

1 DIVERSIFIED REPORTING

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6 COMMITTEE ON OVERSIGHT AND

7 GOVERNMENT REFORM,

8 U.S. HOUSE OF REPRESENTATIVES,

9 WASHINGTON, D.C.

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13 INTERVIEW OF: VLAD DORJETS

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17 Tuesday, May 10, 2016

18 Washington, D.C.

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21 The interview in the above matter was held at 6410

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

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1 Appearances:

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4 For COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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6 JONATHAN J. SKLADANY, SENIOR INVESTIGATIVE COUNSEL

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8 KATY ROTHER, COUNSEL

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17 CHARLES LUFTIG, DEPUTY GENERAL COUNSEL

18 MATTHEW B. CARNEY, GENERAL ATTORNEY

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1 Mr. Skladany. This is a transcribed interview of Vlad
2 Dorjets. Chairman Chaffetz requested this interview as part
3 of the committee's investigation of the Waters of the United
4 States Rulemaking.

5 Would the witness please state your name for the
6 record?

7 Mr. Dorjets. Vlad Dorjets.

8 Mr. Skladany. Thanks. On behalf of the chairman, I
9 want to thank you for appearing here today, and we
10 appreciate your willingness to appear voluntarily.

11 My name is Jon Skladany. I'm with the committee's
12 majority staff. And I'll have everyone else from the
13 committee who is here at the table introduce themselves as
14 well, starting with Christina.

15 Ms. Aizcorbe. Christina Aizcorbe with the majority
16 staff.

17 Ms. Rother. Katy Rother, majority staff.

18 Ms. Berroya. Meghan Berroya, minority staff.

19 Mr. Longani. Kapil Longani, minority staff.

20 Mr. Burns. Sean Burns, minority staff.

21 Mr. Carney. Matthew Carney, OMB, General Counsel's
22 Office.

23 Mr. Luftig. Charles Luftig, OMB, General Counsel's
24 Office.

25 Mr. Skladany. Thanks. The Federal Rules of Civil

1 Procedure do not apply to any of the committee's
2 investigative activities, including transcribed interviews,
3 but there are some guidelines that we follow, and I'll go
4 over those now.

5 Our questioning will proceed in rounds. The majority
6 will ask questions first for one hour, and then the minority
7 staff will have an opportunity to ask questions for an equal
8 period of time, if they choose. And we'll go back and forth
9 that way until there are no more questions, and the
10 interview is over.

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

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

19 Mr. Dorjets. Yes, I do.

20 Mr. Skladany. And so the reporter can take down a
21 clear record, we'll do our best to limit the number of
22 people directing questions at you during any given hour to
23 just the people on the staff whose turn it is, and we'll try
24 to go one at a time.

25 It's also important that we don't talk over one another

1 or interrupt each other if we can help it. And that goes
2 for everybody.

3 We encourage witnesses who appear before the committee
4 to freely consult with counsel if they so choose. You are
5 appearing here today with counsel. They have already
6 introduced themselves for the record.

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

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

21 Mr. Dorjets. Yes, I do.

22 Mr. Skladany. This also applies to questions posed by
23 congressional staff in an interview. Do you understand
24 this?

25 Mr. Dorjets. Yes, I do.

1 Mr. Skladany. Witnesses that knowingly provide false
2 testimony could be subject to criminal prosecution for
3 perjury or for making false statements. Do you understand
4 that?

5 Mr. Dorjets. Yes, I do.

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

8 Mr. Dorjets. No, there is not.

9 Mr. Skladany. I'll just note that the content of what
10 we discuss here today is confidential, so we ask that you
11 not speak about what we discuss in the interview to anyone
12 who is not present here today, to preserve the integrity of
13 our investigation.

14 That is the end of my preamble. Is there anything my
15 colleagues would like to add?

16 Mr. Longani. Nothing for the minority.

17 Mr. Skladany. Okay. We'll get started with the first
18 hour, and it is 10:11.

19 Mr. Luftig. And before we start questions, I just
20 wanted to say for the record that Mr. Dorjets is appearing
21 here voluntarily, prepared to speak to matters within the
22 scope of his personal knowledge. He is prepared to stay
23 until 5:00 today, if that's necessary. Hopefully we can
24 finish sooner, but if necessary.

25 Over to you.

1 Ms. Aizcorbe. Thank you. It is now 10:12. We'll
2 begin with the first hour.

3 EXAMINATION

4 BY MS. AIZCORBE:

5 Q Mr. Dorjets, what is your current role with OIRA?

6 A I am a desk officer.

7 Q And how long have you been in this role?

8 A Approximately two years.

9 Q And which division are you a desk officer for?

10 A In the Natural Resources and Energy Branch.

11 Q What are your primary duties in this role?

12 A I have a portfolio that includes all rulemakings
13 issued by the Office of Water at EPA, conservation matters
14 put out by USDA, and information collections by NRC.

15 Q I'm sorry. Could you remind me what you said; how
16 long have you been in this role?

17 A Approximately two years.

18 Q Two years. And were you in any other position
19 before you became a desk officer with this division?

20 A Any other position at OIRA?

21 Q At OIRA.

22 A No. I have been with OIRA for -- for two years.

23 Q Approximately how many rulemakings would you say
24 you've reviewed or been involved with during your two years
25 with OIRA?

1 A I'd say approximately 30.

2 Q Have you reviewed any other joint rulemakings
3 besides the Waters of the United States Rule, which I'll
4 refer to now was WOTUS?

5 A No, I have not.

6 Q When did you first become involved with the WOTUS
7 rulemaking?

8 A When it was submitted for -- when the final rule
9 was submitted for review, but I don't recall the exact date
10 of that.

11 Q And when you say "submitted for review," do you
12 mean to OIRA?

13 A Yes.

14 Q Okay. Who was the desk officer handling WOTUS
15 review before you took over?

16 A My branch chief, Jim Laity, handled the review at
17 proposed stage.

18 Q And can you explain the role or duties you were
19 assigned in handling review of the final rule?

20 A The same roles that relate to any -- the review of
21 any rule. It's to serve as primary -- I guess prime point
22 of contact for stakeholders to distribute the rule for
23 agencies to submit comment, to liaise with the promulgating
24 agencies, to liaise with other offices within the White
25 House.

1 Q What was your familiarity with the WOTUS
2 rulemaking before you assumed this role?

3 A Zero.

4 Q What is your background or expertise in
5 environmental policy?

6 A I have approximately 14 years of experience in
7 energy and environmental policy.

8 Q And how did you become acquainted with OIRA's
9 review of the WOTUS guidance and proposed rule when you came
10 on board? Did Mr. Laity or anyone else brief you about the
11 rule and guidance?

12 A A couple weeks before the rule was formally
13 submitted, as is customary for some of the more visible
14 rules, EPA and the Corps came in for a briefing at
15 a -- provide a high-level summary of the nature of the rule
16 and what we would expect to see. That was the first time I
17 had -- I understood some of the specifics.

18 Q And to be clear, that's before the final draft
19 rule was submitted, correct?

20 A Yes.

21 Q Okay. And did you meet with anyone with OIRA to
22 discuss OIRA's review of the proposed rule before you began?

23 A No. I believe that, as due diligence, I -- I
24 skimmed the proposed rule a little bit in the days before
25 the final rule came in. But without knowledge of the

1 issues, I didn't know what was moot, what was going to be
2 applicable, so I didn't spend a lot of time doing --

3 Q You didn't receive any instructions or guidance
4 from other individuals from OIRA who had been working on the
5 rule to date?

6 A I did not.

7 Q Can you explain the role that Stuart Levenbach
8 played with respect to this rule?

9 A He didn't play any role. He would -- role. He
10 was technically the desk officer for the Army Corps of
11 Engineers. And since this rule -- but since this rule was a
12 joint rule between the Army Corps and EPA, it was determined
13 that I would lead the rule. So Stuart was copied on some of
14 the emails, I think initially, as a courtesy, but I think
15 even that dropped off as it was clear that he wasn't going
16 to have a role in the review.

17 Q And that contradicts some information that the
18 committee has received about Mr. Levenbach's role. We
19 haven't heard that he played no role. In fact, we heard he
20 played a role. So just to get a little bit of clarification
21 on that point, you said he was cc'd on some emails as a
22 courtesy. And we understand he attended some outreach
23 meetings for the rule. Is there anything else that he would
24 have been involved with?

25 A I -- I don't -- obviously, I don't know the nature

1 of what information this contradicts. I mean, it's possible
2 he attended some of the meetings early on, but to the best
3 of my recollection that did not continue throughout the
4 whole review. Maybe in the first couple of meetings he
5 attended, but as far as the actual day to day, the review,
6 the resolution of issues, the normal process of desk officer
7 responsibilities, he was not involved, no.

8 Q And you said he handled the portfolio for the Army
9 Corps; is that correct?

10 A Yes.

11 Q And so with respect to this rulemaking, were you
12 in contact with the Corps as Mr. Levenbach was not involved?

13 A Yes, I was.

14 Q Okay. Can you explain the role that Cortney
15 Higgins played with respect to the rulemaking?

16 A For her it was absolutely zero. She wasn't, as
17 far as I know, copied on any emails, involved in any
18 meetings.

19 Q And when you're making these statements, are you
20 referring to the entirety of the rulemaking or just the time
21 in which you were working on it?

22 A Thank you for clarifying. To -- to the role that
23 I played in the final review. I can't speak to any role she
24 may have had previous to my involvement in it, so --

25 Q But after the time that the draft final rule was

1 submitted to OIRA, you know that she played no role on the
2 rulemaking?

3 A Yes. In the final rule that I led the review on,
4 she did not play any role.

5 Q Can you explain the role that Amanda Thomas played
6 with respect to the rule?

7 A As our staff economist, she was consulted
8 on -- when the rule was first -- when the final rule was
9 first submitted, but in not -- I would not say a very
10 significant role.

11 Q And what do you mean when you say "consulted"?

12 A I -- in general, when a rule is submitted to OIRA,
13 we share it with the economist, so that she or he is aware
14 of it to the extent he or she's interested, so they can
15 review it, provide comments, and then it's up to them to
16 decide how engaged they want to become, if they're aware of
17 issues that they want to resolve. So it's -- we share
18 the -- we send the rule to the economist, and then, as
19 needed, continue to have discussions.

20 Q Are you aware of what type of review Amanda Thomas
21 may have conducted of the rule or the rule's economic
22 analysis?

23 A I am aware of her having been involved in the
24 proposed rule and some of the review prior, but are you -- I
25 guess are you asking for the role before the final rule was

1 submitted or during the final rule?

2 Q Either that you're able to speak to.

3 A I know that she was involved in some capacity at
4 the proposed stage. I don't know specifically what since I
5 wasn't involved in that.

6 Q And you did not work directly with her during your
7 time on the rulemaking?

8 A I -- no, I did because I -- I sent her the final
9 rule when it came in. And I consulted with her to get her
10 thoughts on the way that the economic analysis was
11 presented.

12 Q Can you explain the role that Katie Johnson played
13 with respect to the rule?

14 A As a policy level official in OIRA's front office,
15 she often served as an advisor to the administrator, and
16 sometimes handled some of the other discussions with policy
17 level officials and other White House offices and other
18 agencies.

19 Q Are you aware of when Ms. Johnson became involved
20 in the rulemaking?

21 A I don't know.

22 Q And when you say that she was a policy level
23 official, can you clarify what that means? I'm not sure I'm
24 aware of what that means in the context of OIRA staff.

25 A Generally, when we review rules, the reviews are

1 done at career -- between career officials to career
2 officials as counterparts between OIRA and other agencies,
3 and we try -- and as issues are raised or concerns are
4 raised, we try to negotiate and find -- one of OMB's main
5 roles is to serve as sort of a neutral honest broker between
6 agencies, and we try to serve in that capacity. And
7 sometimes we are the ones raising the concern. Sometimes
8 it's an outside stakeholder. Sometimes it's other agencies.
9 We facilitate that discussion and try to find resolution.

