record. It is now
3 1:08.

4 E X A M I N A T I O N (R E S U M E D)

5 B Y M S . A I Z C O R B E :

6 Q Welcome back. Ms. Darcy, are you aware of how the
7 Corps typically conducts its costs and benefits analysis for
8 rules?

9 A Not specifically for rules. Most -- most -- what
10 I'm most familiar with, what the Corps does for cost benefit
11 analysis, is when they do it for our projects. We develop
12 cost benefit analyses and determine whether there's a
13 federal interest in investing in a -- in a Corps project
14 when we do a feasibility study.

15 Q Is that handled by the Army or the Corps?

16 A It's handled by the Corps.

17 Q And would you say it's a similar process of your
18 oversight of that as is -- as in your rulemaking?

19 A It's similar, but that the -- the analytics are
20 different, you know, because you're dealing -- in a -- in a
21 project you're dealing with a project specific cost and
22 benefits. You know, like the impact of a dredging project
23 on the -- on the global economy or something like that which
24 is different than a benefit cost analysis that was done with
25 a rule which is a nationwide rule.

1 Q So you're not aware of whether the cost benefit
2 analysis for WOTUS differs in any way from how the Corps
3 typically engages in a cost benefit analysis?

4 A Only in that, you know, the scale of it and what
5 would be considered in it is different than a
6 project-specific cost benefit analysis.

7 Q The Corps report that they were not involved in
8 the process of developing a cost estimate for the rule. And
9 I know earlier you mentioned that the EPA was heavily
10 involved based on their development of the economic
11 analysis. What was your understanding during the rulemaking
12 of the Corps' involvement?

13 A In the cost benefit or in the economic analysis?

14 Q Correct. Or any costs or benefit development.

15 A I know that they provided some data to help inform
16 the analysis that was done. I'm -- I'm not sure if we were
17 actually doing the analysis other than providing the data.

18 Q Did you discuss the cost benefit analysis with
19 anyone at the Army or Corps?

20 A No. Only in being briefed on the costs and
21 benefits in preparation for discussing the rule and going to
22 hearings on the rule.

23 Q Did you discuss it with the EPA?

24 A No. Again, only in preparation for briefings for
25 hearings.

1 Q Were you aware that the Corps had concerns that
2 certain costs had been mischaracterized by the EPA as
3 benefits?

4 A Not until later in the process when, again, the --
5 the Corps had some concerns that their data was just being
6 used and not analyzed.

7 Q Did you discuss that concern with anybody at the
8 EPA?

9 A I did not.

10 Q Is there a reason why?

11 A No. It wasn't -- I didn't discuss it with -- with
12 the administrator. So others may have discussed it, but I
13 did not.

14 Q During the rulemaking a senior Corps regulatory
15 staffer suggested that the EPA was intent on including a
16 benefits analysis that would show that the rule's benefits
17 outweigh its costs. Were you aware of any effort to
18 approach the WOTUS analysis with this goal?

19 A No.

20 Q Did you discuss the scope of the rule's benefits
21 with anyone?

22 A No, not in -- in response to queries.

23 Q So when you mentioned earlier that you had a
24 belief that the rule's benefits outweighed its costs --

25 A Uh-huh.

1 Q -- that was your personal opinion or belief?

2 A Well, and it was based on the -- the economic
3 analysis that was provided.

4 Q Okay. And is that based on the final economic
5 analysis or both of them as it was being developed?

6 A I'd say both of them, but -- but the early-on
7 economic analysis is the one that I was referring to earlier
8 and the one that I testified to more than a year ago.

9 Q Throughout the rulemaking, the agencies used a
10 statistic that 117 million Americans have not had, and will
11 continue to not have clean water without the WOTUS rule.
12 The Army and Corps staff cannot identify where this
13 statistic came from or how it was developed. At least those
14 staffers who we've spoken with. Do you know how it was
15 developed?

16 A According to the USGS -- US Geological Survey
17 about 59 percent of the headwaters of -- in this country are
18 the source of drinking water for -- and under the existing
19 rule, the rule before this proposed rule, some of those
20 headwaters were not included in -- as being jurisdictional
21 under the rule. So the extrapolation was that of the people
22 who get their drinking -- about 117 million people get their
23 drinking water from the headwaters that were not protected
24 under the earlier rule. So that's what that means.

25 Q So that statistic didn't involved any of the

1 limits that were subsequently added to the rule?

2 A No. No.

3 Q Do you know who developed that statistic?

4 A The USGS and -- and -- provided the underlying
5 data about the percentage. And then, the extrapolation
6 about how many people get their drinking water from those
7 sources came from the EPA.

8 Q Okay. And so, EPA also came up with that talking
9 point, if that's what you want to call it? Did the Army or
10 Corps play any part in its development as one of the talking
11 points for the rule?

12 A No. Not in its development, but the fact that it
13 was based on the USGS, as well as the statistics regarding
14 the drinking water sources for that number of people.

15 Q We spoke a little bit earlier about the
16 connectivity report. What was your involvement in its
17 development?

18 A The connectivity report was developed by the EPA
19 science research -- not lab. It's the research center. And
20 then, subsequently was reviewed by the Science Advisory
21 Board. So the actual scientific development of that was not
22 a Corps of Engineers development. It was -- it was written
23 in consultation with, but we didn't develop it, per se. The
24 science research -- excuse me, at the EPA did.

25 Q You mentioned earlier that you had read a version

1 of the connectivity report around the rule's proposal; is
2 that correct?

3 A Yes.

4 Q Do you recall when you received a copy of the
5 draft connectivity report?

6 A No. It was -- gosh, I can't remember the -- I
7 don't remember, but I got it and then it went to the Science
8 Advisory Board. And then, I want to say it was in the fall,
9 but I don't remember exactly, but it was -- it was before
10 the final -- between the proposed and final rule.

11 Q So you received it before it went to the
12 Scientific Advisory Board?

13 A I did. Actually, though I think I read the final
14 because there was a Science Advisory Board that -- that was
15 meeting to review the connectivity report and the Corps of
16 Engineers was -- participated in that Science Advisory Board
17 meeting. So I'm trying to make sure that it was -- was it
18 before the Advisory Board meeting or after that that I read
19 it? I think it was before, but I'm not clear. I'm not
20 certain.

21 Q Did you also then read the final version of the
22 connectivity report?

23 A I did.

24 Q What was your understanding of the purpose of this
25 report?

1 A The purpose of the report -- the -- the EPA
2 consulted over, I want to say, 200 different either
3 journals, experts in the field, all to sort of update the
4 science on the hydrology of the Clean Water. Particularly
5 in response to determining what a significant nexus was.
6 Again, that was a term that was thrown out in the Supreme
7 Court decision and then we had to figure out how to
8 incorporate that into the final rule.

9 Q You mentioned earlier that you did not review
10 comments from the report's peer review, but we didn't speak
11 about the Science Advisory Board's review of the report.
12 Did you read those comments?

13 A I read excerpts from it. I didn't read the entire
14 thing.

15 Q Do you know how their comments were resolved in
16 the final report?

17 A I think the Science Advisory Board's review was
18 part of the final report. You know, I don't think it was,
19 we took this and didn't take that. I think it was, you
20 know, not an appendix, but was -- was part of the final
21 because it had to go out for that Science Advisory Board
22 review before it was final.

23 Q So you're unaware of any unresolved concerns that
24 the board might have come up with?

25 A Uh-huh.

1 Q That was a yes?

2 A Yes. Yes. Sorry, I'm nodding my head.

3 Q That's fine. The connectivity report was not
4 finalized until January of 2015, well after the rule was
5 drafted and the agencies undertook drafting the final rule.
6 At any point were you concerned that the EPA undertook
7 efforts to pursue the rule while its scientific basis was
8 being developed?

9 A No. The -- the connectivity report, you know, was
10 being reviewed. It had been developed. It hadn't been
11 finalized. And I think -- and also I think part of the
12 reason -- and I -- in extending the public comment period
13 was to be able to have the public comment on the final once
14 the Science Advisory Board had reviewed it. So that even
15 though it wasn't the final, they could review what the
16 Science Advisory Board said.

17 Q Are you aware whether the report was being
18 developed during the development of the guidance?

19 A Back in 2008 or 2007? I don't know.

20 Q And I ask just because we understand, and I think
21 we've discussed a little bit, that the guidance was
22 essentially the basis for the rulemaking.

23 A Uh-huh.

24 Q So if the text was similar, but the report wasn't
25 finalized until, you know --

1 A Until the rule?

2 Q Correct.

3 A Proposed rule.

4 Q I was trying to understand your -- your basis
5 of --

6 A I don't know when the connectivity report was
7 begun. So I -- I don't know that answer.

8 Q Okay. To your knowledge, has the Army undertaken
9 rulemakings before developing the science underlying its own
10 rulemakings?

11 A I don't -- I don't know.

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

17 A I didn't learn of that until, I think, very late
18 in the process.

19 Q Do you recall how you learned about it?

20 A I think it was probably part of the technical
21 review that was done by the Corps after, like, the April
22 time frame I think.

23 Q Okay.

24 Ms. Fraser. Can I just ask everybody to remind
25 themselves to keep your voice up.

1 Ms. Darcy. I'm sorry.

2 BY MS. AIZCORBE:

3 Q The Corps report that it did not conduct new
4 science on significant nexus, how to determine impacts to
5 physical, biological or chemical integrity of waters, or the
6 five types of water bodies determined to be similarly
7 situated despite believing such science to be necessary to
8 support the rule. At any point in your review did you
9 discuss whether to conduct additional science?

10 A No.

11 Q Is there a reason why not?

12 A I don't believe at what stage the -- the Corps
13 raised those issues. So, no, I don't -- I don't.

14 Q You don't recall receiving any requests or
15 concerns from the Corps earlier in the rulemaking process,
16 like during the development of the proposed rule, that
17 additional science might be necessary?

18 A I don't recall their ever raising that, no.

19 Q In the course of the rulemaking did you visit any
20 of the isolated water bodies identified by the rule to be
21 similarly situated?

22 A No. If I happened -- no. I mean, I didn't go to
23 look at prairie potholes.

24 Q Are you aware of whether anybody in the Corps or
25 Army did?

1 A If they did, I wasn't made aware of it.

2 Q Okay. How did you decide what kind of science was
3 necessary to support a definition of ditches, or lack
4 thereof, in the final rule?

5 A Again, relying upon the connectivity report.

6 Q Are you aware of what kind of science the EPA may
7 have conducted on ditches?

8 A I believe through the connectivity -- again,
9 through the connectivity report. That's the basis for all
10 the science that we were using.

11 Q Okay. Can you explain your involvement in
12 reviewing and approving the proposed rule before it was sent
13 to OMB for review?

14 A Being briefed on it and reviewing it. And I -- as
15 I said, I did read it before -- before it went to OMB.

16 Q In reviewing the proposed rule were you aware of
17 whether the agencies had considered alternatives?

18 A Uh-huh. Yes. We had considered alternatives.
19 And one of the -- I think I mentioned earlier, one of the
20 things that we asked for in the public comment period on the
21 proposed rule was the definition or the characterization of
22 Other Waters because it had been discussed within the -- the
23 Corps and the Army and EPA. And a resolution of how to deal
24 with it, we didn't come to one. So we wanted to hear from
25 the public about how they could suggest we deal with the

1 Other Waters issues.

2 Q Were those alternatives in the draft proposed
3 rule?

4 A You mean ones that were considered, but not
5 accepted?

6 Q Either way.

7 A Or considered, but not proposed I guess is --

8 Q Correct.

9 A I don't -- I don't recall. I think they were, but
10 I don't -- I don't recall from the proposed to the final.

11 Q But you recall having discussions about
12 alternatives before the proposed rule was sent to OMB?

13 A Yes. Yes.

14 Q Okay.

15 A And at that early stage -- at that point I -- I
16 had a principal deputy who was doing much of the day-to-day
17 along with Mr. Schmauder, and -- and having those meetings
18 about what the alternatives should be.

19 Q And who is that principal deputy?

20 A His name is Rock Salt. He's since retired.

21 Q Okay.

22 A It wasn't because of the Clean Water Rule.

23 Q When we were discussing earlier that you had
24 weekly meetings with some of the senior leadership --

25 A Uh-huh.

1 Q -- you mentioned that you would discuss topics of
2 interest of that week.

3 A Uh-huh.

4 Q At any point did you discuss the WOTUS rulemaking?

5 A Yes.

6 Q And would you say how frequently?

7 A I'd say, you know, the weekly meetings -- at least
8 once a month given where we were in the process. Sometimes
9 it might be weekly. Sometimes it might be once a month.

10 Ms. Aizcorbe. I'd like to enter a set of documents
11 into the record which we'll refer as the Peabody Memorandum.

12 Mr. Hambleton. Number seven.

13 Ms. Aizcorbe. Number seven? Thank you.

14 [Darcy Exhibit 7 was marked
15 for identification.]

16 BY MS. AIZCORBE:

17 Q I haven't printed out all of the lengthy
18 attachments that contain the maps, but those are the texts
19 of the actual memoranda.

20 Are you familiar with these memoranda?

21 A Yes, I am.

22 Q Have you read through them?

23 A I have.

24 Q When did you first receive these memos?

25 A I received the April 27th memo from General

1 Peabody on the 27th, if that was a Monday. Yeah, after one
2 of our Monday meetings.

3 Q And the others?

4 A The one dated the 15th I believe I received via
5 e-mail from General Peabody. Well, General Peabody -- no.
6 General Peabody or General Bostick on the 15th. I remember
7 it was a Friday or Saturday, whatever that was.

8 Q Had you discussed those memos at any of your
9 meetings?

10 A Not at the Monday meetings, no.

11 Q Those memos are dated between April and May of
12 2015.

13 A Uh-huh.

14 Q Were you aware of the concerns raised in the
15 memoranda regarding the scientific, legal and procedural
16 deficiencies in the rulemaking prior to receiving these
17 memoranda?

18 A Well, the one that details that the most is the
19 one -- the May 15th one. That talks about the oversight of
20 the science and the technical report I believe. And I was
21 made aware of it and, subsequent to this, asked my staff to
22 review them as well.

23 Q Your staff in the --

24 A Economic -- in my -- in my office. The economists
25 in my planning office that I referenced earlier today.

1 Q Had any of these concerns been raised to you by
2 either the Corps or leadership who attended these weekly
3 meetings?

4 A There was some concern raised, but not -- just
5 that -- it wasn't really a subject of one of -- you know, in
6 the Monday afternoon meetings that I referenced before. I
7 think this is probably one of the four meetings that -- that
8 General Moore referenced. Some of these issues were raised
9 in one of those meetings. I don't recall which one though.

10 Q But that was before they were issued, correct?

11 A Before the analysis were issued.

12 Q Trying to get a sense of when you --

13 A Yeah. I'm trying to -- I think -- well, I'm
14 trying to recall if it was right after they saw the first
15 draft or if it was during -- I don't recall if it was before
16 or after.

17 Q You mentioned you had your economists review these
18 memoranda.

19 A Uh-huh.

20 Q Did anything come of that review?

21 A They -- nothing meaning what the -- there was --
22 they provided input and in their review found them to be
23 sound technically and economically defensible.

24 Q And by "they" you mean the conclusions or
25 recommendations --

1 A Yes.

2 Q -- in the memoranda?

3 A Well, in the -- in the documents. Not in the
4 memoranda. They didn't see the memoranda. They saw the --
5 the technical documents that were being referenced in this
6 memorandum from the -- from the 15th of May.

7 Q So you're saying that you had your economists
8 review the economic analysis and the technical --

9 A Yes.

10 Q -- support document?

11 A Yes.

12 Q You didn't have them review the memoranda?

13 A No.

14 Q Okay, I misunderstood. Okay. Did you speak to
15 anyone within the Army about these memoranda?

16 A To my counsel.

17 Q And what were the nature of those conversations?

18 A Just what the legal impact is and what the impact
19 would be on the rule.

20 Mr. Hambleton. And you mean Mr. Schmauder?

21 Ms. Darcy. Yes. He's my counsel.

22 BY MS. AIZCORBE:

23 Q Did Mr. Schmauder make any recommendations to you
24 about how to treat the recommendations in the memos?

25 A No. Only that some of the concerns that were

1 raised in the first memo were ones that we were going to
2 continue to try to work to resolve some of them in the final
3 rule.

4 Q Did you discuss any that you believed did not
5 warrant further work or analysis?

6 A Any?

7 Q Any recommendations in the memos. Did you feel
8 that any of them didn't warrant further review?

9 A Some of the issues that were raised in the
10 accompanying memo to the Peabody memo, the -- the Chief of
11 Regulatory memo from the 27th --

12 Q Uh-huh.

13 A -- of April, had some concerns raised that had
14 already been discussed and either -- and dealt with either
15 in a way that we felt was the way to deal with it in the
16 proposed rule, but some of them I don't think were resolved
17 in a way that the Corps liked, which is probably why they
18 came up in this memo.

19 Q And when you say that "we resolved them," who are
20 you referring to?

21 A Us and EPA.

22 Q Okay. Did you discuss the memos with anybody
23 within the Corps after their issuance?

24 A Yes. I discussed the first Peabody memo with the
25 Chief of Engineers, General Bostick.

1 Q And what was the general's conversation? What was
2 the nature of that conversation?

3 A Well, as I have a monthly meeting with General
4 Bostick, and this was the subject of one of our -- one of
5 the subjects of our monthly meeting. And I just said that I
6 was very surprised by it and, you know, was hoping that the
7 Corps could support the -- the President's rule.

8 Q And you mentioned earlier that you had met, if not
9 frequently with the Corps, at least enough that it was more
10 than four times. Why would you say that you were surprised
11 in seeing these memos at this stage?

12 A Well, they -- these are internal, deliberative
13 memos to the Corps and the Army. And I guess I was
14 surprised that they had -- had handed it to me in writing.
15 That -- that surprised me. 'Cause that -- I -- I don't
16 think in the entire seven years -- six-and-a-half years that
17 I've been in this position has a deputy commanding general
18 handed me a memo that I didn't know about.

19 Q And when you say you didn't know about the memo,
20 are you saying about its contents or about the fact that
21 they were developing the memo?

22 A That they were developing the memo.

23 Q So you're saying essentially you had no notice
24 that these memos were coming to you?

25 A Correct. It was handed to me on a Monday

1 afternoon.

2 Q But you did have knowledge of some of the
3 substantive concerns --

4 A Yes.

5 Q -- in those memos, correct?

6 A Yes.

7 Q Did you discuss the memos or their contents with
8 the EPA after receiving these memos?

9 A No.

10 Ms. Fraser. Could you repeat that answer? I'm sorry.

11 Ms. Darcy. No.

12 BY MS. AIZCORBE:

13 Q I have Exhibit 8.

14 [Darcy Exhibit 8 was marked
15 for identification.]

16 I'd like to introduce into the record -- there you
17 go -- this is an excerpt of a transcript from a hearing
18 before the House Transportation and Infrastructure Committee
19 on June 10th of 2015. Just going to ask you about your
20 statements at the top of page 34.

21 A Uh-huh.

22 Q Specifically, just your second statement.

23 A Okay.

24 Q When asked about the Corps' concerns expressed in
25 these memoranda you testified that you, quote, "Took those

1 concerns and talked through them with the Environmental
2 Protection Agency before finalizing the rule," unquote.

3 Who specifically met to discuss these concerns?

4 A Who did I meet with?

5 Q Correct. Well, you said "we." So I just want to
6 clarify who "we" is.

7 A "We" would be Mr. Schmauder and I believe he
8 raised the concerns with his counterpart at the EPA, Greg
9 Peck. And I raised several of the concerns with the
10 administrator.

11 Q And those were separate conversations?

12 A Yes.

13 Q How did you meet with the administrator? Did you
14 meet in person?

15 A It was -- that was a phone call.

16 Q Can you elaborate on what was discussed.

17 A What was discussed in particular were the -- the
18 three issues that were finally resolved in the final rule.
19 One was being the grandfathering provision, the second was
20 the bright line provision and the third was the ditch
21 exclusion.

22 Q And so when you mentioned at the hearing that you
23 took those concerns to the EPA --

24 A Uh-huh.

25 Q -- you're specifically referencing the three that

1 you just listed to us?

2 A Yes. Yes.

3 Q You didn't discuss any of the other concerns that
4 were raised in the memoranda?

5 A No.

6 Q Mr. Schmauder spoke to the committee about those
7 three concerns and said that several adjustments were made
8 to the final rule that satisfied those concerns, but they
9 did not fully satisfy the Corps' concerns. Can you explain?

10 A They're -- the three that I just mentioned that
11 were included in the final rule, there may have been others,
12 probably not as -- some smaller adjustments that were made
13 in the final rule as a result of some of the concerns raised
14 by the Corps. I'm sorry, phrase it again. Do you want me
15 to --

16 Q I was just wondering if you could explain why the
17 adjustments did not fully satisfy the Corps' concerns.

18 A Oh. Well, I -- I think an example is probably the
19 bright line tests that I'll refer to. In some instances
20 the -- the -- the Corps wanted to have everything outside
21 the flood plain to be considered for a significant nexus
22 case by case --

23 Ms. Fraser. Keep your voice up. You're drifting off.

24 Ms. Darcy. I'm sorry.

25 Wanted to have the 100-year flood plain with the outer

1 boundary for -- in consideration for a case-by-case
2 significant nexus determination. And in our -- in our
3 attempt to draw a bright line, we went with the 100, 1,500,
4 4,000, out to the 100-year flood plain. And I believe that
5 the Corps wanted to have the ability to do the -- the
6 significant nexus determination all the way out to the
7 100-year flood plain. The -- what we ended up with was the
8 Other Waters determination being able to be used from 4,000
9 feet to the 100-year flood plain, whichever was larger.

10 BY MS. AIZCORBE:

11 Q When were these final adjustments made to the
12 rule?

13 A Before its final publication. So it was finally
14 published on May -- well, finalized on May 27th. Probably
15 within the April, May time frame. It was fairly near the
16 end of the -- end of the interagency review.

17 Q Had the interagency review process concluded
18 before those changes were made?

19 A No.

20 Q At any point did you emphasize the Army would not
21 sign off on the rule unless those changes were made?

22 A No.

23 Q Did you discuss the memos with anyone within the
24 Executive Office of the President? And I am referring to
25 the Peabody memoranda.

1 A The Peabody memoranda? I did not. There was, at
2 one point, a question posed to me about their existence, but
3 it's not because I shared them with anyone. I think it was
4 probably once the committees had them.

5 Q At any point did you instruct that these memos
6 would not be shared or viewed in any manner?

7 A They were internal Army iterative documents. So
8 they should not have been shared outside of the Army.

9 Q Did you instruct anybody at the Army or the Corps
10 in that way?

11 A No.

12 Q You did not discuss their dissemination with
13 anybody?

14 A I said that they were internal to the Army and
15 they should not be distributed outside the Army.

16 Q I was just wondering who you said that to.

17 A Well, I said it to Craig. I believe I said it to
18 General Bostick and General Peabody.

19 Q The Corps said that they had no role in selecting
20 or analyzing the data for the economic analysis and no role
21 in performing the analysis in the -- in the rule's technical
22 support document. Do you disagree with these positions?

23 A They reviewed the documents. I guess that --

24 Q Do you know when they reviewed the document?

25 A I don't have the dates exactly, no.

1 Q Are you aware of whether it was before the rule
2 went to OMB in its final form?

3 A I do not know what -- between that and the draft
4 final.

5 Q You mentioned earlier that you were not aware of
6 how the EPA was using the Corps' data in its analyses; is
7 that correct?

8 A Yes. They were using the data. I'm just not sure
9 of the analytical tools that they were using to --

10 Q Did you provide comments on the economic analysis
11 or technical support document to the EPA?

12 A Did I? No. My -- when I referenced the
13 economists earlier, we provided that information to them.

14 Q To the EPA?

15 A Yes, and to the Corps.

16 Q To your knowledge, does the Corps typically draft
17 economic analyses for their own rules?

18 A Because I haven't done one before, I don't know.

19 Q Okay, fine.

20 A So again, I'd be speculating, but I think in order
21 to do any rulemaking you have to provide some economic
22 analysis. I think that's part of the executive order.

23 Q The EPA calculated an increase in jurisdiction
24 from 2.7 percent in the proposed to 4.65 percent in the
25 draft final rule. The Corps informed the committee they

1 could not speak to what accounted for -- for the 72 percent
2 increase in jurisdiction. Do you know the basis for this
3 increase?

4 A The basis for the increase would probably be -- I
5 don't know the -- you know, the numbers, but given that some
6 of the similarly situated water bodies would be included now
7 would probably account for that, but I -- I shouldn't do
8 that 'cause that's speculation, but that -- my -- just
9 picturing how that calculation may have been made, that's
10 what I would probably expect.

11 Q Can you explain your statements and the text in
12 the rule talking about how the rule decreases jurisdiction
13 in light of the EPA's calculation that we just referenced?

14 A Okay. The -- after -- after Rapanos and SWANCC
15 there were a number of water bodies that wouldn't be covered
16 because of there not being a determination of significant
17 nexus. So all of those water bodies that would not have
18 been covered by that, were all of those that were in limbo,
19 as we say, from 2008 until we did a final rule.

20 So all of those water bodies would have been -- by the
21 '86 guidance would have been -- would have been covered, but
22 because there had been no guidance or rule since then, they
23 would not have been. So that's where the -- and it's a
24 great -- it's a big, expansive time between the '86 guidance
25 and the 2001 and the 2006 Supreme Court decision.

1 Q Did anyone in the Corps ever express to you their
2 disagreement that the rule results in narrower jurisdiction?

3 A Yes. I believe in thinking -- again, with not
4 being able to do a case-by-case determination on all of
5 those Other Water bodies, that would in some way narrow
6 it -- what we could have been doing before the rule or
7 without this rule.

8 Q Did you receive any direction to approve the
9 economic analysis or technical support document?

10 A That I would approve it? No.

11 Q Do you know whether the Corps' comments on those
12 documents were shared with the EPA?

13 A I believe they were shared with the EPA.

14 Q Do you know how or who would have shared them?

15 A I don't know for certain how that would have been
16 transmitted.

17 Q Can you explain how the Corps' practical
18 experience in making jurisdictional determinations
19 contributed to the decision to include ephemeral streams in
20 the definition of tributary?

21 A As it applies particularly to ephemeral I would --
22 would expect that it was because of their on-the-ground
23 determinations that have to be made in order to do a
24 jurisdictional determination now.

25 Q Would the -- those statements in the rule refer to

1 some sort of practical experience that the Corps has --

2 A Uh-huh.

3 Q -- in making those jurisdictional determinations,
4 but we understand and we've been told that the Corps does
5 not make those determinations. So I'm a little -- I'm just
6 trying to understand where they come from.