10 If we are unable to resolve the issue at our level, we
11 sometimes elevate it to policy officials to resolve at their
12 level, and Katie Johnson would be the first level. She
13 would then try to resolve it at hers, and then elevate it
14 above her if necessary.

15 Q So are policy level officials not considered
16 career; are they political appointees?

17 A Yes, they are.

18 Q They are political appointees?

19 A Yes, they are political appointees. I'm sorry.

20 Q How did you and other OIRA staff interact with
21 Administrator Shelanski during your review?

22 A We have -- the branch has bi-weekly meetings with
23 Administrator Shelanski, at which point we would put any
24 rules requiring his attention on the agenda to provide an
25 update. To the extent issues needed further discussion, it

1 would -- it was common to set up a follow-on meeting where
2 we can devote more time to that.

3 Q And did you do so with respect to OIRA, or WOTUS
4 in any case?

5 A I believe so, but I don't recall exactly.

6 Q Did you advise Mr. Shelanski on any particular
7 policy matters relating to the rule?

8 A It -- we don't -- I don't know. I guess I don't
9 know if we advise. We would provide recommendations
10 sometimes. That's the way we refer to it at least. But,
11 yes, to the extent there were some matters, we provided some
12 recommendations.

13 Q Can you characterize the administrator's
14 involvement or role in OIRA's review of rulemakings?

15 A He -- it depends on the rule, so it's hard to
16 characterize in general terms. Since there are some rules
17 where he has no involvement, there are some rules that he
18 has greater involvement. It depends on the -- as I
19 mentioned earlier, if there are issues that need to be
20 elevated for resolution, it depends on whether any of those
21 issues need his attention. We try not to bring issues to
22 him if we can avoid it.

23 Q For larger rulemakings such as WOTUS, is that the
24 nature of what you encountered with your engagements with
25 Mr. Shelanski?

1 A It's not even a function of size. There are some
2 very big, important rules that could have no direct
3 involvement from the administrator other than to update at a
4 bi-weekly meeting. So it's hard to generalize in what
5 situations. Similarly, they are very small rules that if
6 you reach an impasse it may require his involvement. So
7 it -- there's really no way to generalize that.

8 Q Are you aware of his involvement in this
9 rulemaking besides just here at bi-weekly briefings?

10 A I am aware he had discussions with other officials
11 in some capacity.

12 Q What other officials?

13 A I do not know.

14 Q How are you aware of this, then?

15 A Because sometimes he would come back and provide
16 guidance on certain matters, and I know that he wasn't
17 making those things up. He was engaged in his -- whatever
18 process he was involved in outside of the staff level.

19 Q And when you refer to "guidance," what are you
20 referring to specifically?

21 A There were a couple matters where we needed his
22 input. Some of them I don't -- in some cases, I recall that
23 he was provided guidance from other places, other officials.
24 I don't know who that would have been.

25 Q But is it guidance other than -- the rule, the

1 text of the rule, how -- the timing, I mean, do you remember
2 what the nature of this guidance is -- was?

3 A There was one specific matter, for example, where
4 I remember we sought -- we provided a recommendation
5 specifically on the setting of the bright lines. I know
6 that that was something that he took to other officials, and
7 a resolution was passed down to us. So, but I don't know
8 what dynamic, who exactly was involved in those meetings or
9 how that played out.

10 Q We have been informed that OIRA looks closely at
11 the process of the rulemaking but also at the rule
12 substance; is that an accurate characterization in your
13 opinion?

14 A Yes.

15 Q Can you explain the role the Council on
16 Environmental Quality plays in the rulemaking process?

17 A They are one of several White House offices that
18 is involved in the distribution of a review -- of a rule
19 when it comes in. And then, to the extent that they raise
20 concerns, they are one of the voices that can raise
21 concerns, that it is then my job to try to resolve.

22 Q How frequently did you meet with or discuss the
23 rule with CEQ during your review?

24 A A representative from CEQ attended almost every
25 single meeting with external stakeholders under E.O. 12866.

1 So since there were meetings almost on a daily basis, I had
2 some interaction with CEQ almost on a daily basis.

3 Q Did you discuss any policy or technical decisions
4 regarding the rule with CEQ or any other offices within EOP
5 outside of these 12866 meetings?

6 A No. I believe -- I believe that CEQ was the only
7 other White House office that was involved that I was
8 involved with during the review.

9 Q Did you discuss any policy or technical decisions
10 regarding the rule with CEQ outside of these 12866 meetings?

11 A Yes, I did.

12 Q Do you recall the nature of those conversations?

13 A No, I do not.

14 Q Did you receive any instruction or suggestions
15 regarding the rule's review or changes to the rule from CEQ?

16 A No. I don't recall the nature of their -- the
17 comments that they submitted on this rule.

18 Q But you do recall that they submitted comments on
19 the rule?

20 A It would have been common for them to -- I have no
21 reason to think they didn't submit comments. I just don't
22 recall what those comments were.

23 Q What stage of the rulemaking would that have
24 occurred at? After the draft final rule is submitted to
25 OIRA, is the rule then shared with other EOP offices at the

1 time of interagency review, or is it done at a different
2 time?

3 A The way the process works is that once the -- a
4 rule is submitted to OIRA by a promulgating agency, we try,
5 as soon as possible, to distribute. We send two different
6 emails. One goes to other agencies, whether to a primary
7 point of contact, generally in the secretary's office, and
8 then to points of contact or the relevant technical subject
9 matter experts and White House offices. So that would have
10 happened probably a day -- the same day that the rule came
11 in, maybe the day after.

12 Q So concurrently it would go both to the agencies
13 as well as to the EOP offices?

14 A Yes. Generally, concurrently with the same
15 deadline, and we treat them separate just so that the White
16 House -- there is no reason for the agencies to know who
17 within the White House is necessarily involved.

18 Q We understand that senior leadership of OIRA had
19 discussions regarding specific timelines or deadlines for
20 the rule's finalization. Did you receive any guidance on
21 the timeframe for OIRA's review or anyone at OIRA -- from
22 anyone at OIRA?

23 A Yes. I was -- I don't recall if it was before the
24 rule came in or after, but I was given a date by which there
25 was expressed preference for OMB to conclude the rule by

1 that date.

2 Q Do you recall who at OIRA gave you that direction?

3 A No, I don't.

4 Q Do you recall whether it was somebody in a
5 leadership position above you? Who would you take direction
6 from on the rulemaking otherwise?

7 A It would -- it would probably have come from one
8 of the policy officials, whether it was Katie or Howard I
9 don't recall, but it's customary for somebody at their level
10 to provide that kind of guidance.

11 Q The Corps informed the committee that they were
12 told the draft final rule would be delivered to OMB in early
13 spring of 2015, and that there had been an even earlier
14 timeframe for delivery in late winter; were you aware of
15 these deadlines?

16 A No, I was not.

17 Q And you mentioned earlier that the policy staff at
18 OIRA can typically set a deadline for a rules review; do you
19 ever receive deadlines from agencies for OIRA's review or
20 promulgation of the rulemaking?

21 A I have no idea what discussions may happen between
22 agencies and the policy officials behind the scenes to set
23 those deadlines. But as far as I'm -- but the deadline
24 comes to me from OIRA's policy officials.

25 Q You sent a series of emails on May 5, 2015, to a

1 number of agencies regarding review of the final rule. I'll
2 enter one of those emails into the record as Exhibit 1.

3 [Dorjets Exhibit No. 1 was marked
4 for identification.]

5 Ms. Aizcorbe. Can we go off the record a second?

6 [Brief recess taken from 10:31 to 10:32 a.m.]

7 Ms. Aizcorbe. We can go back on the record.

8 BY MS. AIZCORBE:

9 Q Mr. Dorjets, do you recognize this email to the
10 Department of Energy on May 5th?

11 A Yes, I do.

12 Q Okay. As I said, you sent a series of emails on
13 May 5th to a number of agencies regarding review of the
14 final rule stating, "The pressure on WOTUS Clean Water rule
15 is getting turned up on high, and I have been asked to do
16 whatever I can to provide all comments back to EPA by the
17 end of the week. I know I originally set a deadline of
18 Monday, so I apologize for changing direction on the fly,
19 but do you think you can get me your agency's comments on
20 the OIRA by noon on Friday?"

21 This gave agencies just over a week to review the
22 71-page analysis. Can you explain this email?

23 A I -- explain it in what way? The context or --

24 Q Sure. Genesis, the context.

25 A I assume that I had been given guidance or

1 instruction to change -- to push up the deadline for -- in
2 some capacity, and I required to pass that on to the
3 agencies.

4 Q You don't recall in this case specifically who
5 that instruction came from?

6 A No, I do not.

7 Q Whether it came from the agencies or OIRA?

8 A It would not have come from the agencies.

9 Q So it came from OIRA?

10 A It would have had to, but I don't know who or how
11 or how it would have been transmitted to me, but it's OIRA.
12 I receive my instructions from OIRA, so it wouldn't have
13 come from the agencies.

14 Q Various agencies sought extensions of their time
15 for review during interagency review of the final rule and
16 expressed that the time provided was given -- that was given
17 was insufficient to conduct a meaningful review. I will
18 walk through a few of those examples now.

19 Can I have the next exhibit which I'll enter into the
20 record as Exhibit 2?

21 [Dorjets Exhibit No. 2 was marked
22 for identification.]

23 Take a moment to familiarize yourself with this email
24 chain.

25 A Okay.

1 Q Okay. And I'll walk through this from the bottom
2 of the email chain up through the top. On April 28, 2015,
3 NASA requests an extension of their review stating, "Due to
4 the very short time period provided for our interagency
5 review, we had no ability to include our critical field
6 centers in our comment review process."

7 You respond on the 29th stating, "I know that the
8 review window is quite short, especially for such an
9 important rulemaking, but unfortunately we are on a very
10 tight schedule and I cannot be sure that we will have -- be
11 able to consider any comments received after the two-week
12 window."

13 NASA responds, "Please do keep our concerns in mind
14 with the tight timeline. If possible, some schedule
15 extensions would be much appreciate and support a more
16 in-depth review."

17 You respond on May 5th, "I'm afraid to inform you that
18 there is even less time than originally expected."

19 NASA then responds, "Vlad, you're killing us. I have
20 three NASA centers working hard to present -- to a present
21 deadline of close of business May 7th. That would leave
22 time to address ambiguities and holes for a NASA response by
23 the 11th. By the way, I am on leave since I won't have any
24 this summer. I guess that loses. While I feel for your
25 situation and am grateful for your candor, I think it is

1 fair to say that the powers that be are more interested in
2 schedule, apparently compressed, than a reasoned responsible
3 that objectively lays out likely ramifications to NASA
4 programs, projects, and operations. We will do our best,
5 but NASA's response may be raw, less than comprehensive, and
6 overall less than is needed to properly weigh the
7 implications of the new definition of WOTUS on NASA and our
8 proud nation as a whole."

9 And, in fact, in an email on May 8th, which we will
10 also introduce --

11 Ms. Berroya. Is there a question anywhere?

12 Ms. Aizcorbe. Yes. I'm -- this is part of a question.
13 Thank you. We can go off the record.

14 [Brief recess taken from 10:35 to 10:36 a.m.]

15 Ms. Aizcorbe. We are back on the record.

16 BY MS. AIZCORBE:

17 Q In fact, in an email on May 8th, which I'll mark
18 as Exhibit Number 3 --

19 [Dorjets Exhibit No. 3 was marked
20 for identification.]

21 Mr. Luftig. I just want to state for the record that
22 the previous email that you were reading from was -- you
23 were reading from portions or excerpts of the email chain.
24 I just want to make that clear because it wasn't.

25 Ms. Aizcorbe. And I will do so from here on out.

1 Thank you.

2 Mr. Luftig. Okay. Thanks.

3 BY MS. AIZCORBE:

4 Q In the email on May 8th, towards the bottom of
5 this page, NASA states that, "Due to the time constraints
6 for the review, Johnson Space Center was unable to review
7 and provide comments because relevant staff were either out
8 of the office already or working on other issues." Do you
9 recall these emails, Mr. Dorjets?