7 A Where what comes from?

8 Q The -- the practical experience that -- that is
9 referenced in the rule.

10 A Well, the Corps has to go out and -- and look --
11 do on-the-ground site evaluations whenever they are asked to
12 do a jurisdictional determination. Either a preliminary or
13 a regular jurisdictional determination. So they have
14 practical experience in doing that. I guess I'm not clear
15 about where the ephemeral stream particular case is coming
16 from.

17 Q The preamble to the rule discusses the Corps'
18 practical experience in making significant nexus
19 determinations and in -- I guess my question was, what
20 specific determinations the preamble is referring to because
21 the Corps asserts that it never made significant nexus
22 determinations for isolated waters. So that those -- those
23 determinations don't exist.

24 A Well, they would have to have made some kind of
25 determination, whether it is a determination that it is or

1 is not jurisdictional, whether it is isolated or adjacent or
2 neighboring or any of the -- I mean, if it's not, you know,
3 a navigable water, they have to make a determination of the
4 impact of other kinds of waters.

5 Q And that's something that the Corps -- you're
6 saying the Corps had done in the past prior to this
7 rulemaking? 'Cause I think maybe that's one of the concerns
8 is that the Corps never operated under this term
9 "significant nexus." So they're saying they have no
10 practical experience conducting jurisdictional
11 determinations for those isolated water bodies.

12 A Well, I -- I think that the -- making a
13 significant nexus determination in order to make a decision
14 about a jurisdictional determination is -- I think that's
15 accurate. Whether they've had to evaluate a significant
16 nexus and not been able to make either a -- a jurisdictional
17 determination under that might be where the -- the
18 disconnect is here.

19 Q So that's what you were referring to when you say
20 "practical experience"?

21 A Right.

22 Q Is that the Corps has general experience
23 conducting these jurisdictional determinations and that
24 would be translatable into the new rule's framework?

25 A I believe it could be, yes.

1 Q Okay. Did you ever discuss whether it could be
2 with the Corps?

3 A Not as specific as -- as you've just outlined, but
4 the fact of whether or not this would be implementable on
5 the ground, I did.

6 Q And what were the Corps' comments about the
7 implementation of this rule?

8 A The rule as finalized or the final rule? It would
9 be -- because, as you stated, the significant nexus
10 determinations had not been made, there would -- there's the
11 expectation that there would be significant nexus
12 determinations made in the future and that they would be
13 equipped to do that. We would probably need more staff, you
14 know. So we'd ask for more money in our budget that year.

15 Q Okay. I have another exhibit to introduce. This
16 is Exhibit No. 9.

17 [Darcy Exhibit 9 was marked
18 for identification.]

19 I'm just going to be referring to Administrator
20 McCarthy's statements at the top of page 112. This is an
21 excerpt from a transcript of one of our committee's hearings
22 on July 29th, 2015. Again, I'm just going to ask about the
23 top statement.

24 A Okay.

25 Q So, did you get a chance to read that?

1 A Uh-huh.

2 Q Okay. The rule was finalized a mere month after
3 the Peabody memoranda were transmitted. Yet, Administrator
4 McCarthy testified before this committee after the rule's
5 promulgation that with respect to the memos you indicated,
6 quote, "that all -- all of the concerns of the Army Corp.
7 had been satisfied," unquote. And that "she," quote -- or
8 you individually had conversations with her "about the
9 changes that the Army Corps was interested in making as the
10 proposal moved through the interagency process and
11 understood that everything had been fully satisfied,"
12 unquote.

13 When did you communicate to Administrator McCarthy that
14 the Corps' concerns in the memos had been satisfied?

15 A Just before it was finalized.

16 Q How did you meet when you were speaking with
17 Administrator McCarthy? Was it in person or over the phone?

18 A I think that was a telephone call.

19 Q Would you agree with her characterization of your
20 conversations?

21 A I would.

22 Q The Corps indicate, and we now know from the final
23 rule, that not all of the concerns expressed in these memos
24 were ultimately adopted or addressed in the final rule. Can
25 you explain your position that all of the Corps' concerns

1 had been satisfied?

2 A You know, I guess what I might qualify is that all
3 of the Army's concerns had been satisfied. Perhaps some of
4 the Corps' -- you know, as referenced to both those memos
5 there are a number of concerns. I believe that the majority
6 of them had been satisfied. And that's probably what the
7 administrator is referring to.

8 Q We spoke earlier that you were surprised when you
9 received the memos. Had you, in your six years at the Army,
10 experienced the Corps ever expressing such dissention over
11 an ongoing project?

12 A Probably not to this -- no. I mean, we've --
13 there are differences then within the Corps and in the Army
14 and ultimately I have to make decisions, but this one was
15 one of the -- probably nothing like this.

16 Q Okay. Specific distance thresholds that we've
17 discussed or touched on were added to the draft final rule.
18 Do you recall when you learned about their development?

19 A I'm sorry, what thresholds?

20 Q The adjacency limits.

21 A Oh. Well, again, that was one of the -- the three
22 major changes that we made in the final rule. Again, it was
23 ongoing as to what the bright line should be. And it was
24 shortly before we went final. I want to say within a week
25 or two of when we finally arrived at the -- the -- the

1 bright line.

2 Q Were you involved in their development?

3 A I was consulted about it and -- and gave my input.

4 Q Who at the Army or Corps were involved in their
5 development?

6 A Craig Schmauder. And I know he consulted with
7 regulatory, as well as counsel, about the impacts of each of
8 these lines and, you know, going from the 100-year to the
9 4,000 foot.

10 Q And when you say "counsel," you mean his Office of
11 General Counsel?

12 A Corps counsel.

13 Q Oh, Corps counsel.

14 A Yeah. David Cooper was the Corps counsel at that
15 time.

16 Q And besides just the fact that they consulted, do
17 you have any understanding of the Corps' or Army's
18 involvement in actually developing those numbers?

19 A I know that numbers were based on a number of
20 things. Some of the numbers were coming from EPA, but some
21 from the Corps, as far as the delineations, but I remember
22 one specific meeting with the Corps regulators, as well as
23 counsel, and Lance Wood. We drew graphs or drew pictures on
24 the table in my conference room showing where the bright
25 lines would be, what would be in, what's in the flood plain,

1 where the 100-year flood plain was, where the 100-foot mark
2 was and what the impact would be. And we -- they drew
3 pictures so that I would understand what the impact was at
4 each of those lines. So they had a great deal of input and
5 technical input in telling me what the impacts would be from
6 drawing those lines.

7 Q Were you concerned at all with what you were
8 seeing as far as lost jurisdiction to these lines?

9 A No. Again, because some of the significant nexus
10 determinations would be -- you would be able to make that
11 determination by going to 100-year flood plain.

12 Q Did you sign off on the limits that were
13 ultimately included in the final rule?

14 A I did.

15 Q Can you explain how these distance thresholds were
16 determined?

17 A There -- well, they're based on a lot of it going
18 back to the connectivity report and what each of these lines
19 would capture. And, you know, the 100-year flood plain is
20 a -- a statistic or alignment used in any number of things
21 from a FEMA map to other things. But the 100-year flood
22 plain varies so much depending upon the characteristics of
23 the water body. The 100-year flood plain from the
24 Mississippi River is a lot different than the 100-year flood
25 plain from a tributary.

1 So having that latitude to be able to go out to
2 100-year flood plain -- some -- sometimes the 4,000-foot
3 line is passed the 100-year flood plain. Sometimes it's
4 within the 100-year flood plain. So having that flexibility
5 to go out as far as you can in order to determine how the
6 connection is going to be made to a navigable water I
7 thought was what would be the most protected.

8 Q How did you negotiate the 100-year flood plain
9 into the final rulemaking? Did you have those conversations
10 just with EPA or did you consult anybody else about them?

11 A The final determinations about it -- again, in
12 consulting with regulatory and having the -- our maps drawn
13 for us. It -- the final number I talked with EPA about.

14 Q Did you meet with anybody within the Executive
15 Office of the President about those last-minute changes?

16 A No. I did not meet with them.

17 Q I'm going to reference Exhibit No. 1 if you still
18 have it in front of you, your QFR responses.

19 On page two, question two, Chairman Inhofe asks about
20 changes to the technical support document and other
21 background documents to address Corps criticisms of the
22 rule. The chairman asks you for your basis for believing
23 that the 4,000 foot distance threshold limit, quote, "will
24 protect the types of water that in practice have been
25 determined to have a significant nexus," unquote, since

1 isolated wetlands are analyzed based on connection to
2 interstate commerce and not their significant nexus to
3 navigable waters. You say that, "The agencies have balanced
4 protection and clarity, scientific uncertainties and
5 regulatory experience, and established a line that is, in
6 their judgment, reasonable and consistent with the statute
7 and its goals and objectives."

8 Q Can you explain your response?

9 A Well, I'm not sure what -- in addition to what's
10 said here that would be in response to the question. You
11 want to formulate it another way that maybe I can be more
12 responsive for you.

13 Q Sure. Well, let's start here. When you refer to
14 "the agencies and their judgment," who were you referring
15 to?

16 A The -- the Army and the EPA.

17 Q And did you ever discuss the difference in the
18 connection of these determinations to interstate commerce
19 and then to navigable waters, since they would be, at least
20 what's being suggested here, two separate sets of data?

21 A Didn't discuss it in that context, no.

22 Q When you received this question did you -- how did
23 you consider answering this question? Because it doesn't
24 seem that you really address that part of the chairman's
25 concerns.

1 A Which part?

2 Q The part that I just read about the fact that you
3 say, "The 4,000 foot distance threshold limit will protect
4 the types of water that in practice have been determined to
5 have a significant nexus"?

6 A Uh-huh.

7 Q "When isolated wetlands are analyzed based on
8 their connection to interstate commerce and not their
9 significant nexus to navigable waters." We're just trying to
10 understand your comment that those waters that have been
11 protected are going to continue to be protected
12 notwithstanding this 4,000 foot threshold.

13 A That they would not continue to be protected?

14 Q Well, your -- your assertion is that they will
15 continue to be protected.

16 A Protected, right.

17 Q But we understand the Corps' concerns are saying
18 that this distance threshold will, in fact, not protect
19 their existing jurisdiction over those waters?

20 A Well, again, I -- I just don't agree with that
21 characterization.

22 Q And you don't agree with that characterization
23 because the Corps could then go out and make significant
24 nexus determinations outside of that 4,000 foot distance; is
25 that right?

1 A Uh-huh. Yes.

2 Q Okay. Were public comments on specific distances
3 solicited in the rulemaking?

4 A Not the specific numbers, no, but -- but that was
5 a response to -- the public comments said that they wanted a
6 bright line and those numbers, I believe, provide that
7 bright line.

8 Q And it was your understanding that public comments
9 seeking a bright line were specifically referencing distance
10 thresholds?

11 A I -- I believe that they were. I mean, there may
12 have been some public comments that particularly put numbers
13 out there, but I'm -- I don't know what those are, but --

14 Q And the bright lines weren't necessarily
15 referencing any other clarity that the public sought in the
16 rule. You -- you believed that the bright lines that were
17 being asked for were actual distance thresholds that the
18 public was asking you to produce?

19 A Yes.

20 Q Can you explain how the limits will be used in the
21 field. I know we spoke very briefly about implementation of
22 the rule, but how do you see the Corps going out and
23 implementing based on those distance thresholds?

24 A Well, when we make jurisdictional determinations
25 we do it, you know, on the ground. And so, what would

1 happen, I expect if this is implemented, is that we would be
2 able to go out and look at where the 100-year flood plain is
3 and where the 100-foot line is and be able to make
4 determinations based on that -- that linear calculation.
5 And also, based on what the water -- the characteristics of
6 the water body is that we're making the determination about.
7 It has to have flow. It has to have all the characteristics
8 of a tributary in order to be able to even begin to make a
9 significant nexus determination.

10 Q Did the Corps express any concerns about being
11 able to determine where 4,000 feet was?

12 A I think they said we're not quite sure how to
13 measure because we haven't done it before, but you know,
14 this is -- it's -- it's a new generational rule. So we
15 would -- it's not that we're not able to do that. It's just
16 we hadn't done it. We had not gone out with a tape measurer
17 and done that before.

18 Q You don't have a 4,000 foot tape measurer?

19 A We might, but if we don't there's a market for one
20 probably.

21 Q Were you aware that the guidebook accompanying the
22 Rapanos guidance and the EPA's own connectivity report
23 provided it's inappropriate to use specific distance
24 thresholds?

25 A I was not aware of that.

1 Q Were these limits included in the draft that was
2 circulated for final interagency review? Just trying to get
3 a sense of when they were added.

4 A No. They were added -- they were added in the
5 final -- within that, whatever many weeks, months that was.

6 Q Okay. We touched a little on tribal consultations
7 earlier and I'll try to keep it brief and non-repetitive.
8 So, I apologize in advance if I do repeat some of these.

9 Can you elaborate on exactly what aspects of the tribal
10 consultations the Army participated in?

11 A I -- I don't know what particular aspects other
12 than, you know, the -- the ones that are reflected in the --
13 the tribal memorandum or report that was -- was introduced
14 earlier. As far as what specific input we had, you know,
15 I -- I was not personally involved in it. So I would need
16 to look back and -- and find out who exactly was, but --

17 Q Are you aware of who at the Army or the Corps
18 reviewed this final summary for tribal consultation?

19 A I don't know the person.

20 Q Are you aware of whether anybody signed off on it
21 or reviewed it before it was finalized?

22 A I would have to assume, but that would be -- I
23 don't know that -- I have not been told exactly who did
24 that.

25 Q Did you direct the Army or the Corps to conduct or

1 participate in consultations in any particular manner?

2 A In a particular manner, no. Just that we needed
3 to be involved in them.

4 Q Would you say that you reviewed the Army or Corps'
5 compliance with the Executive Order 13175 Consultation and
6 Coordination with Indian Tribal Governments in this
7 rulemaking?

8 A I personally did not. I did review those
9 documents that you have there in front of you.

10 Q And to be clear, we're talking about the final
11 summary, correct?

12 A Correct. As well as the -- I reviewed the
13 executive order before as well as --

14 Q When you say you did not personally review for
15 compliance with the executive order, was there anybody in
16 the Army who did?

17 A Again, I can't name a name, but I'm -- I'm -- I
18 believe that we did, but I can't -- I can't give you a name.

19 Q Mr. Schmauder informed the committee that tribal
20 consultations for this rule were managed by the EPA and
21 their tribal liaison staff. Who decided that the EPA would
22 manage this process?

23 A I believe it was a joint decision.

24 Q And would that decision have been at your level or
25 staff?

1 A It would probably have been at staff because I did
2 not have that conversation with the administrator, so.

3 Q Are you aware of who decided that the rule does
4 not have tribal implications as specified under the
5 executive order?

6 A I believe it would be as a result of the -- the
7 consultations that we had and that the EPA being the final
8 author of that report, but again, it was done in conjunction
9 with the Army.

10 Q Even though you're not able to say who would have
11 been working with the EPA on this?

12 A Yeah. I can't give you -- I don't have a name to
13 give you.

14 Q Were you ever briefed on the aspects of the
15 consultation process that the Army or Corps participated in?

16 A In a tribal consultation?

17 Q Correct.

18 A I don't believe I had a -- a briefing on that.

19 Q Are you aware of any concerns that certain tribes
20 felt they were not consulted?

21 A The ones that are reflected, I think there were
22 three tribes that issued comments in that report. Those are
23 the ones that I'm aware of.

24 Q You mentioned earlier that you took a trip with
25 Mr. Smith to Navajo Nation a few months ago.

1 A Uh-huh.

2 Q We understand that one of the council members
3 raised the WOTUS rulemaking in that meeting. Do you recall
4 that?

5 A I don't recall, but we were in a meeting with the
6 chairman and the -- the new president or the vice president
7 talking about mostly the projects on the Nation. They may
8 have raised it, but -- but it wasn't an extensive
9 conversation with me.

10 Q Mr. Smith informed the committee that one of the
11 council members said that the rulemaking had adversely or
12 would adversely affect tribal sovereignty and resources and
13 that they had not been consulted. So you're saying that you
14 were not privy to that conversation or that -- that
15 statement by that council member?

16 A I -- if I was, I don't recall it.

17 Q Okay. What government-to-government meetings, if
18 any, did the Army or Corps hold with tribal governments? I
19 know you said you generally weren't briefed on the specific
20 meetings.

21 A Right. Yeah. I don't know what those would have
22 been, which specific tribes.

23 Q Do you recall whether the EPA at any point made
24 any representation to you that it complied with the
25 executive order?

1 A I don't recall a conversation saying we did this.

2 Q I don't want to get started on another section.

3 Okay, we can go off the record.

4 [Brief recess taken from 2:10 to 2:13 p.m.]

5 Ms. Fraser. It's 2:13. We're back on the record.

6 Ms. Berroya. Ms. Darcy, again, my name is Meghan and I
7 would like to circle back to some things we spoke about when
8 we were last talking.

9 Ms. Darcy. Okay.

10 Ms. Berroya. And I apologize for any of the
11 repetition, but I want to make sure that I fully understand
12 your statements today --

13 Ms. Darcy. Okay.

14 Ms. Berroya. -- before the committee.

15 Ms. Darcy. Okay. Should I refer back to something?

16 Ms. Berroya. Yes, Exhibit 2, please.

17 And, for the record, Exhibit 2 is a portion of the
18 interview transcript of Charles Smith before this committee
19 on February 19th, 2016.

20 If you could, look at page 20.

21 Ms. Darcy. Okay.

22 Ms. Berroya. On page 20 in response to a question from
23 committee staff Mr. Smith said, quote, "She," referring to
24 yourself, "told me in a face-to-face meeting in July -- the
25 date escapes me. Maybe it was early August. It might be in

1 my earlier testimony. It was the second face-to-face I had.
2 That she was disappointed in my recommendation and that she
3 had lost confidence in my ability to support her position on
4 the rule. And that the rest of my portfolio would remain
5 the same, but I would not work on the rule or its
6 implementation."

7 Ms. Darcy. Okay.

8 Ms. Berroya. When we last spoke you said you're not
9 sure you said those exact words, but I recall you saying
10 that you were disappointed; is that correct?

11 Ms. Darcy. Yes.

12 Ms. Berroya. Can you explain to me what you were
13 disappointed in with Mr. Smith.

14 Ms. Darcy. Part of -- we spoke earlier about his
15 preparing an EA and telling us that it was about -- it was
16 near completion. Well, I was disappointed to learn that the
17 draft EA that he had been working on was not nearly
18 complete. So that was my disappointment, that that wasn't
19 nearly complete when that's how it had been characterized.

20 And then, I think I explained earlier when I told him I
21 had lost confidence that was a result of the e-mails that he
22 sent that weren't accurately representing me or our office.

23 Ms. Berroya. So, to be clear, you were not
24 disappointed that Mr. Smith was recommending an EIS?

25 Ms. Darcy. No. No. I mean, as I think I stated

1 earlier, his recommending an EIS was his professional
2 judgment and I -- I accept that and appreciate that. I was
3 disappointed in that what had been represented as an ongoing
4 development of an EA had not gotten to the point that it was
5 almost complete.

6 Ms. Berroya. And I believe you just stated this, but I
7 want to again just make sure that I fully understand.

8 Ms. Darcy. Okay.

9 Ms. Berroya. Mr. Smith said that, quote, "She had lost
10 confidence in my ability to support her position on the
11 rule."

12 Ms. Darcy. Uh-huh. Yes.

13 Ms. Berroya. Can you elaborate on what you meant when
14 you informed Mr. Smith that you had lost confidence in him?

15 Ms. Darcy. Well, again, it was the result mostly of
16 the -- the e-mails that didn't represent what I had said to
17 him in those meetings. And saying that he -- he was now the
18 main point of contact for our office and not Mr. Schmauder
19 and that had never been communicated to him or to Mr.
20 Schmauder. So I -- that's how I didn't have confidence in
21 the fact that he was accurately representing what I was
22 saying.

23 Ms. Berroya. So your loss of confidence in Mr. Smith
24 is not related to his recommendation that an EIS be
25 completed?

1 Ms. Darcy. No. I said the -- the confidence part,
2 sort of, that -- that put me in that position was the -- the
3 misrepresenting me in his e-mails to EPA.

4 Ms. Berroya. Can you turn to the next page of Exhibit
5 2, please.

6 Ms. Darcy. Sure.

7 Ms. Berroya. I'm going to go to the second part of the
8 second paragraph of Mr. Smith's answer that begins, "And
9 then."

10 Ms. Darcy. Uh-huh.

11 Ms. Berroya. Do you see where I am?

12 Ms. Darcy. "And then"? Am I on the right page?

13 Ms. Berroya. Next paragraph down.

14 Ms. Darcy. This one? "One was three years ago," that
15 one?

16 Ms. Berroya. Yeah. I can start there.

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

1 Did you recommend that Mr. Smith be -- have his rating
2 be reduced because of his EIS recommendation?

3 Ms. Darcy. No.

4 Ms. Berroya. In the last -- the last time that we
5 spoke you said that the EIS recommendation was not a primary
6 reason that Mr. Smith -- that you concurred with Mr. Smith's
7 rating being reduced, correct?

8 Ms. Darcy. Correct.

9 Ms. Berroya. You said that Mr. Smith's
10 misrepresentation in e-mails was one of the factors; is that
11 correct?

12 Ms. Darcy. That was one of the factors of my losing
13 confidence in him and not having him be our spokesperson on
14 the rule -- the implementation of the rule.

15 Ms. Berroya. But you mentioned when we last spoke that
16 the EIS recommendation was one of the factors that you
17 considered when concurring with the recommendation to reduce
18 Mr. Smith's rating, correct?

19 Ms. Darcy. Correct in that we have to look at
20 everything that was based on performance in that entire
21 rating period.

22 Ms. Berroya. Can you explain what aspect of the EIS
23 recommendation by Mr. Schmauder you considered when
24 concurring with that recommendation?

25 Ms. Darcy. By Mr. Schmauder or Mr. Smith?

1 Ms. Berroya. I'm sorry, by Mr. Smith, yes.

2 Ms. Darcy. Okay. So?

3 Ms. Berroya. Let me restate the question.

4 So, what aspect of Mr. Smith's EIS recommendation did
5 you consider in reviewing the totality of his work product
6 when concurring with Let Mon Lee's reduction of Mr. Smith's
7 rating? Was it the substance of the recommendation? Was it
8 the quality? Was it --

9 Ms. Darcy. It wasn't -- it wasn't his recommendation.
10 It was the work product that was not complete as an -- even
11 as an EA in -- in what he had been saying he had been doing
12 in developing the EA over time.

13 Ms. Berroya. So did Mr. Schmauder's -- let me start
14 again.

15 Did Mr. Smith's opinion that the WOTUS rulemaking would
16 have a negative impact influence your concurrence that his
17 rating be reduced?

18 Ms. Darcy. Well, let me -- is the question whether
19 his -- his -- in -- in developing an environmental
20 assessment -- you have to develop an environmental
21 assessment in order to determine whether or not you need an
22 environmental impact statement or whether you come to the
23 conclusion of a FONSI, a Finding of No Significant Impact.
24 So you have to do an EA in order to get to the decision, one
25 way or the other, EIS or FONSI. And I believe that in -- in

1 Mr. Smith's development of the EA he was getting to a point
2 where he was determining that -- well, he advised that he
3 thought an EIS was necessary, but given the fact that the
4 development of the EA had -- was not as far along as I had
5 been told it was, influenced my assessment of his work
6 product more than the recommendation for the EIS versus the
7 EA. Am I -- am I making myself clear?

8 EXAMINATION

9 BY MS. FRASER:

10 Q Let me ask you this question.

11 A Okay.

12 Q The document that was ultimately handed to you by
13 Chip Smith, the document that was purported to be 85 percent
14 complete --

15 A Uh-huh.

16 Q -- and that you subsequently determined was not
17 that close to being complete --

18 A His supervisor and others determined that and
19 advised me of such.

20 Q Thanks for the correction.

21 A Yeah.

22 Q Was there any analysis in that document that
23 supported either a FONSI or an EIS, as far as you know?

24 A As far as I know, I -- again, I don't think it had
25 gotten to the point of being -- getting to that

1 recommendation.

2 Q Okay.

3 A I think Mr. Smith's recommendation was based on
4 what he had done so far, but I don't believe it was at the
5 point where it could go -- you know, that it was going to
6 say EIS. It was his opinion that an EIS was going to be the
7 outcome.

8 Q But that opinion was not reflected in any of the
9 writings that had been in that report; is that right?

10 A That's -- that's -- yes.

11 Q And as far as you know, that opinion was only
12 verbal and it was shared with you and his supervisor at the
13 time that he turned in his 85 percent, or whatever the
14 percentage was correct, document?

15 A Yes.

16 Q I'd like to turn your attention now to a part of
17 the discussion we were having in the last hour regarding the
18 Peabody memos. During that discussion you were asked about
19 your communication with the EPA regarding the content of the
20 Peabody memos. I'd like to turn your attention to the
21 exhibit that has pages 11 -- 111 and 112 that is Ms.
22 McCarthy's testimony. What exhibit number is it?

23 A Nine.

24 Q Nine, thank you. If we take a look at page 111 of
25 that document, I'd like you to follow along with me as I

1 read.

2 Now, at that hearing, which is the July 29th Oversight
3 and Government Reform hearing that this testimony was taken
4 at, Ms. McCarthy was asked if it was her understanding
5 whether or not Assistant Secretary Darcy took concerns in
6 the memos and, quote, "walked them through with the EPA
7 finalizing the rule." Administrator McCarthy responded,
8 "That is my understanding, yes." Page 111.

9 A Uh-huh.

10 Q She also responded -- she was also asked whether
11 or not she could confirm whether EPA knew of the concerns
12 before finalizing the rule. She responded, quote, "In
13 working with Jo Ellen Darcy" -- and I think this is on page
14 112.

15 A Uh-huh.

16 Q "In working with Jo Ellen Darcy on this rule, she
17 indicated that all of the concerns of the Army Corps had
18 been satisfied. In moving forward with the final, I
19 individually had conversations with her about the changes
20 that the Army Corps was interested in making as the proposal
21 moved through the interagency process, and I understood that
22 everything had been fully satisfied."

23 Is Administrator McCarthy's testimony consistent with
24 your recollection?

25 A It is. And I would just add that, you know, in

1 that conversation I -- they had been -- the Army's concerns
2 had been fully satisfied.

3 Q The Army's concerns?

4 A Yeah. And -- for the purposes of moving forward
5 with the final rule I believe they were.

6 Q Let's explore that for a moment, the Army's
7 concerns.

8 Now, the Army's concerns are the concerns that are put
9 forth -- well, are -- are the issues that are contemplated
10 both by the Army and the Army Corps; is that right?