10 A Yes. And what was your impression when you
11 received them?

12 Q It's --

13 Ms. Berroya. Which -- I'm sorry, which email are you
14 talking about?

15 Mr. Dorjets. Yeah. It's --

16 Ms. Aizcorbe. These are all email exchanges between
17 NASA and OIRA.

18 Ms. Berroya. Are you talking about Exhibits 2, 3?
19 Exhibit 1? Can we just be clear on the record what we're
20 talking about?

21 Mr. Skladany. The email she just read into the record.

22 Ms. Berroya. Right. So which exhibits are you
23 referring to?

24 Mr. Skladany. It was a single conversation.

25 Ms. Aizcorbe. If I may begin over?

1 Ms. Berroya. Sure.

2 BY MS. AIZCORBE:

3 Q When we were discussing these two emails, and
4 chain of emails between you and NASA discussing the fact
5 that there was insufficient time for them to conclude a
6 review --

7 A I'm sorry. The --

8 Q We're talking about Exhibits 2 and 3.

9 A Exhibits 2 and 3. Thank you.

10 Q These are the two NASA emails.

11 A Um-hmm.

12 Q Do you recall these emails?

13 A Yes, I do.

14 Q Do you recall what your impression was when you
15 received these emails?

16 A I --

17 Ms. Berroya. Christina, where is the -- I'm
18 just -- I'm sorry to interject. It looks like Exhibit 3 is
19 cut off. Is there a --

20 Ms. Aizcorbe. Let's go off the record, please.

21 [Brief recess taken from 10:39 to 10:41 a.m.]

22 Ms. Aizcorbe. We can go back on the record.

23 BY MS. AIZCORBE:

24 Q What was your impression upon receiving these
25 emails?

1 A That it's -- this is -- well, I don't remember my
2 exact impression for these specific emails at this specific
3 moment. The nature and gist of these emails is a very
4 common exchange that happens during a review with agencies.
5 So there's -- there had been nothing out of the ordinary in
6 receiving these emails.

7 Q So you've experienced, then, agencies coming to
8 you and saying that certain components within their agencies
9 would be unable to review within the time period allotted?

10 A I have -- in my role, I have no way of knowing
11 what is happening behind the scenes. We set deadlines. We
12 understand that it might -- some people may be on vacation,
13 people may be sick. It's -- we set deadlines, and we expect
14 the agencies to do what they can to provide comments back.
15 It's very common for agencies to ask for more time, to
16 complain about the time.

17 If I had -- if I defer to agencies on giving them as
18 much time as they wanted, they would probably ask for six
19 months to do the -- provide the level of diligence and
20 review that they feel is appropriate. So I don't know
21 behind the scenes what was happening, whether these people
22 really were available or not available, but this is a very
23 common type of exchange that happens with agencies.

24 Q You said you have never experienced an agency
25 telling you that they would have components within their

1 agency who would be unable to review the rule in that time
2 period?

3 A No, I have.

4 Q You have.

5 A That's a --

6 Q Okay. I have another email which I'll enter into
7 the record as Exhibit 4. I'll be referencing the top two
8 exchanges on this email chain.

9 [Dorjets Exhibit No. 4 was marked
10 for identification.]

11 Ms. Berroya. And I would also note for the record that
12 Exhibit 4 does not appear to be the complete email chain.

13 Ms. Aizcorbe. The references I will be making are
14 complete for purposes of these questions.

15 Ms. Berroya. Right. But the --

16 Ms. Aizcorbe. For purposes --

17 Ms. Berroya. This is not --

18 Mr. Skladany. Let's just move on.

19 Ms. Berroya. This is not complete.

20 Mr. Skladany. You made your point on the record.

21 Ms. Berroya. Right. So what the witness might want to
22 refer to is not complete. He is not being provided with a
23 complete document.

24 Mr. Luftig. We would ask, to the extent possible, to
25 receive the full chain, so that if the witness needs to

1 reference back to anything he could do so. And if -- and
2 going off the record.

3 [Brief recess taken from 10:44 to 10:45 a.m.]

4 Ms. Aizcorbe. We can go back on the record.

5 BY MS. AIZCORBE:

6 Q Are you familiar with this email chain, Mr.
7 Dorjets?

8 A Not specifically, but --

9 Q On the second email in this chain, on Tuesday, May
10 5th, regarding the timeline, the Department of
11 Transportation responds directly to you, "Thank you. I am
12 not sure we can do it by the end of the week."

13 You respond, on Tuesday, May 5th, "Thanks for letting
14 me know. Do you know whether Katie distributed the rule to
15 others in the agency? Please do your best to get me
16 something by Monday, the original deadline. If needed, I
17 can send the other comments to EPA and the Corps and let
18 them know that your agency's comments will be provided
19 later, but I can't guarantee how that will go over given the
20 pressure to get this rule out the door."

21 You're saying, after reading through it, you still
22 don't recall making that statement to Ms. Lew at the
23 Department of Transportation?

24 A I have no reason to believe I didn't make the
25 statement. I just don't remember writing the email.

1 Q Okay. Next exhibit is another email, which we'll
2 mark as Exhibit Number 5.

3 [Dorjets Exhibit No. 5 was marked
4 for identification.]

5 A Okay.

6 Q On May 5th, we're talking about the Department of
7 Transportation again. The DOT responds asking, "If you
8 could buy us a bit of time, that would be great" at the top.
9 Let me start. I apologize. Let me start back at the
10 bottom.

11 A Oh, I see.

12 Q Yeah. This part. I apologize. Towards the
13 bottom of the page, we're looking at an email from May 5th
14 at 6:40 p.m. DOT says to you, "If you could buy us a bit
15 more time, that would be great."

16 There are several other exchanges, and then you respond
17 on May 8th at 11:03 a.m., the second sentence of your email
18 at the top of the page, "In terms of timing, only a handful
19 of agencies should be able to get me their comments today.
20 Do you think that you can get me something on Monday? If
21 you send me anything beyond that, I will certainly forward
22 it to EPA and the Corps but cannot guarantee that it will
23 get the same level of attention." Do you recall this
24 exchange, Mr. Dorjets?

25 A Yes.

1 Q Okay. We'll go to the next one. I have one last
2 one and I'm done. We will -- one more email exchange which
3 I'll mark as Exhibit 6.

4 [Dorjets Exhibit No. 6 was marked
5 for identification.]

6 A Okay.

7 Q Okay. We'll start at the bottom of the first
8 page, but the full chain is here. On May 27th, the USDA
9 notes that the rule will be announced today and asks whether
10 the RIA will be attached or if you are still working on it.
11 You respond halfway through your email on the 27th, at 10:56
12 a.m., "Unfortunately, by the time I got your message, we had
13 already wrapped up the RIA and it would have been extremely
14 difficult to reopen it at that point."

15 USDA responds, "Yes. That process was not well
16 managed. There was no return solicitation for agencies to
17 see what EPA had proposed or not, changing in response to
18 comments." And in the last line of his response he says,
19 "Sometimes the folks across the street from you do not care
20 about longer term issues that other agencies do care about."
21 You then respond that there is only so much you -- that you
22 could do.

23 Mr. Dorjets, do you recall this exchange?

24 A Yes, I do.

25 Q Did you discuss any of these requests for

1 extensions with anyone within OIRA to your recollection?

2 A I don't recall.

3 Q Do you recall discussing that the agencies were
4 indicating they would be unable to complete a review or that
5 the shortened timeframe would prevent them from conducting a
6 quality review?

7 A No. I -- it would have been uncommon for me to do
8 that. I would have -- it just -- given the fact -- this
9 second exchange happens very frequently, so there would have
10 been no reason for me to elevate this type of issue unless I
11 was aware of a specific issue that was being made aware to
12 me that wasn't getting resolved. Then I would have
13 considered how to handle that, but this very broad type of
14 "we need more time," it's -- it's just a very natural type
15 of discussion, so there would have been no reason for me to
16 elevate it.

17 Q And it's a natural type of discussion that you
18 have with rules where their interagency review deadline is
19 not truncated as it was in this context? The timeline for
20 review here was shortened --

21 A Right.

22 Q -- as you refer to in these emails. And you said
23 you don't recall how you received this instruction; is that
24 correct?

25 A Right.

1 Q And so I'm saying you are suggesting that this is
2 a common complaint that you receive from agencies, but in
3 this case the review period that they were given was
4 shortened even further.

5 A Um-hmm.

6 Q So I'm saying, in this context where they were
7 given even less time than what they are typically given, did
8 that not raise any certain concern to you that they were not
9 able to complete the review of the RIA in that time?

10 A No. I don't recall how I handled this, if I had
11 discussed this with my supervisors or not. I might have
12 communicated it, but I don't recall any specific discussions
13 about this.

14 Q And you don't recall why the review period was
15 shortened?

16 A No. That I do not --

17 Q Especially for as important a rule as WOTUS in the
18 draft final rule stage where agencies are given literally
19 their last chance to comment on this rule; you don't recall?

20 A This -- the period -- there is no set period of
21 review for a rule. It is a function of a number of things.
22 One is my constraints on other rules. It can be whether
23 there is -- the agency wants to do a press release or roll
24 out on a specific date. But I have given agencies one week
25 to review a rule. I have given agencies six weeks to review

1 a rule.

2 So I can't really -- like the fact of shortening it
3 is -- it's still within the window of what I have given
4 agencies. So it's still -- I guess it wouldn't have raised
5 any alarm bells, no.

6 Q You aren't aware of the length of this rulemaking
7 that had been undertaken before you came on board, correct?

8 A I'm sorry. Could you clarify that?

9 Q You understand the history behind the WOTUS
10 rulemaking and guidance before you came on board at OIRA, do
11 you not?

12 A No. I'm not sure what you're referring to, no.

13 Q I'm trying to get to the point that this is
14 clearly not the first time the agencies had seen the rule,
15 but that there had been several iterations of the rule that
16 had gone through review at OIRA.

17 A There was a -- I'm aware of there being a proposed
18 rule that had gone for review. I'm not aware of any other
19 iteration.

20 Q And with respect to a rule of this magnitude and
21 complexity, you're saying that you wouldn't give it any
22 thought to give agencies one week to review the rule versus
23 six weeks?

24 A I -- actually, and I'm sorry, I don't mean to be
25 difficult. I actually don't agree with the premise that

1 this is that -- the magnitude and the complexity, because
2 compared to a lot of the other rules that I do, this is
3 actually not a very complex rule. It doesn't deal with very
4 technical issues of specific pollutants being discharged and
5 the limits and the equipment that has to be installed and
6 tests. This was dealing with jurisdictional determinations.

7 So as far as rules go -- and I can't speak to the
8 magnitude, that's -- but in terms of complexity, this wasn't
9 a very complex rule.

10 Q Can you give the committee an example of some of
11 the other rules that you would consider more complex than
12 this?

13 A Certainly. The effluent limitation guidelines on
14 steam electric power plants set numeric limits on discharges
15 of very specific toxins by coal plants into -- into waters,
16 and it recommended technologies, and then you had to -- as
17 part of my review, I needed to gain comfort that the
18 pollutant really was being discharged at a sufficient level
19 to require regulation, that the specific equipment would
20 mitigate that, look at competing technologies,
21 competing -- look at the cost-benefits of different
22 resolutions. You're really dealing into very technical
23 biology, chemistry, engineering of things on those types of
24 rules. None of this came up here.

25 Q And you didn't look into the connectivity report

1 or the analysis that was provided on this rulemaking? You
2 feel it -- did you review that at all?

3 A No. It wouldn't have been my place to review
4 those -- the connectivity report as part of this review.

5 Q But with respect to these other rules, you did
6 review the scientific analysis and basis for this
7 rulemaking?

8 A No. I wouldn't have reviewed the science in those
9 rules either.

10 Q Okay.

11 A It's -- I have to just understand the issue well
12 enough to decide whether -- how to resolve it and if I'm
13 happy with the language.

14 Q Okay. Is it common in your experience to truncate
15 agency's time for review of a final rule, after you've given
16 an agency a deadline to pull it back?