11 A Yes, in most cases.

12 Q And we discussed during the morning hours that
13 staff concerns from the Corps had been raised through Mr.
14 Schmauder for your determination several times during the
15 process; is that right?

16 A Yes.

17 Q And that was during the entire year-long process
18 that it took this rule to develop; is that right?

19 A Yes.

20 Q And so, at the time you received the Peabody memos
21 and you looked at some of those things that had been
22 discussed in there, many of those points are issues that had
23 been raised to your attention previously; is that right?

24 A Yes.

25 Q And you had discussions with Mr. Schmauder and

1 other people within the Army and the Corps about some of
2 those issues; is that right?

3 A About some of them, yes.

4 Q And based on the discussions that you had on those
5 issues you made a determination as to whether or not these
6 issues were going to become a part of the final rule; is
7 that right?

8 A Yes.

9 Q There came a point at which you took some matters
10 and they became part of the final rule and there came a
11 point where some other matters did not make it into the
12 final rule; is that right?

13 A Yes.

14 Q You mentioned several of those matters. Some of
15 them were the grandfathering aspect. You also mentioned a
16 comprise on ditches.

17 A Yes.

18 Q And a few minutes ago you had a lengthy discussion
19 about the bright line rule and the 100-year flood plain,
20 right?

21 A Yes. Yes.

22 Q And those were the issues that had been discussed
23 as the rule went along in development that you ultimately
24 decided, these were ones that I think is worth making
25 changes in the rule for, right?

1 A Yes. Yes.

2 Q And these were all issues that had been brought to
3 your attention by Corps staff, right?

4 A Yes.

5 Q Now, I believe in the very first -- second hour
6 that we were having this discussion, Secretary Darcy, you
7 mentioned that it is your prerogative to make final
8 determinations on policy concerning the rule.

9 A Yes.

10 Ms. Berroya. Would you expect that all viewpoints
11 within the Corps to be incorporated in a final rulemaking?

12 Ms. Darcy. I don't believe that all viewpoints are
13 always included in a final rulemaking.

14 BY MS. FRASER:

15 Q And that even outside of rulemakings, people in
16 organizations have differences of opinion as to how to
17 approach any particular issue, right?

18 A That's correct.

19 Q And oftentimes, not everybody's viewpoint on an
20 issue can be included in a final document?

21 A And often they are considered, but -- if not
22 agreed to, but they are considered.

23 Q And in this case you considered many or if not all
24 of the concerns that were raised in the Peabody memos and
25 decided which ones you wanted to include in your final

1 document?

2 A Which ones I thought we would be able to get some
3 agreement on within the rule, yes.

4 Ms. Berroya. And you discussed the issues that were
5 raised within the Peabody memo with the EPA, correct?

6 Ms. Darcy. Yes. I -- I talked about many of them with
7 the administrator, but Craig Schmauder discussed all of them
8 with EPA staff.

9 Ms. Berroya. So you're aware that all of the issues
10 and concerns raised in the Peabody memos were --

11 Ms. Darcy. Were discussed, yes.

12 Ms. Berroya. -- were discussed?

13 Ms. Darcy. Yes.

14 Ms. Berroya. And in your discussions with my
15 colleagues in the majority in the last hour you mentioned
16 that some of the viewpoints expressed in response to the
17 WOTUS rulemaking were stronger than you had seen in other
18 situations, correct?

19 Ms. Darcy. Yes. Well, and because I hadn't seen them
20 in writing before. Maybe one -- you know, one reason that
21 they seemed stronger.

22 Ms. Berroya. I think you've also referred to this as a
23 generational rulemaking --

24 Ms. Darcy. Yes.

25 Ms. Berroya. -- correct? What did do you mean by

1 that?

2 Ms. Darcy. I mean that there has not been a rulemaking
3 associated with the Clean Water Act for a generation. That
4 it is -- this law was enacted 40 years ago. So in 40 years
5 we've had an evolution of the science which is what this
6 rule is based on. And being informed by the science in
7 order to update the rule so that it is more -- so that it is
8 as protective of this nation's waters as it could be is what
9 the goal of the rule was to begin with.

10 Ms. Berroya. Do you think that the significance of
11 this rulemaking might have caused some within the Army or
12 Army Corps to express their viewpoints in response more
13 strongly?

14 Ms. Darcy. That's a possibility I suppose.

15 Ms. Fraser. I'd like to have this document marked as
16 our next exhibit.

17 [Whereupon, Reporter responds.]

18 Ms. Fraser. Ten, thank you.

19 [Darcy Exhibit 10 was marked
20 for identification.]

21 BY MS. FRASER:

22 Q Exhibit 10 is Questions for the Record that were
23 asked of Administrator McCarthy after the July 29th hearing
24 of the Oversight and Government Reform Committee. I'd like
25 to draw your attention to page two.

1 Now, in response to these Questions for the Record,
2 Administrator McCarthy was asked on page two whether or not
3 each of the issues or recommendations raised by the Corps in
4 these documents were in fact adopted or otherwise addressed
5 in the final rule. She responded in question two, "Final
6 Clean Water Rule reflects consideration of, and decisions on
7 each of the issues raised by both the Corps and EPA staff.
8 The rulemaking process represents years of interagency
9 discussion, coordination and decision making consistently
10 involving technical, policy and legal input from staff
11 managers and senior policy executives. The final rule
12 represents conclusions based on the best available science,
13 agency experience and the law. These conclusions were
14 accepted by both EPA and reviewed through an interagency
15 process coordinated by the Office of Management and Budget."

16 Secretary Darcy, is Administrator McCarthy's statement
17 an accurate representation of the body of work between your
18 office and the EPA?

19 A Yes, I believe it is.

20 Q I draw your attention to the document again.
21 Question five, Administrator McCarthy was asked -- she
22 stated, "All final decisions made by the Department of the
23 Army and EPA reflect careful consideration of input from the
24 Corps and EPA staff and represent the best science the
25 agency -- agency experience with administration of the Clean

1 Water Act, and the law."

2 Again, Secretary Darcy, is this an accurate statement?

3 A Yes.

4 Q I'm going to ask you to take a look at question
5 six, page two -- bottom of page two. Administrator McCarthy
6 stated, "The Final Clean Water rule is the result of many
7 years of coordination and discussion between the EPA and
8 Corps staff during which time both agencies were involved in
9 extensive evaluation, coordination and final
10 decision-making. During this process EPA, Army and the
11 Corps staff talked on perhaps hundreds of occasions to share
12 perspectives, provide information and discussion options.
13 Discussions also involved experts from other agencies on
14 legal, technical and policy issues to ensure the final rule
15 represents the best science, agency experience and the law."

16 Again, is this an accurate statement or representation
17 of the work between the EPA and the Army on the WOTUS rule?

18 A Yes, it is.

19 Q Would you characterize that some of the concerns
20 that had been raised in the Peabody memos and individually
21 by Corps staff would be embodied by these hundreds of
22 meetings and other contacts that were made between the EPA
23 staff and the Corps staff and the Army?

24 A That they would have been embodied in those
25 discussions, yes.

1 Q And again, this rule was developed over a number
2 of years?

3 A Yes.

4 Q Okay. I'd like to ask you once again about a
5 discussion that was had earlier about the timeline
6 concerning the development of this rule.

7 Now, there's been some contention, Secretary Darcy,
8 that there was an inappropriate urgency to complete this
9 rule quickly. Once again, you discussed a few minutes ago
10 that this rule took years. Approximately, how many years
11 did it take from the time that you got involved in the
12 guidance to the time that a final rule was promulgated?

13 A Well, as I said earlier, when I began this job in
14 August of 2009 the guidance was in -- in process. And if
15 the final rule went final in June of 2015, that's at
16 least -- that's six years that I was involved for the
17 administration.

18 Q Would you consider that six-year period to be a
19 quick process?

20 A It was long.

21 Q It was long, right?

22 A Yes. As I said, it was the first rulemaking I've
23 been involved with and it takes a long time.

24 Q And in your experience with the rule do you
25 believe that the timetable by which various benchmarks were

1 reached in this rulemaking, was it inappropriately
2 influenced by politics in your estimation?

3 A No. Again, we were instructed to follow the
4 science and listen to the public and I think that's what we
5 did.

6 Q And so, based on your experience with this lengthy
7 rulemaking, how do you respond to charges that there was
8 inappropriate urgency in the timeline?

9 A I just don't think that's accurate.

10 Q There was some concerns raised in previous
11 interviews there was inappropriate influence by the U.S.
12 Department of Transportation and U.S. Department of
13 Agriculture in this rulemaking. Do you recall what interest
14 these two agencies had in the development of this rule?

15 A Well, as -- as federal agencies they have an
16 interest in -- in any rulemaking that impacts their -- their
17 agency. The Department of Transportation concerns over road
18 construction, what the impact would be, particularly on
19 ditches. The Department of Agriculture, as far as the
20 impact on farmers, ranches and civil culture.

21 What the rule does is make the existing exemptions
22 permanent for farmers and ranchers. And wanted to ensure
23 that that continued and that no change was made to the prior
24 converted croplands provisions of the rule. So, they were
25 very interested on what the impact was going to be on -- on

1 their agencies and their constituents.

2 Q And is there anything inappropriate or invalid
3 about taking their consideration -- their concerns into
4 consideration?

5 A No. And that's part of the interagency process to
6 review. That happens with every rule.

7 Q In your estimation did the administration exert
8 any kind of inappropriate influence on the promulgation of
9 this rule?

10 A No.

11 Q Did the administration instruct yourself or, as
12 far as you know, the EPA to get this rule done or promulgate
13 this rule without regard to science or science research?

14 A No. The basic tenant for the promulgation of this
15 rule is that it be based on sound science -- the best
16 available sound science, which is what's available now. Not
17 what was available when the law was written in the '70s.

18 Q Was there any instruction from the administration
19 regarding disregard for any statutory requirements as you
20 developed this rule?

21 A No.

22 Q And in your experience were any members of the
23 Corps ever instructed to disregard science or regulation --

24 A No.

25 Q -- as they put the rule together?

1 Was any part of this rule forced upon the Army and the
2 Corps by the EPA?

3 A No.

4 Q How would you characterize the relationship
5 between the Army and the EPA as they developed the rule?

6 A I would say that as -- throughout the development
7 of the rule the relationship improved over time. And I
8 think it has been a result of the fact that we were
9 collaborating for -- for a shared goal which was to make the
10 Clean Water Act more transparent, more predictable for the
11 stakeholders who rely on it. And I think because of that we
12 improved the relationship between the two agencies
13 dramatically. We now have joint implementation memos that
14 have never happened before and I think it's because of
15 the -- the shared development from day one with the same
16 goal.

17 Q Okay. Do you believe that the joint rulemaking
18 between the Army and the EPA accomplished the goal set out
19 in the Rapanos and SWANCC decisions?

20 A I do.

21 Q And do you stand by the -- do you stand by
22 everything that's been set forth in this rule?

23 A I do.

24 Q And do you believe that it comports with the law?

25 A Yes, it does.

1 Q And you do believe that it comports with science?

2 A I do.

3 Ms. Fraser. We can go off the record.

4 [Brief recess taken from 2:41 to 2:43 p.m.]

5 Ms. Aizcorbe. Go back on the record.

6 EXAMINATION

7 BY MS. AIZCORBE:

8 Q Okay. We've spoken quite a bit -- at least our
9 colleagues have spoken quite a bit about the Army's NEPA
10 action with respect to this rulemaking. So I'll try to keep
11 it short.

12 You were the ultimate decision-maker for the NEPA
13 action; is that correct?

14 A Yes.

15 Q Can you explain your background with reviewing or
16 conducting NEPA analyses prior to the WOTUS rulemaking?

17 A I personally have not done a NEPA analysis. I'm
18 not a biologist or ecologist by trade. I'm familiar with
19 environmental impact statements and EAs in the work that
20 I've done previously during -- and legislation. My
21 portfolio involved Clean Water, Safe Drinking Water, all of
22 the Army Corps of Engineers water resources programs and
23 projects. So I'm familiar with an EA and the difference
24 between an EA, EIS and the NEPA process, but I've personally
25 never conducted one.

1 Q As my colleagues touched on previously, two
2 environmental assessments were conducted, one by Chip Smith,
3 which was not published, and one by Gib Owen which was
4 ultimately included in the final rule. Can you explain the
5 decision to pursue a second EA.

6 A I wouldn't characterize it as a second EA. I
7 would characterize it as the EA to accompany the rule. The
8 draft EA that was being developed by Mr. Smith ultimately
9 was not completed. The completed EA for the rule was
10 completed by Mr. Owen.

11 Q Who decided to have Mr. Owen initiate or continue,
12 I guess, the EA?

13 A I did.

14 Q What is Mr. Owen's position with the Corps or the
15 Army?

16 A He's -- he's the -- my assistant for
17 environmental -- okay, we just redid the job descriptions.
18 So I can't remember his exact title, but he's in the Policy
19 and Legislation division of my office and he oversees many
20 of the environmental programs.

21 Q Was Mr. Owen involved in the WOTUS rulemaking
22 prior to being brought on to conduct this analysis?

23 A He was involved in as much as the policy and
24 legislation branch is involved in overseeing and being up to
25 speed on what the pursuits are within our policy branch.