17 A No, it's not common.

18 Q You mentioned on several --

19 Mr. Luftig. I'm sorry. What was your answer?

20 Mr. Dorjets. It is not common.

21 BY MS. AIZCORBE:

22 Q You mentioned on several occasions that comments
23 might not be considered after this revised deadline. Who
24 told you the agencies might not consider comments received
25 after this new date?

1 A Nobody. That's a standard response that I give to
2 agencies as an incentive for them to meet the deadlines.

3 Q And do you recall what you meant in your email to
4 the Department of Transportation that only a handful of
5 agencies should be able to get their comments today?

6 A I -- reading it, I don't recall exactly what I was
7 thinking at the time I wrote this. Reading it now, I -- I
8 mean, what I imagine I meant was that some -- only a handful
9 of agencies were going to be able to meet the deadline, and
10 that the others were going to be submitting it after that.

11 Q Can you explain the purpose of interagency review
12 for a draft final rule?

13 A For other agencies to have an opportunity to
14 provide comments.

15 Q To your knowledge, were all agency comments in
16 fact considered in full and addressed by the agencies before
17 the rule was promulgated?

18 A Absolutely. Yes.

19 Q Notwithstanding the emails that we just discussed
20 where certain agencies couldn't complete a full review?

21 A I don't -- there is a difference between
22 this -- the tenor of these emails and specific comments that
23 are raised for me to resolve. So with this type of, you
24 know, complaining about deadlines and having to work later
25 hours and -- it's very common.

1 But I'm not aware of any specific issue that either
2 agencies raised that I couldn't resolve or anything that
3 really needed specific attention. This is a much more
4 general type of complaining that kind of happens on most
5 reviews.

6 Q Are agencies required to certify to you after they
7 receive comments from agencies that they have addressed
8 them? You just said that you are in fact aware that all
9 agency comments were in fact considered in full and
10 addressed by the agencies before the rule was promulgated.

11 A I need to rephrase. I am confident that all of
12 the issues that were raised by interagency reviewers were
13 addressed to a satisfactory level as part of the review.

14 Q And what do you mean when you say "to a
15 satisfactory level"?

16 A That there are no outstanding issues that needed
17 to get resolved that weren't.

18 Q And if there had been, how would you be aware of
19 that?

20 A Because an agency would have communicated it to me
21 or I would have identified it, and then we would have had to
22 decide how to resolve it.

23 Q And that did not happen in this case, correct?

24 A Yes.

25 Q Can you explain Mr. Johansson's comments from the

1 USDA that sometimes the folks across the street from you do
2 not care about longer term issues that other agencies do
3 care about?

4 A I'm sorry. What's the question?

5 Q Can you explain it? Do you know who he is
6 referring to?

7 A I mean, he's -- he's referring to people in the
8 White -- in the west wing, but I can't speak to the specific
9 context for why he would be saying that.

10 Q Who are your primary points of contact for the
11 agencies in this rulemaking?

12 A Which agencies?

13 Q The rulemaking agencies.

14 A Oh, the rulemaking. I'm sorry. Greg Peck at EPA
15 and Craig Schmauder at the Corps.

16 Q Did you or anyone else at OIRA communicate
17 directly with the Corps during the rulemaking?

18 A I don't know whether anybody else communicated
19 with the Corps.

20 Q How frequently did you speak with or meet with the
21 EPA and Army?

22 A Daily. Army or the Corps? I guess Craig
23 Schmauder is Army, so daily.

24 Q And were all of your conversations joint with both
25 of these agencies?

1 A They -- I certainly tried to make them joint, but
2 I don't recall whether there are specific instances where
3 one person wasn't available for a call.

4 Q I'd like to introduce our next email into the
5 record as Exhibit 7.

6 [Dorjets Exhibit No. 7 was marked
7 for identification.]

8 On May 12, 2015, Mr. Laity reaches out to Greg Peck of
9 EPA saying, "Please call re WOTUS. One or two issues I need
10 to discuss. Thanks." The Army and the Corps were not cc'd
11 on this email. Was it common for OIRA to speak directly
12 with the EPA throughout the rulemaking?

13 A It was common for OIRA to speak directly with EPA.

14 Q And were you aware of the nature of these
15 conversations between Mr. Laity and Mr. Peck?

16 A No, I didn't.

17 Q They did take place, in fact, after you came on
18 board at OIRA; is that correct?

19 A I --

20 Mr. Luftig. Are you asking him to speculate?

21 Mr. Dorjets. I --

22 Ms. Aizcorbe. No. This conversation happened -- the
23 email exchange occurred on May 12, 2015. And so I was
24 asking if that was after Mr. Dorjets was in his current
25 capacity.

1 identification.]

2 Mr. Dorjets. I'm sorry. 8 and 9 appears to be the
3 same email?

4 Ms. Aizcorbe. Did you get two of the same?

5 Mr. Luftig. So we have -- are we off the record?

6 Mr. Dorjets. We can go off the record.

7 [Brief recess taken from 11:00 to 11:02 a.m.]

8 Ms. Aizcorbe. We can go back on the record.

9 BY MS. AIZCORBE:

10 Q In Exhibit 8, we're looking at an exchange between
11 Mr. Peck at the EPA and you --

12 Ms. Berroya. We don't have --

13 Ms. Aizcorbe. -- Exhibit 8, which is an email --

14 Ms. Berroya. Right. But we don't have -- we don't
15 have it.

16 Ms. Aizcorbe. Oh, sorry.

17 Ms. Berroya. Right. So we need to wait until
18 everybody at the table has it. Thanks. Okay.

19 BY MS. AIZCORBE:

20 Q So 8 is the email with the subject line Re Log
21 Ponds from Friday, May 15, 2015, at the top, between Mr.
22 Gregory Peck and you, Mr. Dorjets. And, 10, we're looking
23 at an email from Thursday, May 21, 2015, from Mr. Laity at
24 the top to Mr. Peck. And I was simply showing you these
25 emails as examples of direct communications between OIRA and

1 the EPA.

2 And both of these emails refer to discussion about
3 changes to the preamble. I'll start with number 8. At the
4 top Mr. Peck says, "Glad this is language we added to the
5 preamble. Is there something here that would be responsive
6 to your request for additional clarity?" And then you go on
7 to discuss the actual preamble language.

8 In Exhibit 10, at the bottom, Mr. Laity emails Mr. Peck
9 with some sample language discussing cooling ponds, and Mr.
10 Peck responds, "Looks good. I'll drop this language into
11 the preamble. Thanks. How is the grandfather language?"

12 And Mr. Laity responds, "Working on it with Kelly.
13 Will get back to you shortly."

14 So my question to you was, is it common for OIRA to be
15 engaging, making changes to the rule, without discussing
16 those changes with the Army or the Corps?

17 A I -- on this rule specifically, or I
18 guess -- could you just rephrase or --

19 Q In your experience, you've said you hadn't worked
20 or worked on or reviewed any joint rulemakings before. So
21 this would be the only case --

22 A Right.

23 Q -- that you have experience I guess with working
24 with multiple agencies who are in the rulemaking? So during
25 the time that you were working on this rule, you said that

1 you did correspond with and discuss certain items with the
2 EPA directly. And my question was, is it common for those
3 discussions to involve changes to the rule or its preamble?

4 A So I think I'm hearing two different questions.
5 I'll answer both of them, just to -- to be complete. One
6 is, yes, it was common for me to discuss changes to the
7 preamble and the rule with EPA and the Corps. That was the
8 main nature of our discussions was me raising concerns and
9 finding ways to resolve them, which generally took the form
10 of rewriting some of the document to address that concern.
11 So that was a large part of my discussion with the agencies.

12 As to whether it was with one agency or the other,
13 I -- there was -- because it was a joint rule, to the extent
14 that there might have been a discussion with one agency that
15 the other couldn't participate in, I wouldn't have approved
16 any of the language had the other one not seen it and signed
17 off on it.

18 So in this -- in the case of Exhibit 8 where Mr.
19 Gregory Peck is providing this preamble language,
20 it's -- even though the Army was not copied on this email, I
21 would have still forwarded that email to him to make sure
22 that there was concurrence on it.

23 Q Are you saying you did so in this case?

24 A I have no reason to think I didn't because it was
25 a joint rule by both agencies. Or spoke -- with him over

1 the phone or in some way got comfort that the Army was happy
2 with this language, too.

3 Q So you're saying in every case where you had a
4 discussion with the EPA on something you would then follow
5 up with the Army or the Corps on that matter; is that
6 correct?

7 A Either in that specific matter or maybe if there
8 was an entire -- maybe there was a new draft of the document
9 that went around, maybe that -- I got comfort on that. But
10 in some form or another, yes, I needed to make sure that
11 both agencies were satisfied on the resolution.

12 Q Was that just the way you operate, or were you
13 given any formal guidance from OIRA as to how to handle a
14 joint rulemaking and including both agencies in that --

15 A No, I was not -- I was not given any formal
16 guidance. It just made -- seemed to make sense, if it's
17 both agencies are issuing the rule, that they would both
18 need to look at the language.

19 Q Can you explain how OIRA evaluates whether an
20 agency has appropriately or sufficiently responded to public
21 comments?

22 A So there's -- it depends on the rule and the
23 situation. Agency's response to public comments can take
24 one of two -- in my experience, one of two forms. One is
25 that they could be summarized within the preamble of a final

1 document. In some cases, that is not feasible, so there is
2 a separate report that is generated with that. It is then
3 the desk officer's -- one of the desk officer's duty to
4 review to the best of his or her ability either the document
5 or specific matters that are addressed in the document.

6 Q And which course was taken in WOTUS?

7 A In the case of WOTUS, there was a separate
8 document that was being prepared by the promulgating
9 agencies.

10 Q Did you review the public comments for this rule?

11 A I reviewed specific -- I reviewed the public
12 comments for the issues that I felt I needed to review the
13 public comments. So to the -- sorry. Let me rephrase. If
14 a comment -- if a concern was raised by a member of the
15 public, interagency reviewer or by an agency as part of the
16 review process, and I wished to see how the agencies were
17 resolving those specific comments, I asked the agency to
18 send me that portion of the document so I could reach
19 comfort on how they had addressed those issues.

20 Q Do you recall how frequently you did so with
21 respect to this rulemaking?

22 A I don't recall how frequently. At least a half
23 dozen times, maybe a dozen.

24 Q Did you receive the agency summaries of comments,
25 of substantive comments that the agency received?

1 A Yes. As far as I recall, each time I asked the
2 agencies to inform me of how they had addressed those public
3 comments, they were responsive.

4 Q And when you say they were responsive, you -- can
5 you explain what you mean by that? You reviewed the
6 summaries that the agencies gave you and you --

7 A Yes.

8 Q -- then had the corollary comments and compared
9 them against each other?

10 A No. It is not common, but not -- it would not
11 have been necessarily common for me to review all of the
12 subsequent -- all of the comments that were submitted.
13 Sometimes it's sufficient if a stakeholder came in for an
14 E.O. 12866 meeting and raised a concern, it would have -- at
15 that point, time is of the essence.

16 It's sufficient for me to call one of the promulgating
17 agencies or email them and -- especially because as a
18 courtesy we invite the promulgating agencies to participate
19 in those calls, in those meetings, sorry. So they would
20 have heard the same concern and know what I was referring
21 to. So I could sort of just call one of them and say, "You
22 heard the stakeholder raise this concern. Can you please
23 let me know how you addressed it?" And then they would have
24 sent me something.

25 Q Do you know when the agencies completed their

1 review of substantive public comments?

2 A I do not know.

3 Q Were you ever informed that the draft final rule's
4 analysis of public comments or their separate report was not
5 complete by the time the rule was promulgated?

6 A I have no reason to think it was not complete by
7 the time it was promulgated.

8 Q Do you typically ask agencies whether they have
9 completed their review of substantive comments when a rule
10 is sent to OIRA for final review, or do you just assume it's
11 done at that point?

12 A No. It is -- the more common approach is for the
13 document to be submitted to OIRA for review as part of the
14 rule. However, there have certainly been several cases like
15 this one where the document, for one reason or another,
16 still is not finalized. So it is only uploaded or
17 finalized -- it is finalized separate from my review.