1 And this was a big policy initiative for our agency. So --

2 Q So --

3 A -- he was familiar with it.

4 Q He was familiar with it, but he hadn't necessarily
5 individually contributed to the rulemaking?

6 A Not in -- not in the development of it early on,
7 no.

8 Q Were you aware of when his exposure to the
9 rulemaking began?

10 A Well, he joined our office while in the midst.
11 He's only been with our office for two years now,
12 two-and-a-half years. He was with the Corps in the Corps
13 headquarters before that. So when he came on board, you
14 know, as part of what was in our Policy and Legislation
15 portfolio he was aware that it was under development.

16 Q Do you know what he was working on while he was
17 with the Corps?

18 A He was in their -- in the regional integration
19 team for the Mississippi Valley division. He'd been --
20 previous to that he worked in the New Orleans district,
21 worked on post Katrina recovery and -- and on Katrina --
22 actually, he was there during Katrina.

23 Q And how long had he worked for you before you
24 assigned him to this task?

25 A Let's see.

1 Q You said he was --

2 A I believe it was -- yeah. Well, at least a
3 year-and-a-half maybe.

4 Q And you were aware of his qualifications at the
5 time you assigned him to the EA?

6 A Yes.

7 Q On Exhibit No. 2, your QFR responses, on page
8 nine.

9 A Which exhibit was it again, please?

10 Q One.

11 A One, okay.

12 Q So your first response at the top of that page.

13 A On page nine?

14 Q You state that, "Mr. Owen has extensive experience
15 with environmental compliance and, therefore, had the
16 necessary skills and expertise to lead the environmental
17 compliance effort for the Clean Water Rule."

18 A Uh-huh.

19 Q Can you elaborate what you mean by "extensive
20 experience with environmental compliance"?

21 A That was part of his responsibility in -- in the
22 New -- New Orleans district was environmental compliance.
23 Again, it's mostly post Katrina. As far as the permits that
24 were issued and how people were complying with them and what
25 was needed in order to get permits, as well as recovery

1 efforts.

2 Q You mentioned in an earlier hour that Mr. Owen had
3 conducted environmental assessments before.

4 A Uh-huh.

5 Q Can you explain how you knew this.

6 A His supervisor told me that he had had that
7 experience.

8 Q And who was his supervisor?

9 A Let Mon Lee.

10 Q Are you aware of how many he conducted?

11 A I don't know how many.

12 Q Do you know whether he did those in his capacity
13 with the Corps?

14 A Yes.

15 Q Okay. You also mentioned that Mr. Owen
16 conducted -- consulted with experts. Can you be more
17 specific?

18 A I know there are people within the New Orleans
19 district, within the planning and environmental compliance
20 division and the regulatory division there who had had
21 experience in doing EAs themselves.

22 Q The chief of the Corps regulatory program informed
23 us that during his review "she answered basic questions for
24 Mr. Owen about regulatory program information. Including
25 the definitions of a jurisdictional determination that her

1 regulatory staff would typically know the answers to." Does
2 that raise any concern with you?

3 A That he consulted an expert to help him?

4 Q That he was asking -- that he was asking such
5 basic questions as -- I provided the example, what a
6 jurisdictional determination means?

7 A I -- no. I think it's probably a reflection on
8 the fact of wanting to assure that the -- the definition of
9 a jurisdictional determination was the same in the eyes of
10 the chief of regulatory as it was in what was going to be
11 reflected in an EA.

12 Q So there's no concern that the chief of the Corps
13 regulatory program was informing this committee that he
14 asked basic questions that any of her regulatory staff would
15 have known the answers to?

16 A No. Again, I think the -- well, I think asking
17 the question helps to make sure that there's a consistent
18 understanding in what a jurisdictional determination is.

19 Q Were you aware at the time of taking Mr. Smith off
20 of the EA that he had reviewed over 500 NEPA compliance
21 documents and drafted several dozen environmental
22 assessments and EIS's?

23 A I wasn't aware of that number, but I knew he had
24 experience in both of those areas.

25 Q You mentioned that there was some question about

1 the status of Mr. Smith's EA when he turned it into his
2 supervisor and Mr. Schmauder. At any point did you read Mr.
3 Smith's draft?

4 A I did not read the draft.

5 Q So any of your observations that you were
6 discussing earlier were based on what you heard from Mr. Lee
7 and Mr. Schmauder?

8 A Yes.

9 Q You also said earlier that Mr. Smith informed, I
10 believe Mr. Lee, but if I'm wrong, please correct me, that
11 he couldn't do an EA. Do you mean to say that he couldn't
12 complete an EA with a FONSI or that he couldn't do the EA
13 itself?

14 A I believe he said he could not do an EA because he
15 believed that an EIS was necessary.

16 Q Are you aware of whether his draft EA contained a
17 recommendation to do an EIS?

18 A I don't believe it did. I think that was verbal,
19 but I'm -- I'm not certain.

20 Q Mr. Smith informed the committee that he could not
21 complete an EA FONSI because of changes made to the rule.
22 Is that consistent with your understanding?

23 A Yes.

24 Q To your knowledge, did he give you or anybody else
25 any other explanation of his recommendation for an EIS?

1 A Anymore detail? I'm not aware.

2 Q What was Mr. Owen told or charged with when he was
3 brought on to complete an EA?

4 A That we needed to have an environmental assessment
5 of the -- of the final rule 'cause it was after the proposed
6 rule that this -- well, that we needed -- that our office
7 was responsible for doing the economic analysis -- I mean,
8 the environmental analysis for the proposed rule.

9 Q Was he informed that there was already a draft EA
10 in existence?

11 A Yes.

12 Q Was he informed as to why that author was taken
13 off of the EA?

14 A I don't believe I told him that. His supervisor
15 may have.

16 Q Are you aware of whether he was told that he must
17 complete the EA so that it made a FONSI?

18 A No.

19 Q Based on when Mr. Owen initiated the second
20 environmental assessment, which is, to our understanding,
21 and please correct us if we're wrong, after April 27th when
22 Mr. Smith turned his in, he had less than a month to
23 complete his assessment before OMB completed its review. At
24 any point did you question how Mr. Owen completed his
25 environmental assessment in such a short period of time?

1 A No. I didn't question why he had. I told him to
2 use whatever resources he needed to, avail himself of any
3 experts or whatever to help him.

4 Q Was he given any deadline for completion of his
5 EA?

6 A I don't believe so.

7 Q Can you explain what you took into consideration
8 in approving the Army's FONSI, specifically, what kind of
9 data and analysis?

10 A What was contained in the environmental assessment
11 was again prepared by experts and reviewed by experts of
12 NEPA within the administration. Including the Council on
13 Environmental Quality and the Department of Justice. So,
14 I'm not an NEPA expert, but I consulted them in order to
15 make this determination.

16 Q And CEQ and DOJ had not seen the draft EA; is that
17 correct?

18 A That's correct.

19 Q Okay. Did you --

20 A By "draft EA" you mean the one that Mr. Smith was
21 preparing?

22 Q Correct.

23 A Okay.

24 Q Did you read Mr. Owen's EA?

25 A I did.

1 Q Are you aware of how it evaluates significant
2 adverse impacts to endangered species and habitat?

3 A I'm not sure what you're asking there.

4 Q I was just asking how it evaluates significant
5 adverse impacts within the scope of the ESA?

6 A I'm -- well, depending upon -- it would be within
7 the confines of the Endangered Species Act. We have to
8 evaluate the impact on habitat.

9 Q Are you aware of whether there was an analysis in
10 his assessment of this impact?

11 A I believe there was.

12 Q Same question for the rule's impact on historic
13 properties based on changes made to the rule.

14 A I believe that all of those things have to be
15 included in an EA because we're required to consult with --
16 on the Endangered Species Act, on 106 of the Historic
17 Preservation Act and also the Fish and Wildlife Coordination
18 Act.

19 Q But you don't recall how that -- those aspects
20 were analyzed?

21 A Not the particulars of them, no.

22 Q Okay. When did you first find out that the Corps
23 was recommending an EIS?

24 A That the Corps was recommending an EIS?

25 Q Or that staff within the Corps felt an EIS was

1 necessary?

2 A There was one meeting that, in the opinion of one
3 of Corps counsel's, that an EIS would probably be necessary
4 if we made a -- made decisions one way or another. The EIS
5 that's referenced in the Peabody memo is the first time in
6 writing that they had said that they believed that an EIS
7 was necessary.

8 Q Do you recall when that one meeting with Corps
9 counsel took place?

10 A No, but it was before -- I don't remember. It was
11 with Corps counsel and others, but it was -- I remember
12 Lance Wood's opinion on that.

13 Q Was it before Mr. Smith had finished, or to the
14 extent that he finished his draft EA, had turned that in?

15 A I don't recall exactly.

16 Q Do you recall it being the first time you had
17 heard anybody within the Army or Corps recommend or say that
18 an EIS might be necessary?

19 A That might have been the first time. I -- I think
20 it's the first time I had heard it from Lance Wood.

21 Q Besides the Peabody memoranda, did anyone in the
22 Corps express directly to you the need to complete an EIS?

23 A No.

24 Q Anyone in the Army?

25 A No.

1 Q Did you discuss it with the EPA at all?

2 A On an EIS versus an EA? I don't recall having a
3 conversation about that.

4 Q When you were discussing your conversations with
5 Mr. Smith earlier and whether or not the reasons for his
6 removal included his recommendation that an EIS be conducted
7 you stated that you weren't sure those were the words you
8 used. Just to be clear, in those two meetings did you
9 discuss his draft EA at all?

10 A Not the contents of it, no.

11 Q Did you discuss anything about the EA or his
12 involvement with the EA?

13 A I believe we did, but again, I don't recall
14 exactly what -- we -- we probably did.

15 Q I'm just trying to understand what might have
16 given Mr. Smith the impression that his recommendation was a
17 part of the justification for his removal from the Clean
18 Water Rule after he'd been primarily working on it for so
19 long. So, if there's any other memory that you have of
20 discussing it in those meetings that would be helpful for us
21 to know.

22 A My decision to have Mr. Smith not be representing
23 our office on the implementation of the rule was based on
24 the e-mails that he sent that mischaracterized our meetings.

25 Q And in those e-mails you said that there was a

1 misrepresentation about Mr. Schmauder's role in the
2 rulemaking.

3 A Uh-huh.

4 Q Is that the entirety of what was concerning to you
5 in those e-mails?

6 A It -- it was that and the fact that I had
7 designated Mr. Smith as the sole person within our office to
8 be working on this and that was not the case.

9 Q Would you be willing to share those e-mails with
10 the committee?

11 Ms. Darcy. Can I do that?

12 Ms. Weis. Yeah.

13 BY MS. AIZCORBE:

14 Q I'm not -- I'm not sure they've been produced to
15 the committee yet in the production.

16 A Okay. Yeah. I don't know either, but e-mails
17 that were the basis for my loss of confidence in Mr. Smith?

18 Q Correct.

19 A Okay.

20 Ms. Darcy. I would have to ask you.

21 Ms. Berroya. I'm sorry, I know I was doing this a lot
22 in the last hour, but did you -- you just said you
23 designated Mr. Smith to be the sole person in the office --

24 Ms. Darcy. No, I had not.

25 Ms. Berroya. Sorry, I'm way back here.

1 Ms. Darcy. Okay.

2 BY MS. AIZCORBE:

3 Q So would you be allowed to -- or would you be
4 willing to share those e-mails with the committee if counsel
5 provides for that?

6 A Yes. Yes.

7 Q Okay.

8 A Just have to ask legal if I can do that.

9 Q My colleagues also spoke about Mr. Smith's
10 performance rating of a four. You said you couldn't speak
11 to Mr. Lee's comment that it had something to do with Mr.
12 Smith's recommendation for an EIS. What exactly was the
13 reason for his change then? You said it was -- you took a
14 holistic view of all his activities in that year, but are
15 you as the final signatory for performance ratings
16 responsible for providing any sort of justification?

17 A Not -- no, not really. The -- the intermediate
18 rater makes a rating and then I either concur or -- or not
19 with that. And the intermediate rater had that rating and I
20 concurred with what he had proposed.

21 Q And to your knowledge Mr. Lee did not include any
22 mention of Mr. Smith's performance with respect to the
23 rulemaking in his rating?

24 A Performance particular to the rulemaking? I think
25 it would have -- the performance would have some basis on --

1 on the rating, but it would be more than just his
2 performance on the rulemaking.

3 Q I was just asking if the justification provided in
4 his actual rating included any mention of the rule or his
5 recommendation or his conducting the EA to your knowledge
6 or --

7 A I'd have to go back and look at his rating.

8 Q Uh-huh. When you sign off on performance ratings
9 or approve on ratings that other people have conducted or
10 drafted, does a justification need to accompany any change
11 in a rating from a previous year?

12 A It doesn't have to, no.

13 Q Is it typical that there's no justification
14 provided?

15 A What -- usually the -- the way it's structured is
16 there are, you know, goals within there that you are
17 supposed to -- that you set out to meet in that year. And
18 then the -- the intermediate rater provides a response to
19 that as -- as the -- the -- the employee has characterized
20 what they have accomplished in that year. And then, the
21 intermediate rater provides their comments on whether they
22 have met those goals or whether they concur or any kind of
23 other input as to whether that has been met or not. And
24 again, on -- on Chip's in particular, I'd have to go back to
25 see what exactly Mr. Lee proposed in his initial rating.

1 Q You don't recall having a conversation with Mr.
2 Lee about the reason for that change?

3 A No.

4 Q Okay. The Peabody memoranda included a series of
5 recommendations including reducing the linear foot distance
6 in definition for -- from 1,500 to 300 feet, adding new
7 criteria as you've mentioned as the 100-year flood plain and
8 editing the final draft for clarity and simplicity. And,
9 specifically, that without these changes the final draft
10 cannot be promulgated as a final rule without an EIS. Were
11 all of the changes that I just mentioned implemented in the
12 final rule?