18 Q And when was that document uploaded for this
19 rulemaking?

20 A I don't recall.

21 Q Do you recall whether it was before interagency
22 review began?

23 A I recall that the response to comments document
24 was not uploaded with the other rulemaking documents at the
25 time when the rule was first submitted.

1 Q Do you recall receiving the response to comments
2 document before the final rule was promulgated?

3 A I don't recall when -- no, I do not recall.

4 Q Do you recall reviewing that document at all?

5 A Not in full. But I reviewed pieces of it as
6 needed.

7 Q Did you have any discussions with the agencies
8 about that document?

9 A I certainly -- one of the matters of -- that we
10 discussed on occasion was the status of it. I needed to
11 make sure that it would be done, but otherwise the main
12 nature of the conversation was responses to my questions on
13 how to address specific concerns, so they could provide me
14 that chapter, that language, that section, so I can gain
15 comfort that those issues were satisfactorily resolved.

16 Q Did the agencies provide any justification as to
17 why it was not sent to OIRA along with the final rule?

18 A I -- yes, I believe it was the number of comments
19 that they had received that they had to address.

20 Q And did that raise any concern to you, that it was
21 not completed by that time?

22 A No. Because -- I mean, no, it didn't because I
23 know that a number -- in fact, due to the significant number
24 of form letters that the agencies had received, I knew that
25 those would still take time to resolve. And I knew that I

1 had an opportunity to ask for specific comments, so I could
2 gain comfort on that. Even -- given the number of comments,
3 I believe it was over a million that they were --

4 Q I'm just referring to the substantive comments.
5 So those that are unique or original, not the form letters.

6 A Okay.

7 Q So we're just talking about the agency's responses
8 to the substantive comments.

9 A Okay.

10 Q And so my question was, what would your
11 expectation be for when a document like the response to
12 those substantive comments would be completed?

13 A My expectation is that it would be completed and
14 submitted as part -- with the preamble and the RIA. But at
15 the same time, I know that that's not always feasible. So I
16 accept the fact that I may have to handle that review in a
17 different way than I would, but I certainly expect and hope
18 that it would be submitted at the same time.

19 Q Was the final preamble submitted to OIRA for
20 review at the same time as the final rule?

21 A Yes. They are part of the same document.

22 Ms. Aizcorbe. I think I'm out of time, so if we can go
23 off the record.

24 [Brief recess taken from 11:14 to 11:24 a.m.]

25 Mr. Longani. We can go back on record. Thank you.

1 The time is 11:24.

2 BY MR. LONGANI:

3 Q Good morning, Mr. Dorjets.

4 A Good morning.

5 Q Again, Mr. Dorjets, if I ask you a question that
6 is either incomplete, ambiguous, or vague, just let me know
7 and I'll rephrase, okay? I'm not trying to trick you with
8 any question. If there's anything that's unclear whatsoever
9 in my questions or any follow-ups, please feel free to let
10 me know and, again, I will rephrase. Okay?

11 A Thank you.

12 Q Thanks very much. Mr. Dorjets, you briefly talked
13 about your background with my majority colleague in the last
14 hour. I want to ask you a couple of cleanup questions
15 related to your background. You said in the last hour that
16 you have not held any other position at OIRA other than what
17 you currently are in; is that correct?

18 A Yes, that is correct.

19 Q Okay. And you've been in that position for two
20 years; is that correct?

21 A Approximately, yes.

22 Q Okay. Who is that you report to?

23 A Jim Laity.

24 Q Okay. And have you always reported to Jim Laity?

25 A Yes, I have.

1 Q Okay. And during this rulemaking, was Jim Laity
2 your primary supervisor?

3 A Yes.

4 Q Prior to coming to OIRA, can you describe your
5 professional background?

6 A Certainly. I graduated with a master's degree in
7 international energy policy from the Johns Hopkins School of
8 Advanced International Studies. Then I spent five years as
9 an energy consultant in the private sector. Following that,
10 I joined the Department of Energy as an economist, an energy
11 economist at the U.S. Energy Information Administration
12 where I spent approximately seven years.

13 Q Okay. Now, on the executive orders that guide
14 OIRA's review, and more specifically Executive Orders 12866
15 and 13563, OIRA has approximately -- has 90 days to complete
16 review of both the proposed and final rule; is that correct?

17 A Yes. We try to get reviews done in under 90 days.

18 Q So can you expand upon that? You said you try to
19 get the reviews done in 90 days. Is it fair to say that
20 sometimes the process takes more than 90 days?

21 A The process can take more and can take less. I
22 have done reviews that have been completed in three weeks,
23 some of them extend beyond 90 days.

24 Q Okay. Can you tell us why that happens? Why is
25 there a variation in terms of the time that it takes to

1 complete review of a rule?

2 A Certainly. Sometimes it's due to the complexity
3 of the rule. Some rules where the size or the subject
4 matter -- some rules are very easy, some rules are very pro
5 forma. So there is the actual specific nature of the rule
6 that can determine how long -- how much time it takes to
7 review it.

8 Similarly, there may be -- there may be reason why a
9 rule needs to come out on a certain date. Whether that is a
10 press release or a legal obligation, sometimes a rule is
11 being issued because it's a court order. And while agencies
12 certainly try to give OIRA as much time as possible to
13 review that rule, that is not always possible. And
14 sometimes we are in a situation where we have to review a
15 rule by a certain date or the agency is in contempt.

16 So there can be a number of reasons why the deadline
17 may change.

18 Q Is it unusual for OIRA to take more than 90 days
19 to review a rule at either the proposed or final stage?

20 A No, it is not.

21 Q Is it unusual for OIRA to take less than 90 days
22 to review a rule at either the proposed or final stage?

23 A No, it is not.

24 Q Approximately how many rules does OIRA review
25 annually?

1 A I would have no -- I do not know.

2 Q Okay. Would several hundred be in the ballpark?

3 A At least, yes.

4 Q Okay. And would you agree that a significant
5 portion -- and I would say by "significant" let me say
6 one-third to a half -- are significant -- are economically
7 significant rules?

8 A I --

9 Q If you know.

10 A I don't know the answer to that.

11 Q Sure. Is the rulemaking process the same for
12 every rule or is it tailored to each rule?

13 A The process -- the process more or less is the
14 same, but the timelines, the specific nature, those may
15 vary, but the process is more or less the same.

16 Q Okay. A process that's guided by the Executive
17 Orders 12866 and 13563 --

18 A Yes.

19 Q -- is that correct?

20 A That is correct.

21 Q And based on the rule, does OIRA's level of
22 engagement with agencies vary?

23 A Yes.

24 Q Is there anything inappropriate about agencies
25 engaging OIRA at any point during the rulemaking process,

1 especially after the rule has been submitted for final
2 review?

3 A Promulgating agencies or --

4 Q Yes.

5 A -- reviewing agencies?

6 Q Well, let's start with promulgating agencies.

7 A No, not at all.

8 Q And, in fact, would you expect that?

9 A Yes, that's a part of the process.

10 Q And let's talk about agencies that are reviewing
11 this during the interagency review process. Anything
12 inappropriate about them contacting you to -- contacting
13 OIRA to discuss substance-related matters?

14 A No, that's -- in fact, that's the process. That's
15 the way it's intended to work.

16 Q Okay. Mr. Dorjets, when you work on a
17 rule -- strike that. How many rules do you normally work on
18 at the same time?

19 A It varies. It's generally at least three or four.
20 I think I have done as many as eight at one time.

21 Q Okay. So generally you're working on, on average,
22 three to four rules at the same time?

23 A Yes.

24 Q When you were reviewing the Clean Water Rule, do
25 you recall how many rules you were juggling at the same

1 time?

2 A No, I don't recall, but it probably was three or
3 four.

4 Q Okay. And each one that was assigned to you must
5 be put through the same rulemaking requirements and
6 processes as set forth in the executive orders, correct?

7 A Absolutely.

8 Q And so for each rule that you are reviewing
9 concurrently, you have to handle all 12866 comments and
10 meetings; is that correct?

11 A Yes.

12 Q You have to address all comments provided by
13 commenting agencies during the interagency review; is that
14 correct?

15 A Yes.

16 Q You have to address all comments coming from OIRA
17 and OMB and making sure that the promulgating agencies are
18 addressing those comments; is that correct?

19 A Yes.

20 Q You're briefing supervisors and taking direction
21 from those supervisors; is that correct?

22 A Yes.

23 Q You're responding to feedback from promulgating
24 agencies; is that correct?

25 A Yes.

1 Q You're proposing solutions to resolve
2 disagreements between commenting agencies and promulgating
3 agencies that arise during the rulemaking process; is that
4 correct?

5 A Yes.

6 Q You're responding and addressing literally
7 thousands of comments for each rule that you are reviewing;
8 is that correct?

9 A Yes.

10 Q In essence, is it fair to say that you are a
11 clearinghouse for information coming from all relevant
12 stakeholders during the review of a rule, including
13 agencies, private parties, NGOs, tribes, et cetera?

14 A Yes.

15 Q And as you formulate and juggle each rule, and the
16 multiple procedural requirements for each rule, you must
17 keep the process moving in order to meet the deadlines set
18 out by OIRA and OMB; is that correct?

19 A Yes.

20 Q The Clean Water final rule was concluded in less
21 than 90 days, correct?

22 A Yes.

23 Q Do you know why?

24 A No.

25 Q Is there anything atypical about the fact that it

1 was concluded in less than 90 days?

2 A No.

3 Q Is there anything unusual about a promulgating
4 agency asking for an expedited review of a rule; in other
5 words, shorter than 90 days?

6 A No.

7 Q In fact, isn't that fairly common?

8 A Yes, it is very common.

9 Q I want to talk to you briefly about deadlines. In
10 the last hour, you mentioned that you received your deadline
11 from supervisors at OIRA with respect to the Clean Water
12 Rule and completion of the analysis of the Clean Water Rule;
13 is that correct?

14 A Yes.

15 Q Anything unusual about OIRA setting a deadline for
16 completion of a rule?

17 A No.

18 Q In fact, why was OIRA setting deadlines for
19 completion of rules?

20 A It -- I can't speculate to all the possible
21 reasons. I'm not -- I don't -- I'm not generally informed
22 of what they are. I know in some cases it can be a legal
23 reason. In some cases it could be a -- I have been involved
24 in rules where there was a certain public engagement where
25 the appropriate secretary wanted to make an announcement of

1 a rule, so that served as an incentive. I'm sure there are
2 other reasons that I'm not privy to.

3 Q What would happen to the rulemaking process
4 generally if OIRA set deadlines that it did not keep?

5 A I mean, the process would fall apart. We
6 need -- there is a high volume of rules that we go through.
7 We need to maintain -- we need to maintain a steady pace, so
8 we can clear the -- the path for new rules to come in. And
9 because in general there -- what sometimes happens is that
10 we will instruct agencies that in order to keep workload
11 manageable to -- that we will not accept a certain rule
12 until we have concluded a review on another rule of that
13 agency to not overwhelm us. So we need to keep the process
14 going.

15 BY MS. BERROYA:

16 Q And why do you need to keep the process going?

17 A Because these rules are being promulgated for a
18 reason, and whether it's court-ordered or policy decision,
19 and OIRA's role is to -- is a part of that piece, to make
20 sure that those regulations get out, to the extent they need
21 to go out.

22 Q And if regulations didn't get out, what would
23 happen? Would the process just grind to a halt?

24 A I wouldn't want to speculate to what would happen
25 if all the regulations wouldn't go out, but I'm sure it

1 wouldn't be a pleasant experience, legally or politically.

2 BY MR. LONGANI:

3 Q During the interagency review process, is it
4 unusual for agencies to submit comments after the rule in
5 question -- or after the deadline is set for the rule in
6 question?

7 A Yes.

8 Q I'm sorry. Wait, I'm sorry. It is unusual to --

9 A No, it is not unusual.

10 Q Is not unusual.

11 A I'm sorry. Thank you.

12 Q No, I'm sorry. I just wanted to make sure. And
13 when those comments are submitted, is it commonplace for
14 you, in particular, to consider those comments, even if they
15 came a couple of days after the deadline?

16 A Yes. And it's a -- whenever agencies ask -- it's
17 very common for agencies to ask to submit comments after a
18 deadline. I -- because I know it's a slippery slope and I
19 have to work with these agencies repeatedly, and I don't
20 want them to get in the habit of missing deadlines, we need
21 to be firm in incentivizing them to not make that a habit.
22 So I will -- I think in every case my common response -- and
23 I can't speak to how other desk officers handle this, but
24 the way I handle it if an agency asks to miss a deadline is
25 to say, "Look, I'll take a quick look. I'll resolve issues,

1 if needed, but I can't promise that I will devote the same
2 amount of energy to your comments if you miss the deadline."

3 That being said, agencies still commonly miss the
4 deadline.

5 Q Okay. And when you say, "I may not be able to
6 devote the same level of energy," what do you mean by that?

7 A What I -- generally what that means is what's
8 possible is at that point I will have already sent all of
9 the agents -- all of the comments I have received to the
10 promulgating agencies. So I have already created my set
11 of -- my consolidated set of OMB comments that reflect all
12 of the comments I have received by other agencies and sent
13 that on to the promulgating agencies, so they can begin
14 processing it.

15 If another agency sends me comments after the fact,
16 I'll review them, and then I would have to make a judgment
17 call whether it's worth sending -- pulling back the
18 document, sending a revised document, raising a new issue.
19 It's really a judgment call on the nature of that issue.

20 Q If you felt the comment was substantive and new
21 and had not been heard and addressed before, would you
22 forward those comments to the promulgating agency?

23 A Absolutely.

24 Q And has anyone -- any supervisor ever told you not
25 to forward any documents after the deadline?

1 A No. No.

2 Q Okay. Do you still have the exhibits in front of
3 you?

4 A Yeah.

5 Q Let me just close up on that specific line. Is
6 there anything -- in the context of the Clean Water Rule,
7 were there any comments that you did not forward that were
8 substantive and new from any agency that was submitted to
9 you after the deadline?

10 A No.

11 Q Was there any comment that you felt that you
12 received either before or after the deadline of the Clean
13 Water Rule context that was not forwarded to the
14 promulgating agencies for review?

15 A There was no comment that was not forwarded that I
16 felt should have -- a comment I received at any point.

17 Q I want to go back to -- all right. If you could
18 pull up Exhibit 1, if we could go through that for just a
19 second. Do you have that in front of you?

20 A Yes.

21 Q Okay. My majority colleagues introduced this
22 during the last hour. I want to ask you a couple of
23 follow-up questions on that. In your experience, is there
24 anything significant about the fact that OIRA moved up the
25 review deadline by three days?

1 A Well, it's not common. It's certainly not
2 significant, I don't think.

3 Q Okay.

4 BY MS. BERROYA:

5 Q Why don't you believe it's significant?

6 A Because I think that the -- nobody ever has enough
7 time, as much time as they would wish, to provide comments
8 on our rule. And while this may mean agencies have to work
9 a little harder or maybe stay a little later to get it, it's
10 part of the process. And it's -- I think agencies are able
11 to work around something like this.

12 BY MR. LONGANI:

13 Q And by "this," do you mean the deadline being
14 moved up three days?

15 A Yes.

16 Q Okay. In this email, Mr. Dorjets, from you to
17 Elizabeth Kohl, and Dan Cohen is copied on this, it
18 says -- I'm going to read you the relevant portion. It
19 says, "Betsy, the pressure on WOTUS Clean Water Rule is
20 getting turned up from on high, and I've been asked to do
21 whatever I can to provide all comments back to EPA by the
22 end of the week."

23 What do you mean by "the pressure is getting turned on
24 high -- the pressure is getting -- the pressure is being
25 turned up from on high"?

1 A I'm not aware of any of the specific context that
2 would have precipitated me to write this. But by looking at
3 this email, this is the way I was basically trying to
4 explain to the Department of Energy that, look, it's not my
5 fault. I'm sorry. I was basically blaming my boss, to put
6 it bluntly, for why I needed to do this. But so I
7 don't -- but I don't recall the exact set of events.

8 Q Is this sentiment -- blaming your
9 boss -- something that you regularly use to motivate
10 agencies to return comments to OIRA in a timely fashion?

11 A Yes, it is.

12 Q And you've previously said that it is not unusual,
13 and in fact common, for agencies to ask for more time during
14 the rule review process; is that correct?

15 A Yes.

16 Q And you sent this same email to every agency in
17 the interagency review process, correct? And by that I mean
18 the "WOTUS Clean Water Rule is getting turned up from on
19 high," that --

20 A I --

21 Q If you remember.

22 A I don't remember, but I have every reason to think
23 I did, to any agency that hadn't submitted comments yet.

24 Q And what would have been -- is the reason because,
25 again, you wanted to motivate them to return the comments by

1 the OIRA deadline?

2 A Yes. That's exactly right.

3 Q Okay.

4 BY MS. BERROYA:

5 Q In your experience, is it oftentimes difficult to
6 motivate agencies to return comments by the deadline imposed
7 by OIRA?

8 A No matter what the deadline is, the agencies
9 always manage to get their comments in, whether it's at the
10 deadline or a day or two late. So I wouldn't say it's
11 difficult, but it's part of the process.

12 Mr. Longani. A little late with this, guys, Exhibit B
13 as in boy. Oh, actually, I didn't -- I didn't do it
14 by -- what number are they up to?

15 Ms. Aizcorbe. The next one is 11.

16 Mr. Longani. Yeah, let's do 11.

17 [Dorjets Exhibit No. 11 was marked
18 for identification.]

19 Mr. Luftig. Off the record.

20 [Brief recess taken from 11:44 to 11:45 a.m.]

21 BY MR. LONGANI:

22 Q If you can take a moment to review that.

23 A Yes, I've reviewed it.

24 Q Mr. Dorjets, you've had the opportunity to review
25 this. I've provided you with an exhibit now that is three

1 pages, one front and back. I'm going to refer you to the
2 top email, and it's from you to Ms. Lew at DOT. It's dated
3 May 5, 2015, at 6:34 p.m., and it is in response to her
4 discussion about the timeline and the deadline for
5 responding to the review for the economic analysis; is that
6 your understanding of the context of this email chain?

7 A Yes, it is.

8 Q Mr. Dorjets, you respond to Ms. Lew by
9 saying -- I'm looking at the last sentence of your response,
10 which is the third sentence, you say quote, "I'll do
11 everything I can on my end to buy you some more time, but it
12 may be out of my control." If you actually felt that an
13 agency needed additional time for substantive review, would
14 you have asked your boss to allow for that agency to have
15 the additional time necessary?

16 A Yes.

17 Q So did you ever receive any instructions in the
18 Clean Water rule context to not expand the deadline under
19 any circumstances?

20 A No, I did not.

21 Q Did anyone pressure you, be it OIRA or anyone
22 outside of OIRA, to complete this rule by the initial
23 deadline set forth in your email of April 27, 2015, which is
24 on the third page?

25 A Nobody pressured me. I knew that there was -- the

1 date was set, and I should do everything I can to meet that.
2 But if I felt that it wasn't feasible, I certainly did not
3 feel pressured not to communicate that in any way.

4 Q Okay. And is it unusual that you attempt to
5 comply and complete a rule's review by the deadline that you
6 are provided?

7 A No, it is not.

8 Q And, again, are Ms. Lew's comments asking for more
9 time unusual?

10 A No, it is not. And, in fact, in this case, the
11 reason she needed more time is that she wasn't forwarded the
12 document due to internal miscommunication within the
13 Department of Transportation that the person that I -- my
14 primary liaison did not think to share the document with
15 her, and now she was asking for more time while other people
16 in the agency had reviewed it.

17 Q Okay. And the deadline that you set forth,
18 approximately two weeks, is that a common amount of time to
19 review an economic analysis at the final rule stage?

20 A Yes, very common. I check -- I tend to give
21 either two or three weeks to most of my reviews.

22 Mr. Longani. Let's mark this as Exhibit 12, I believe
23 we're up to. Thank you.

24 [Dorjets Exhibit No. 12 was marked
25 for identification.]

1 BY MR. LONGANI:

2 Q Mr. Dorjets, I'm just going to ask you, looking at
3 the email from Mr. Dorjets to Mr. Peck and Mr. Schmauder,
4 Saturday, May 16, 2015, 10:34 a.m., subject Forward WOTUS
5 Passback Comments. Mr. Dorjets, you say, "DOT's comments on
6 passback are below. I think I've captured the instances of
7 confusion and grammatical errors. They know it, but in my
8 own comments, but forwarding to you for thoroughness. Also,
9 please note the clarification questions they have posed."

10 Gregory Peck then responds to everyone, including Mr.
11 Schmauder and you, "DOT's interpretation of the revised
12 ditch exclusion is correct in my view. Craig?"

13 Mr. Dorjets, have you had an opportunity to review this
14 email?

15 A Yes, I have.

16 Q Is the discussion that is taking place between
17 you, Gregory Peck, and Craig Schmauder typical of how
18 interagency comments are reviewed and analyzed?

19 A It was common of this rule, given the fact that it
20 was a joint rulemaking, yes.

21 Q Okay. And, in fact, as you testified to earlier,
22 the last hour, all substantive comments from the agencies
23 were addressed by you with both the EPA and the Corps; is
24 that correct?

25 A Yes.

1 Q Can you think of a single instance where the
2 substantive comment or substantive comments were not
3 addressed with both entities?

4 A It's possible I had discussions with one entity
5 and not the other. But as I mentioned earlier, I would have
6 asked for concurrence from the other agencies before
7 proceeding.

8 BY MS. BERROYA:

9 Q And in some instances, concurrence could have been
10 granted in a phone call with one agency and an email of
11 another; is that correct?

12 A Absolutely.

13 Q Or sometimes concurrence could have been granted
14 through circulating a new draft in which the revised
15 language would have been included; is that correct?

16 A Yes.

17 Q So concurrence could have been granted from the
18 agencies in different manners, correct?

19 A Yes.

20 Q But concurrence would have been granted from both
21 in all instances?

22 A Yes.

23 BY MR. LONGANI:

24 Q Mr. Dorjets, would you take a look at Exhibit 8
25 again, please?

1 A Okay.

2 Q Mr. Dorjets, I now want to direct your attention
3 to an email that starts at the bottom of the page, and it's
4 from you to Gregory Peck and copied on that are Gautum
5 Srinivasan, Craig Schmauder, Tera Fong, and Erin Burke, and
6 Sharon Cooperstein. Do you see that?

7 A Yes, I do.

8 Q And, again, this relates to log ponds; is that
9 correct?

10 A Yes.

11 Q And my majority colleagues have pointed you to the
12 very top email which is from Gregory Peck to you; is that
13 correct?

14 A Yes.

15 Q Do you have any doubt that that discussion, which
16 is based on the discussion below, was indeed communicated to
17 Mr. Schmauder?

18 A No, I do not.

19 Q Okay. Can you pull up Exhibit 7, please.

20 A Okay.

21 Q Again, this is an email that my majority
22 colleagues showed you. It's from Gregory Peck to Jim Laity.
23 It's dated May 12, 2015, and Greg Peck simply says, "We'll
24 call you." Do you have that in front of you?

25 A Yes.

1 Q Mr. Dorjets, do you actually know the context of
2 this email?

3 A No, I do not.

4 Q Do you know anything about the follow-up on this
5 email?

6 A No, I do not.

7 Q Do you know whether Jim Laity called Greg Peck and
8 Craig Schmauder in follow-up to this email?

9 A No, I do not.

10 BY MS. BERROYA:

11 Q You're not on this email, are you?

12 A No, I am not.

13 Q You don't know if the call referenced in this
14 email occurred, correct?

15 A No.

16 Q You don't know if Army was included on the call?

17 A No.

18 Q You don't know if anything on the call was
19 eventually discussed with Army?

20 A No.

21 Q Anything you might have stated regarding this
22 email would have been speculation?

23 A No. Sorry. Yes.

24 Q Thank you.

25 BY MR. LONGANI:

1 Q I'm going to ask you now to pull up Exhibit 2.

2 A Okay.

3 Q In the email -- and the email I'm referring to is
4 the starting -- it's from Kenneth Kumor to you, amongst
5 others, and it starts with "Vlad, you're killing us." Do
6 you see that email?