13 A Some of them.

14 Q You mentioned earlier that the Corps' opinion that
15 an EIS was necessary was not based on the final rule which
16 included some changes; is that correct?

17 A Yes.

18 Q In an interview well after promulgation of the
19 final rule the chief of the Corps regulatory program
20 informed this committee that she stood by her
21 recommendations in these memos. Is there some other reason
22 why you would think that the Corps does not still hold the
23 opinion that an EIS would have been necessary to evaluate
24 the impact of this rule?

25 A You mean once the rule was final whether the Corps

1 believes that an EIS is still necessary? Is that the
2 question?

3 Q Right. So you mentioned that the Corps held this
4 belief that an EIS was necessary because they were not
5 considering the rule in its final form.

6 A Correct.

7 Q And so what I'm saying is, we have Ms. Moyer
8 coming to the committee saying that she still stands by all
9 of her recommendations in the memos, which included the
10 statement that an EIS was necessary to promulgate the final
11 rule. And so, I'm trying to understand if it's your opinion
12 that -- that -- or if there was something else that you
13 meant to say earlier when you were saying that the Corps
14 didn't consider the final rule.

15 A Well, I think that many of the changes that were
16 made between the proposed rule and the final rule were of
17 the basis for an EA as opposed to an EIS. And I'm not -- I
18 can't speak for where Jen Moyer believes the changes were or
19 were not significant enough to have an EIS.

20 Q And so you're not aware of the Corps' position at
21 this time as to whether an EIS should have been conducted?

22 A I have not had a conversation with them about
23 that.

24 Q Did you discuss making a FONSI with anyone before
25 the environmental assessment was complete?

1 A Well, just the -- the questions I would ask on a
2 regular basis about what the status of the EA was.

3 Q Was it your understanding that the rule could not
4 be promulgated without a FONSI? Was it your understanding
5 that a FONSI would be necessary in order to move the rule
6 along or is there some other reason why you assumed that a
7 FONSI was necessary?

8 A No. I mean, a finding of no significant impact is
9 necessary in order to move forward or, again, a
10 recommendation of an EIS. And we found that the FONSI was
11 what was necessary for this rule.

12 Q After others, who have significant regulatory and
13 other experience with this rulemaking, recommended that
14 based on the changes an EIS would be necessary. So I'm
15 trying to understand why that was not --

16 A Well, I -- I guess in consulting experts on NEPA
17 and given the final rule text, an EA and a FONSI were
18 finalized. As far as the Corps' opinion of the EIS, I
19 believe it's based on a snapshot in time that does not
20 reflect the final rule. And they may not agree with that,
21 but --

22 Q And notwithstanding their current position?

23 A If that's their current position.

24 Q And I know we touched on this earlier, when you
25 say that experts were consulted and NEPA experts were

1 consulted, did you, in sharing that information with the DOJ
2 and CEQ and your internal experts, share that the Corps had
3 differing opinions?

4 A No.

5 Q Did you speak to anyone regarding whether an EIS
6 would extend the rulemaking timeline?

7 A Discuss it with anyone? No. I mean --

8 Q Any concerns that an EIS would -- would prolong
9 the rulemaking process?

10 A Well, an EIS is a longer process, but that -- it's
11 not a reason to not do an EIS.

12 Q That wouldn't have concerned you?

13 A No.

14 Q Did any other information influence your decision
15 not to pursue an EIS that we haven't already discussed?

16 A I don't believe so, no.

17 Q Mr. Schmauder informed this committee that the
18 decision was made that Army didn't need the environmental
19 assessment to be completed while the rule was still in
20 interagency review so long as it was completed by the time
21 the final rule went public. Can you explain whether that's
22 your opinion as well.

23 A It was being developed while we were finalizing
24 the rule. So it would need to be final when the rule was
25 final.

1 Q And can you explain how that would have worked if
2 the EA made a recommendation for an EIS?

3 A If -- if a decision had been made to do an EIS
4 then the scope of the environmental analysis is broadened
5 and it sort of takes on another form.

6 Q Is it your understanding that an EA is supposed to
7 be submitted to OMB in its review of the final rule?

8 A Yes, 'cause I had to sign it before the final rule
9 I believe.

10 Q Well, we understand that OIRA was asking for the
11 environmental assessment and why it wasn't included in the
12 draft final rule. So I'm just wondering what your
13 understanding was of when that was supposed to be submitted
14 for final review.

15 A Well, before the finalization of the rule because
16 between the time of the interagency review and the final
17 rule is when many of the changes were made. So we had to
18 accommodate those changes in the -- in making the
19 environmental assessment of the FONSI.

20 Q And it's your opinion that those changes were not
21 significant enough to warrant --

22 A An EIS.

23 Q -- a re-review of the EA to determine whether an
24 EIS was necessary?

25 A Correct.

1 Q Going back to your QFR responses on page eight.
2 It's Exhibit 1. Under section nine, the heading is NEPA
3 Compliance. In your response you state that -- I think this
4 is the second paragraph. Quote, "Consistent with the
5 Administrator's authority and the Clean Water Act exemption
6 for EPA regulations from NEPA's requirements, the Clean
7 Water Rule is exempt from NEPA's requirements." Can you
8 explain this statement?

9 A Right. EPA is exempt from NEPA. And this rule,
10 in the eyes of many, did not need to go through the NEPA
11 process. Again, as the decision-maker and as the person who
12 would have to make that decision, I believed that we should
13 do an environmental assessment of this rule and so we did.
14 But, you know, under this, I think it's 511(a), we didn't
15 have to.

16 Q So you're saying the efforts that you undertook
17 were voluntary?

18 A I'm not sure voluntary -- voluntary might be a way
19 to characterize it, but I -- I felt as though it was
20 necessary for us to do an environmental assessment of a rule
21 of this magnitude.

22 Q Are you aware of any other joint rulemakings
23 between the EPA and the Army Corps where they did not
24 conduct a NEPA analysis? And by "they" I mean the agencies.

25 A I think we did a look back when we were making

1 this decision to see what precedence had been set before.
2 And I think there was an instance where there was not an EA
3 done. I'm not sure it was the Army and EPA though. It may
4 have been another federal agency --

5 Q Okay.

6 A -- where they made the decision not to.

7 Q The Corps informed this committee that the
8 environmental assessment does not contain the type of
9 analysis necessary to evaluate the level of impact and make
10 a determination of significance. Do you disagree with this
11 statement?

12 A I do. That's why we did the EA.

13 Q Were you aware at the time of making the decision
14 not to pursue an EIS that the Corps does not track the
15 distance between adjacent water bodies and downstream
16 traditionally navigable waters and, therefore, is unable to
17 say how far those waters are away from what they'd have a
18 significant nexus to?

19 A Right. They currently don't have -- don't track
20 that information.

21 Q And that didn't concern you about the analysis?

22 A I considered it, but I felt as though the --
23 the -- tracking them was necessary and the lines that we
24 needed to draw were ones that were going to make the rule
25 better.

1 Q Other than Mr. Smith, in your office who works on
2 rulemakings?

3 A In my office? Well, it depends. We currently
4 have another rule under -- under review. Actually, the
5 Department of Defense, but it's just a single agency -- it's
6 just a Corps rule and several people in my office have
7 worked on it. It's been with Corps counsel as well as Army
8 counsel, but also because it impacts some management, so my
9 chief of management has sort of been involved in it, but not
10 actually writing it. It's mostly been with -- with
11 counsel's office both with the Corps and my office.

12 Q Do any of these staff have primary
13 responsibilities with respect to every rulemaking like Mr.
14 Smith does?

15 A Mr. Smith -- I'm not sure what rulemakings he
16 would have worked on other than the Clean Water Rule. The
17 rule that I'm referencing here it has to do with the Flood
18 Control Act and the Water -- and the Water Supply Act. It
19 doesn't apply to the Clean Water Act.

20 Q I guess my question was whether you have any other
21 regulatory generalists or specialists in your office?

22 A No. Other than Gib's experience with regulatory
23 in his earlier work with the Corps.

24 Q Has Mr. Smith been reinstated to his former duties
25 with respect to the rule and its implementation?

1 A Not for implementation, no. Well, we're currently
2 not implementing because it's being stayed in the courts.

3 Q I asked you part of this question earlier, but let
4 me just make sure that we're clear. At any point did you
5 recommend that the agencies take more time to conduct more
6 science, assess more alternatives, fully consider public
7 comment or any other reason?

8 A No, because I believed we had done all of that.

9 Q In light of the various concerns raised about the
10 rule and its development did you engage in any discussions
11 about taking the rule back for further work or Corps review?

12 A No.

13 Q The Corps informed this committee that around
14 January of 2014 Greg Peck and Craig Schmauder presented text
15 of a draft final rule to them. So they were -- and they
16 were surprised that they weren't a part of drafting the rule
17 text. They also said that the issues the Corps were
18 extraordinarily concerned about were not reflected in this
19 draft final rule text.

20 Were you aware of who drafted that version of the final
21 rule?

22 Ms. Berroya. Christina, I'm sorry, who from the Corps?

23 Ms. Aizcorbe. This is from Ms. Moyer.

24 BY MS. AIZCORBE:

25 Q Let me ask you again. Were you aware of who

1 drafted the draft final rule?

2 A The draft final rule? The pen was EPA, but again,
3 it was in consultation with us.

4 Q Were you aware of when EPA began this draft?

5 A I don't know the exact date of that.

6 Q Were you aware of concerns about the Corps' lack
7 of engagement in the rulemaking?

8 A They had raised that concern that they were not
9 involved and I -- I had to disagree with that because they
10 were involved. As, you know, even reflected in some of
11 Lance Wood's memos, the Corps was involved in developing
12 this rule.

13 Q At what point did you become aware? Was there a
14 specific meeting or conversation that you had with the Corps
15 where this was first raised with you?

16 A I can't recall a specific meeting or -- but I
17 think that there was a concern that there may have been a
18 meeting that the Corps was not part of at one point during
19 the development of this.

20 Q Do you recall who that meeting would have been
21 with?

22 A I don't recall. I -- I would -- probably Mr.
23 Schmauder.

24 Q Okay. The committee was informed that the rule
25 would not be cleared unless certain changes were made to

1 address the concerns of USDA and DOT. I think we mentioned
2 them a bit earlier.

3 A I'm sorry, who? The committee did you say?

4 Q We've been informed --

5 A Oh, sorry.

6 Q -- that the rule would not be cleared unless
7 certain changes were made to address concerns of the USDA
8 and DOT. And that those changes were adopted in the last
9 month or so over the objection of the Corps.

10 Can you explain a little bit about how these changes
11 were adopted.

12 A The -- I'm not sure what's being referenced with
13 regard to USDA, but I know the Department of Transportation
14 in the interagency process raised the concern about ditches.
15 And -- and we worked with them to try to ensure that the
16 definition of -- in the exemptions was relevant to what they
17 needed as far as making the determination between an
18 ephemeral stream and a ditch and what's jurisdictional and
19 what's not and what its connection is to a wetland.

20 Q Do you know who at the Army or Corps engaged in
21 those discussions with DOT?

22 A I believe Mr. Schmauder and I'm not sure Jen Moyer
23 or not. I'm not sure.

24 Q Are you aware of whether any science or analysis
25 was completed to evaluate this ditch proposal?

1 A Well, each of these determinations made for
2 connectivity based -- are based on the connectivity report.
3 And so, the exemptions for ditches has a lot to do with
4 connectivity because if they're not connected they're
5 exempt. So you have to be able to base it on connectivity
6 to some other existing navigable water.

7 Q So you would say that any of the changes made to
8 the draft final rule are supported directly by the
9 connectivity report?

10 A That's what we would have based the scientific
11 determinations on, yes.

12 Q What was your interaction with the USDA during the
13 rulemaking?

14 A Well, through -- from the beginning when we were
15 first deciding to do the guidance and then the rule there
16 was input and interaction with the Department of Agriculture
17 because of the Clean Water Act's impact on farmers and
18 ranchers. The Clean Water Act in the '70s and then when it
19 was amended in 1986 recognized that prior converted
20 croplands and farming practices were exempt from the Clean
21 Water Act and are exempted now and continue to be exempted.
22 So there was no change there. And I think that was
23 something that the Department of Agriculture was interested
24 in assuring continued.

25 Q And who did you speak to over there?

1 A Several people were involved in the rulemaking.
2 The Secretary, Robert Bonnie, who's the deputy. Other
3 people who've left now whose names escape me, but --

4 Q And who from the Army or Corps would have been
5 involved in that coordination?

6 A Myself, Mr. Schmauder. Again, regulatory,
7 probably Jen Moyer.

8 Q During the rulemaking was it your position that
9 the EPA would speak on behalf of the Corps?

10 A No. It was a joint rulemaking.

11 Q Was it your position that the EPA would represent
12 the Corps' position on policy recommendations or rule text?

13 A Again, it was a joint rule. So we would be
14 represented -- we jointly as the administration would be
15 representing the rule.

16 Q Was it your position that the EPA would represent
17 the Corps in any way in discussions with OMB?

18 A Again, it was a joint rule. We were involved in
19 discussions as the other federal agency.

20 Q And at no point did you receive any indication
21 from Mr. Schmauder that any of these representations were
22 being made by EPA?

23 A That they were speaking on behalf of the Corps?
24 If they were speaking, they were speaking with the Corps.

25 Q Were you aware that Mr. Schmauder was at some

1 points through the rulemaking solely responsible for
2 ensuring the Corps' comments were incorporated into the
3 final rule?

4 Ms. Berroya. I'm not sure that's been established.

5 Ms. Aizcorbe. It has been established with RTI with
6 OIRA.

7 Ms. Berroya. So one person testified to that?

8 BY MS. AIZCORBE:

9 Q We have e-mails indicating that Mr. Schmauder was
10 not involved in a back-and-forth between the EPA and OIRA
11 and that comments were made about assuring that the Corps
12 would ultimately review what the EPA was representing.

13 So, my question to you was whether Mr. Schmauder ever
14 indicated to you that -- that he was taking care of or
15 making sure that what EPA was managing with OMB was
16 ultimately addressing the Corps' concerns because we do have
17 information showing that they were not a part of every
18 engagement with OMB.

19 A That "they" --

20 Q They Army and --

21 A -- Mr. Schmauder was not?

22 Q Correct.

23 A Well, if we were not part of every engagement I
24 guess that's -- I'm still having difficulty figuring out
25 what the question is.

1 Q If you have no awareness, that's fine too. That's
2 a fine answer.

3 A Yeah.

4 Ms. Berroya. No awareness of what? I'm sorry, I'm
5 just confused about what the question is.

6 Ms. Aizcorbe. We have e-mails from Mr. Laity to Mr.
7 Peck, CC'ing Mr. Schmauder discussing, "In the interest of
8 time, I have not reviewed the Corps' comments that I
9 received. Ideally I would do this, but I know you need it
10 ASAP. We will leave it to Craig to ensure that any
11 outstanding Corps comments are appropriately addressed."
12 That's one example.

13 For the sake of time, I'm not introducing them, but I'm
14 happy to -- for our purposes we don't need to. I'm asking
15 her about her knowledge about Mr. Schmauder's involvement.
16 So, it's not necessary.

17 Ms. Darcy. So --

18 Ms. Berroya. Well, if the basis --

19 Ms. Aizcorbe. You can address it in your hour. Thank
20 you.

21 Mr. Skladany. She's speaking to her own experience.
22 The e-mail is irrelevant.

23 Ms. Darcy. I'm not aware of those e-mails.

24 BY MS. AIZCORBE:

25 Q Okay, that's fine. Did you check with the Corps

1 after receiving the final version of the rule whether they
2 had any comments or concerns on that version of the rule?

3 A When the rule was final and promulgated?

4 Q Correct.

5 A I -- I talked to them about looking forward to
6 them supporting the rule and implementing it. And they said
7 they supported the rule, as did the chief of engineers
8 testify to that.

9 Q Did you ever receive or were you aware of any
10 suggestion or direction to conduct the rulemaking in a
11 particular manner?

12 A No.

13 Q In a particular time frame?

14 A No.

15 Q Did you ever give such direction?

16 A No.

17 Q Were you ever told in any way or feel pressured to
18 achieve a specific result with respect to the rulemaking?

19 A No.

20 Q You were never asked or told to ensure that a
21 FONSI would result from the EA or accept EPA's findings with
22 its scientific documents?

23 A Told to do so? No.

24 Q It appears from productions made to this committee
25 that agencies conducted much of this rulemaking through

1 telephone calls. Did you give any direction as to the mode
2 with which the Army or Corps should be conducting its
3 communications about the rulemaking?

4 A No.

5 Q Did you ever provide direction that certain
6 communications regarding this rule would have to be treated
7 in a certain manner or first run by certain staff?

8 A No.

9 Q We understand that you issued two memos in the
10 course of this rulemaking regarding how communications
11 should be treated. One memo directing that communications
12 regarding the connectivity report would first go through the
13 Army and another directing staff with respect to
14 communications made to the public about the rulemaking. Do
15 you recall issuing these memoranda?

16 A Yes.

17 Q Would you be able to provide them to the
18 committee?

19 Ms. Darcy. Can I do that?

20 Ms. Weis. You want to go off the record? I don't want
21 to testify, but yes. I mean, the Army will continue to
22 accommodate and provide documents that are responsive to
23 your requests.

24 Ms. Darcy. Okay.

25 Ms. Aizcorbe. Thank you.

1 BY MS. AIZCORBE:

2 Q Can you explain what led you to issue these two
3 memoranda.

4 A We wanted to ensure that the -- that the
5 communication was going to be coordinated. We are a very
6 dispersed organization. We have 38 districts, eight
7 divisions around the country and around the world. And
8 wanted to ensure that the message and the -- the content of
9 the rule and its intent were being -- were being
10 communicated the same way all the way around the Army. So
11 I -- I believe I issued the memo to General Bostick and the
12 division commanders to say, please -- and so that we can
13 have a universal voice in answering questions, especially
14 from the public and the media.

15 Q Have you ever issued such directives in the course
16 of any other projects with the Corps?

17 A You know, I may have regarding -- again, I'm
18 speculating. I'm not supposed to. I should not speculate,
19 but you know, I just think about our big projects and, you
20 know, I may have regarding everglades at one point in time,
21 but I'm not certain of that.

22 Q That's fine.

23 A Okay.

24 Q Did you ever tell staff that certain information
25 would not reach the EPA, the public or any other body?

1 A No.

2 Q Who in the Army or the Corps typically handles
3 compiling the administrative record for a Corps rulemaking?

4 A Again, this is our first one. So -- or for me. I
5 think the administrative record is compiled by headquarters.
6 In this instance, probably the chief of operations, but I'm
7 not certain about that.

8 Q Okay. Did you engage in any discussions about
9 what would be included in the administrative record?

10 A No.

11 Q It is our understanding that the Corps was
12 instructed to retain documents only from April 2014 on for
13 purposes of compiling the administrative record. Do you
14 have any indication why this period would not cover the
15 entirety of the rulemaking?

16 A No. And I wasn't aware of that.

17 Q Did you discuss inclusion of the Peabody memoranda
18 in the administrative record or any other record for this
19 rulemaking?

20 A No.

21 Q Who at the Army is handling the nationwide permit
22 rulemaking for the 2017 cycle?

23 A The regulatory chief.

24 Q That's Ms. Moyer?

25 A Yes.

1 Q Okay. Are you aware of any discussions or efforts
2 to include WOTUS language in the nationwide permit program
3 rulemaking?

4 A In the nationwide's? No.

5 Q In any other rulemaking packages?

6 A No.

7 Q Are you aware of the EPA's efforts to promote the
8 rule through the use of social media during its development?

9 A I heard about that.

10 Q Do you recall when you became aware?

11 A I became aware of it I think from a press release
12 from the Chairman of the Senate EPW Committee.

13 Q Did you discuss any media outreach effort with EPA
14 through the rulemaking?

15 A No. Just in the context of outreach to everyone,
16 you know.

17 Q So nothing specific regarding targeting
18 specific --

19 A Target, no.

20 Q No. Did you provide any direction on whether the
21 Army or Corps would participate or support the EPA's efforts
22 to engage in social media?

23 A No.

24 Q Have you experienced similar social media
25 campaigning during other projects or, to your knowledge, any

1 other rulemakings that predated you?

2 A No. I don't know if they had social media back
3 then.

4 Q Were you concerned when hearing about these
5 activities that they were out of the ordinary or improper?

6 A No.

7 Q Is there any reason why?

8 A I -- I -- why I wouldn't think that they were
9 improper? I didn't think they were improper.

10 Q Okay. Are you aware of GAO's opinion that these
11 activities violated certain laws?

12 A Meaning the social media activities?

13 Q Correct.

14 A I'm not aware of that GAO report, no.

15 Q And you have not discussed the social media
16 activities with anybody at the Army or the Corps?

17 A No.

18 Q In 2014 the EPA and Corps promulgated an
19 interpretive rule pertaining to agricultural exemptions in
20 the waters of the U.S. under the Clean Water Act, but
21 withdrew the rule shortly thereafter. Can you explain the
22 Army's role in the rule's development?

23 A That was in relation to the agricultural
24 exemptions and we wanted to make it clear that the proposed
25 rule wasn't going to have any further impact than that.

1 Then we were -- then we promulgated that -- we have a
2 memorandum of understanding, or we had, between the
3 Department of Agriculture, the Army and the EPA. Congress
4 subsequently directed us to rescind that rule, which we did
5 I think within a month of being directed to by Congress.

6 Q What science was this interpretive rule based on?

7 A Well, again, the science that the entire rule was
8 based on was the connectivity report, but part of the
9 interpretive -- that interpretative rule again was to make
10 clear about what was in and what was not. And wanted to
11 make it clear that the agricultural exemptions, including
12 some that -- or agricultural practices that had come on line
13 between the time of the exemptions back in the '70s and now
14 that -- ones that the NRCS would have considered to be
15 regular farming practices, that those could be incorporated
16 in the exemptions. So that was the -- the intent of what we
17 were trying to do in that -- in that -- that interpretive
18 rule.

19 Q And is that -- that's the reason why the agencies
20 decided to pursue the interpretive rule?

21 A Uh-huh. Yes, sorry.

22 Q To your knowledge -- to your knowledge, had an
23 interpretive rule of this nature been pursued in -- in
24 coordination with other rulemakings?

25 A Not that I was aware of, no.

1 Q Can you explain NRCS's role in development of this
2 rule?

3 A NRCS -- again, because some of the practices that
4 they now consider to be acceptable, ongoing farming
5 practices that are not reflected in the earlier exemptions
6 in '72, we wanted to include those so that farmers, ranchers
7 and civil culture would know that those practices were not
8 going to be covered by the rule because I think there was
9 some confusion about what the -- what the intent was.

10 Q So they were -- NRCS was consulted by the Army and
11 EPA --

12 A And the Department of Agriculture.

13 Q Okay. Do you recall who at the Department of
14 Agriculture led that effort?

15 A The person we worked most directly with was Robert
16 Bonnie -- Bonnie, the deputy.

17 Q Did you participate in any interagency or outreach
18 meetings on the interpretive rule?

19 A You know, I may have been on one teleconference
20 with the agencies and some interest groups, but I -- I think
21 I did one of those. Excuse me.

22 Q Do you recall what was discussed at this meeting?

23 A I think it was an explanation -- sort of an
24 outreach explanation of what the -- the intent of the
25 interpretive rule was.

1 Q Was Mr. Schmauder primarily leading the
2 coordination effort on that rule as well?

3 A Yes.

4 Q Just some clean up questions and then hopefully we
5 can move on.

6 When were you notified that the committee asked for
7 your interview?

8 A Boy, a couple months ago.

9 Q Okay. Do you recall who informed you?

10 A I believe it was Mr. Schmauder or maybe it was Mr.
11 Parks who at the time was the acting attorney -- acting --
12 not attorney. Acting general counsel for the Army, yeah.

13 Q Have you been asked to produce documents or
14 e-mails related to this rulemaking?

15 A Yes, through the -- your chairman's request, yes.

16 Q Do you recall when you received that request?

17 A When it came in the letter which, was about three
18 or four months ago, was it?

19 Q Have you produced all of your e-mails and
20 documents related to this rulemaking in response to that
21 request?

22 A I believe we're in the process of providing all of
23 those. I'm not quite sure of the current status of the
24 request -- of our document production.

25 Q I was asking about your production of e-mails to

1 your general counsel's office or whomever reviewed --

2 A My e-mails have been provided.

3 Q Okay. Do you recall who you gave them to?

4 A It is someone in the Army General Counsel's
5 Office. I want to say Vinny, but I'm not sure who was in
6 charge of it.

7 Q That's okay.

8 A I think it was Vinny.

9 Q Were you given any instruction on how to search
10 for these documents?

11 A No. Just that anything related to the rulemaking.

12 Q Did you receive any instruction in preparation for
13 today's interview?

14 A Only what the process would be and what the -- I'd
15 never done an interview in a committee before. So just
16 telling me what -- what the process was and, you know, time
17 and all of that.

18 Q And from whom did you receive the instructions?

19 A From Megan.

20 Q Okay. Had you spoken to anyone before today about
21 the transcribed interviews this committee has conducted
22 besides your own?

23 A No.

24 Q Have you given any direction regarding how to
25 communicate with or respond to the committee during its

1 investigation to any of your staff?

2 A No.

3 Ms. Aizcorbe. Okay. We can go off the record. Thank
4 you.

5 [Brief recess taken from 3:34 to 3:36 p.m.]

6 Ms. Berroya. Back on the record. It's 3:36.

7 Ms. Darcy, did you tell Mr. Owen what the outcome of
8 his EA should be?

9 Ms. Darcy. No.

10 Ms. Berroya. Do you believe that Mr. Owen conducted an
11 independent analysis in the course of its EA?

12 Ms. Darcy. I do.

13 Ms. Berroya. Did Mr. Owen ever tell you that he did
14 not have enough time to complete his EA?

15 Ms. Darcy. No.

16 Ms. Berroya. Do you have any reason to believe that
17 Mr. Owen did not have enough time to complete his EA?

18 Ms. Darcy. No.

19 Ms. Berroya. Anyone else? We can go off.

20 [Whereupon, the interview was concluded at 3:38 p.m.]

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CERTIFICATE OF INTERVIEWEE

I have read the foregoing 192 pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Jo Ellen Darcy

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C E R T I F I C A T E

I, SHAUNNA H. MORAN, a Certified Shorthand Reporter of the State of New Jersey, a Registered Professional Reporter, and Notary Public of the States of New York, New Jersey and The District of Columbia, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.

SHAUNNA H. MORAN, C.S.R., R.P.R.

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