7 A Yes, I do.

8 Q Okay. Is the expression -- is the frustration
9 that Mr. Kumor is expressing in this email common for
10 agencies during the interagency review process?

11 A Yes, it is.

12 Q How common is it?

13 A Very common.

14 Q And in fact, there's nothing unusual about the
15 tenor of Mr. Kumor's response, is there?

16 A No, not at all.

17 Q Did you have any reason to agree with Mr. Kumor's
18 contention that "the powers that be were more interested in
19 schedule than substance?"

20 A No, I do not.

21 Q And again, is that typical of agencies who are
22 trying to bargain for more time?

23 A Yes.

24 Q If I could -- I'm done with that exhibit. Thanks.

25 A Okay.

1 Q But if you could pull back up Exhibit 12 --

2 A Okay.

3 Q Sorry. We just went through that.

4 Ultimately, the agencies and the particular -- EPA here
5 is describing -- they actually take DOT's interpretation and
6 incorporate it into the final rule; is that correct?

7 A Yes.

8 Q Okay.

9 BY MS. BERROYA:

10 Q So, initially DOT requested more time, correct?

11 A Mm-hmm. They had -- what I think happened here
12 is, they requested more time but, at least in this case, the
13 comments that they submitted, I had already identified as
14 part of my own review and already passed them along to the
15 agencies. So, it sounds like I was just forwarding it
16 as -- for completeness, but I had already identified the
17 same issues.

18 BY MR. LONGANI:

19 Q Mr. Dorjets, in your experience at OIRA, are
20 differences of opinion amongst the interagency participants
21 common?

22 A Yes, very common.

23 Q And in your experience at OIRA, is it common that,
24 during the interagency review process, that the agencies
25 express views that are subsequently not incorporated into

1 the final rule?

2 A Yes, that is common.

3 Q In fact, is it fair to say that, in most rules,
4 there are bound to be differences of opinion, both between
5 the reviewing agencies themselves and the promulgating
6 agencies?

7 A Yes, very common.

8 Q And would that be particularly so in the context
9 of a joint rule like the Clean Water Rule?

10 A I would imagine so.

11 Q On March 18, 2015, Ken Kopocis, the deputy
12 assistant administrator of EPA's Office of Water, testified
13 at a hearing of the Water Resources and Environment
14 Subcommittee. And during that hearing, he stated, "Quite
15 candidly, I will tell you that there is not a lot of new in
16 the way of issues that are being raised. Many of the issues
17 that are being raised are the same ones that have been
18 raised for several years."

19 Would you agree with Mr. Kopocis that, because of the
20 six-year process of review that the Clean Water Rule has
21 been through, that all of the significant issues related to
22 the rule had been raised by relevant agencies on multiple
23 occasions?

24 A Yes. In fact, I've discussed that same issue with
25 Jim Laity, who was involved with the proposed rule to -- and

1 he communicated the same notion to me.

2 Q Okay.

3 BY MS. BERROYA:

4 Q Mr. Laity had been involved in the Clean Water
5 Rule for quite some time; is that correct?

6 A Yes. He has extensive experience working on this,
7 on the Clean Water Rule, yes.

8 Q Was Mr. Laity a valuable resource for you during
9 your involvement with the Clean Water Rule?

10 A Invaluable. He attended, I believe, every -- if
11 not every, then almost every single E.O. 12866 meeting. And
12 I was able, following each meeting, to the extent necessary,
13 to have a quick debrief to get his reaction to the concerns
14 raised and how -- if necessary, how he thought I should
15 proceed in resolving them.

16 BY MR. LONGANI:

17 Q How often would you communicate with Mr. Laity
18 during the final rule stage?

19 A Daily.

20 Q And by "communicate, let me be
21 specific -- communicate about the Clean Water Rule.

22 A Yes.

23 Q It would be daily?

24 A Yes.

25 Q Okay. Where are your offices located at OIRA, you

1 and Mr. Laity?

2 A In --

3 Q Are you on the same hall? Are you --

4 A Yes, we're on the same hall.

5 Q Do you often go to each other's offices to
6 communicate with each other?

7 A Yes. Yes. We would see each other frequently
8 over the course of the day.

9 BY MS. BERROYA:

10 Q Mr. Laity is your supervisor, correct?

11 A Yes.

12 Q Did you interact with Mr. Laity more frequently on
13 the Clean Water Rule than you might on other rulemakings
14 given his extensive history with the Clean Water Rule?

15 A No. I don't think that -- I would not say that.

16 Q So, you --

17 A I did not interact with him any more frequently on
18 this rule than I did on any other Clean Water Act-related
19 rule.

20 BY MR. LONGANI:

21 Q Would you rely on Mr. Laity's experience in
22 resolving difficult issues during the final review stage for
23 the Clean Water Rule?

24 A Yes.

25 Q And why would you rely on his experience in this

1 context?

2 A Because Mr. Laity is an expert on the Clean Water
3 Act. And both his knowledge and his extensive experience,
4 I -- as my supervisor, it was natural for me to try to tap
5 into his expertise and experience.

6 Q And was it common for Mr. Laity to take the lead
7 or participate in resolving difficult issues as they came up
8 during the final rule stage for the Clean Water Rule?

9 A No, that's -- part of the process is, if there
10 were issues that came up that I didn't -- that I felt I
11 needed his expertise in helping to resolve, I relied on him.

12 Plus, the other factor here is that Jim Laity not only
13 has expertise on these subject matters, but he has expertise
14 with the individuals involved also. He had worked
15 extensively with Greg Peck and Craig Schmauder on other
16 rulemakings. So, if he felt that it would help for him to
17 get involved based on his personal relationship with him,
18 maybe to help facilitate some sort of resolution, he offered
19 to do that.

20 Q In fact, Mr. Laity told this committee that OIRA
21 is "a very flat and informal organization, and we do
22 collaborate a lot." Would you agree with that description
23 of OIRA?

24 A Yes.

25 Q And would you agree that that indeed occurred

1 during the Clean Water Rule?

2 A Yes.

3 Q Jim Laity also told this committee that there was
4 nothing atypical about the fact that the Clean Water Rule
5 took six weeks to review. Would you agree with that?

6 A Yes, I would.

7 Q Okay. Who are your primary agency points of
8 contact for the Clean Water Rule at the Army and the EPA?

9 A Greg Peck at EPA and Craig Schmauder at Army.

10 Q And what was the nature and frequency of your
11 contact during the Clean Water Rule with those individuals?

12 A Nature or the frequency?

13 Q The frequency.

14 A Daily in most cases.

15 Q And this is occurring from April 2015 onwards; is
16 that correct?

17 A There -- maybe not from day one. I might have
18 taken some time to review the documents, familiarize myself
19 with the issues. But then, once I understood the issues and
20 I was -- had -- I mean, for lack of a better expression, had
21 dove into resolving them, at that point it
22 was -- communication was daily.

23 Q Did you find anything inappropriate about Craig
24 Schmauder being the main point of contact for the Army?

25 A No.

1 Q What about Greg Peck for the EPA?

2 A No.

3 Q At any point did you feel you had a lack of access
4 to the EPA or the Army?

5 A No.

6 Q And were these contacts with Mr. Schmauder and Mr.
7 Peck done via phone and email and in person?

8 A Yes.

9 Q And during this process, did you help the agencies
10 work out any differences of opinion?

11 A Yes, I did.

12 Q Is that commonplace for OIRA?

13 A Yes, it is.

14 Q And the fact -- let me ask this. Were there
15 differences of opinion raised between the promulgating
16 agencies, for example?

17 A I would assume there would have had to have been,
18 but I don't recall the specifics.

19 Q Okay. And would that have been unusual for
20 differences to arise between the promulgating agencies?

21 A I -- seeing how this is my only interagency -- my
22 only joint rule, it's hard for me to speculate that that's
23 common or not. But to the extent of other reviews, it's
24 very common to have agencies disagree on how to resolve an
25 issue.

1 Q And during the interagency process, is it common
2 to have disagreements between the agencies involved, the
3 interagency review and the promulgating agency?

4 A It's very common to have some disagreements.

5 Q And in the Clean Water Rule review, final review,
6 did that occur?

7 A Yes, it did.

8 Q And in your role at OIRA, did you serve to resolve
9 those disagreements?

10 A Yes, I did.

11 Q During a rulemaking process, joint or otherwise,
12 are you aware of a situation where there is unanimous
13 agreement by all agencies as to all points?

14 A No.

15 Q And during the rulemaking process, is it fair to
16 say that every staff member's recommendations are not
17 adopted and integrated into the final rule by the ultimate
18 decision maker?

19 A Yes.

20 Q Is the fact that a specific staff member's
21 recommendation was not adopted a sufficient basis to say
22 that the rulemaking was flawed in any which way?

23 A No.

24 Q The end of the rulemaking process for the Clean
25 Water Rule, were you in agreement that the rule should be

1 concluded?

2 A Yes, I was.

3 Q Would you have recommended conclusion of the rule
4 if you had any significant unresolved concerns?

5 A Absolutely.

6 BY MS. BERROYA:

7 Q Absolutely?

8 A I would have communicated if I had -- sorry.

9 Can you rephrase the question?

10 BY MR. LONGANI:

11 Q Sure.

12 Would you have recommended concluding the rule if you
13 had significant unresolved concerns?

14 A Oh. Sorry. Sorry. I apologize.

15 I would not have recommended concluding review.

16 Q Mr. Dorjets, are you familiar with the Government
17 Accountability Office?

18 A Yes, I am.

19 Q What's your understanding of their role as a
20 federal agency, if you know.

21 A I do not know.

22 Q Would you agree that they're an independent
23 agency, if you know?

24 A I do not know.

25 Q Okay. They were not a party to this rulemaking;

1 is that correct?

2 A No, no they weren't.

3 Q Okay. Are you aware that the GAO, following the
4 completion of the Clean Water rulemaking, they conducted a
5 review of the agency's compliance with all relative
6 administrative requirements, including the economic analysis
7 and the administrative -- and concluded that the agency met
8 every requirement?

9 A I was not aware of that.

10 Q Would you disagree or agree with the GAO's
11 conclusion that -- that OIRA complied with Executive Orders
12 12866 and 13563?

13 A I would agree with that.

14 Q During the last hour, you indicated -- you
15 indicated that the CEQ was involved in several meetings; is
16 that correct? And specifically, you said they attended all
17 the 12866 meetings.

18 A Yes.

19 Q Is that correct?

20 A Yes, that is.

21 Q Anything unusual about that?

22 A No, that is not.

23 Q I'm going to ask you to pull out Exhibit 6.

24 A Okay.

25 Q In the last hour, again, in response to my

1 colleague's questions, you responded to what you thought Mr.
2 Johansson was talking about when he was referring to "the
3 folks across the street".

4 Do you actually know who Mr. Johansson was referring
5 to, or were you just speculating?

6 A I was speculating.

7 Q And again, is language like that commonplace in
8 the context of agencies who are frustrated or negotiating
9 for more time?

10 A Yes, that's -- it is common.

11 Q Do you --

12 BY MS. BERROYA:

13 Q Do you have any reason to believe that Mr.
14 Johansson would actually know what anyone anywhere else was
15 thinking about?

16 A No, I have no reason to think that.

17 BY MR. LONGANI:

18 Q And in fact, Mr. Dorjets, were you pressured by
19 anyone at EOP to complete this rule by any specific time?

20 A No, I was not.

21 Q Were you pressured by anyone at EOP to take
22 shortcuts in your analysis of this rule?

23 A No, I was not.

24 Q And by this rule, for the record, I'm referring to
25 the Clean Water Rule. And just to be clear, were you

1 pressured by anyone at OIRA to complete this rule and take
2 shortcuts during the process?

3 A No, I was not.

4 Q Do you feel confident that you complied completely
5 with the executive orders that OIRA abides by?

6 A Yes, I do.

7 Q The rulemaking process for the Clean Water Rule
8 took approximately six years from beginning to end. Would
9 you consider that to be rushed?

10 A I have no basis for that consideration one way or
11 the other.

12 Q Are you aware of any instruction to the
13 promulgating agencies or anywhere -- anyone
14 else -- instructions by EOP to promulgate this rule
15 with -- science or economics?

16 A No, I am not.

17 Q Any evidence to suggest that science or economics
18 was abandoned in considering and addressing the concerns in
19 this rule?

20 A No.

21 Mr. Longani. I'm now going to admit Exhibit --

22 Ms. Berroya. Just mark it for identification.

23 Mr. Longani. Yeah. I'll just mark it for
24 identification. Thank you.

25 This is 12. Thank you.

1 [Dorjets Exhibit No. 12 was marked
2 for identification.]

3 BY MR. LONGANI:

4 Q I want to show you a portion of a transcript that
5 I'm going to quote from Mr. Laity. And why don't we go to
6 page 38, top question, and I'll read the answer . And I'm
7 just going to ask you your thoughts on that, okay?

8 A Mm-hmm.

9 Q So, this is -- what I've handed you is a
10 transcript of the interview of Mr. Laity conducted by this
11 agency.

12 And "Question: So, you don't consider your role at
13 OIRA to include ensuring that the agency had a high-quality
14 review of the substantive comments or type of quality of
15 those, that review, that solely lies with the agency
16 itself?"

17 Mr. Laity says, "I don't want to say that we would
18 never raise issues with an agency if we thought that
19 comments were raising issues that should be better addressed
20 or something like that.

21 "But again, the responsibility for addressing comments
22 under the Administrative Procedures Act is a responsibility
23 of agencies. There's nothing in our executive orders about
24 that. So, any discussions we might have would be informal,
25 and typically that isn't the focus of our discussions with

1 the agency."

2 Do you agree with Mr. Laity's analysis of OIRA's
3 responsibilities in terms of addressing public comment in
4 the rulemaking process?

5 A Yes, I would.

6 Q And is that what you did for the Clean Water Rule
7 in terms of addressing the propriety of the agency's
8 response to public comments?

9 A Yes, I did.

10 Q I'm going to take you to page 36. And well, the
11 last question, which is on page 35 says, "Were you aware
12 that the EPA was also reviewing comments at this time.

13 And Mr. Laity says, "I don't remember if that was true
14 and I was aware of that. But I will say that, when you are
15 reviewing public comments, that's kind of a vague phrase.
16 The agency -- when an agency has a high visibility
17 rulemaking in which they have tens or hundreds of thousands
18 of comments, which was the case here, what usually happens
19 is that they review sort of all the substantive comments
20 early in the process in order to inform the development of
21 the final rule.

22 But then, the process of actually formally preparing
23 all the documentation that's required under the
24 Administrative Procedures Act to show that you have, in
25 fact, reviewed all the comments and provided answers to them

1 and so on, that's an ongoing process.

2 And the understanding was that the process was ongoing
3 during the review of the rule. But I have no reason to
4 think that the agencies have not substantively reviewed all
5 of the major -- all of the major comments. And in fact,
6 there was a detailed discussion of comments in the preamble
7 to the final rule."

8 Do you disagree with anything that Mr. Laity said?

9 A No, I do not.

10 Q Did you have any concerns generally about the
11 promulgating agency's review of public comments or the
12 thoroughness by which they were doing so?

13 A No.

14 Q Did they respond adequately to any questions that
15 you had about substantive matters relating to the public
16 comments?

17 A Yes, they did.

18 Q I want to also take you to page 52 and direct you
19 to the bottom of that page.

20 Q "Are you aware of any provision in the APA" -- and
21 I think it's referring to the Administrative Procedures Act
22 for the record -- "that dictates how agencies decide to
23 respond to comments?"

24 A "I'm not familiar with the details of the
25 language. But my understanding is that agencies have a fair

1 amount of discretion to determine how to comply as long as
2 they review and respond to all substantive comments."

3 Is that your understanding as well?

4 A Yes.

5 Mr. Longani. Mr. Dorjets, just give me a brief
6 indulgence. I think I'm going to take a little break
7 here --

8 BY MS. BERROYA:

9 Q When you were speaking to my colleagues -- in the
10 last hour, you mentioned that there were a few instances in
11 your involvement in the Clean Water Rule where the
12 administrator provided guidance; is that correct?

13 A Yes.

14 Q Is there anything unusual about the administrator
15 providing guidance?

16 A No.

17 Q Anything inappropriate about the administrator
18 providing guidance?

19 A No.

20 BY MR. LONGANI:

21 Q In fact, isn't that his job or part of his job?

22 A Yes.

23 BY MS. BERROYA:

24 Q You also mentioned, when you were speaking with my
25 colleagues, that, in order to provide that guidance, the

1 administrator may have interacted with other officials or
2 individuals; is that correct?

3 A Mm-hmm. Yes.

4 Q And you weren't aware of who those folks were?

5 A No.

6 Q Anything inappropriate or unusual about the
7 administrator interacting with others in order to provide
8 guidance?

9 A No.

10 Mr. Longani. Can we go off the record?

11 [A brief recess was taken.]

12 Ms. Aizcorbe. We will go back on the record. It is
13 now 12:22.

14 EXAMINATION

15 BY MS. AIZCORBE:

16 Q Mr. Dorjets, we were speaking earlier a bit in my
17 colleague's hour about how you addressed the comments and
18 reviewed them during the comment period. You stated that
19 you addressed all substantive comments. Can you elaborate
20 on that statement?

21 A I guess it -- I'm trying to explain -- figure out
22 how to explain it.

23 I was satisfied that any substantive comment that I
24 received through any of the mechanisms that exist for me to
25 receive these comments, were addressed satisfactorily by the

1 agencies to the extent I felt it was appropriate to do that.

2 Q So, you weren't saying that you reviewed every
3 substantive comment, correct?

4 A Are we talking about -- submitted by whom?

5 Q By the public or agencies.

6 A Agencies, yes.

7 Q Okay. So, let's be clear. So, when we were
8 discussing earlier that you addressed all comments, you were
9 talking about agency comments, not about public comments; is
10 that correct?

11 A I addressed all agency -- I was satisfied with how
12 the agency comments were addressed, yes. And I was
13 satisfied with how public comments -- they were
14 addressed -- either addressed to me, raised as part of the
15 E.O. 12866 process, or in some cases, if I had asked to
16 review the public letter. But yes, the ones I was aware of,
17 I was satisfied.

18 Q Did you conduct a review of the substantive
19 comments that were submitted during the public comment
20 period?

21 A No, it was not. No, I did not.

22 Q Okay. The Army Corps informed the committee that
23 many of their comments were not implemented into the final
24 rule without justification from the EPA or Army. Were you
25 aware how or whether the EPA was considering the Corps'

1 comments in the final rule?

2 A I have no knowledge.

3 Q During review of the final rule, did you receive
4 proposed changes from the Corps in response to public
5 comments?

6 A I don't recall.

7 Q Did you receive any comments from the Corps?

8 A I don't recall.

9 Q Do you recall any representations made to you that
10 the Corps' comments were reflected in the final rule?

11 A No, I do not recall.

12 Q Did you specifically ask the Army or EPA whether
13 the Corps provided input?

14 A No, I didn't. Possibly I had asked, but I don't
15 recall specifically.

16 Q Were you aware of a meeting with CEQ and other
17 offices within the Executive Office of the President,
18 regarding last-minute changes to the rule to modify the
19 4,000 limit to include waters within the 100-year
20 floodplain?

21 A I am aware that there were meetings within the
22 review to resolve that issues, because that is one of the
23 issues that came up during review. But I'm not aware of any
24 specific meeting.

25 Q Are you aware of when this change was adopted into

1 the final rule?

2 A I remember this was a meeting that -- this was an
3 issue that was being discussed towards the end of the
4 review, but I don't remember exactly when.

5 Q You're not -- you don't recall whether the final
6 rule had gone through interagency review at that point?

7 A The document would have gone -- I would have
8 distributed it the day the rule had come in or the next day.
9 So, it certainly -- it's safe to say it would have gone
10 through interagency review at that point.

11 Q Mr. Laity informed the committee that he staffed
12 Mr. Shelanski on a call to discuss this change. Do you
13 recall discussing this meeting with Mr. Laity or
14 Administrator Shelanski?

15 A No, I do not.

16 Q Did you receive any instruction or direction as to
17 how to communicate this change that was made to the rule to
18 the EPA or Army once it was approved by OMB?

19 A No, I do not --

20 Q Are you aware of anybody else at OIRA who spoke to
21 the agencies after the change was approved?

22 A I am not aware, no.

23 Q Do you recall whether other agencies were notified
24 of this change?

25 A I don't -- I'm not aware of that, no.

1 Q Would it be customary for any substantive changes
2 to a rule to be communicated to agencies if the rule had
3 already gone through an interagency review?

4 A Not necessarily, no, not in all cases.

5 Q Why is that?

6 A Because OMB doesn't need formal sign-off from all
7 agencies on the rule for us to conclude. So, it's very
8 common that changes get made over the course of the review
9 because one stakeholder had raised it.

10 And we have to make a judgment call if we feel
11 it's -- we need to share that change with the other
12 agencies. If they have a serious equity involvement in that
13 issue, we may, out of courtesy, tell them, "Oh, by the way,
14 we're changing X to Y." But it's really a judgment call on
15 the issue whether we would tell them after the fact.

16 Q You said it's common that changes are made during
17 the course of review. Is it common that changes are
18 escalated to a discussion between Administrator Shelanski
19 and other offices within EOP at this late stage of the
20 rulemaking process?

21 A I can't -- I don't know how often the
22 administrator would speak to other officers in EOP.

23 Q Have you ever experienced a change, a substantive
24 change, made to a rule in -- as late of the process
25 as -- which this rulemaking was at that point?

1 A It varies, because generally there -- generally
2 the final conclusion of a rule is hanging on the resolution
3 of some last-minute item, and that's what's driving the
4 back-end time period. So, it was generally we're discussing
5 some technical matter, and it's -- that's taking days, a
6 week. And once that's done, the rule concludes. It's
7 common to have some technical matter being discussed and
8 negotiated to back up a rule, yes.

9 Q And is that typically discussed or negotiated by
10 the administrator personally?

11 A Certainly, if it's important enough to be at that
12 point, he could -- the matter could very commonly be
13 elevated to him for resolution, yes.

14 Q So, you have experienced this before?

15 A Yes.

16 Q Okay. We also understand changes to ditches were
17 made late in the review process. Can you explain how those
18 changes came about?

19 A I remember this was a issue that -- it was one of
20 the issues that was raised both by stakeholders and
21 Department of Transportation for resolution. I don't
22 remember the specific -- how that issue played out
23 specifically. I just remember that was one of the things
24 that we did discuss as part of the review.

25 Q Are you aware of whether the agencies conducted

1 new science or evaluated new alternatives to either the
2 ditch or the 100-year floodplain proposal before they were
3 implemented?

4 A No, I am not.

5 Q Did you ask if they did?

6 A No, I did not.

7 Q Is there a reason why you did not ask?

8 A It's -- unless I had a reason to ask, I wouldn't
9 have -- I can't speak to why I did or didn't, what my state
10 of mind was at the time, I guess.

11 Q Would you not typically in the course of a
12 rulemaking review, ask agencies what alternatives they
13 considered or what scientific basis they had for making
14 substantive changes to a rule?

15 A It depends on the issue. If I felt -- if there
16 was some type of reason to question it, maybe I would have
17 asked the question. But there are so many issues within a
18 rule that is based on some sort of policy or science that I
19 can't -- to some extent, I have to -- I can't ask the agency
20 to explain every single decision that's referenced in a
21 rule. I have to trust them to some extent unless I have a
22 reason to question it.

23 Q And these were substantive changes made late in
24 the rulemaking process. You didn't feel that either were
25 important enough to ask?

1 A I'm sorry. The --

2 Q The 100-year floodplain change to the 4,000 foot
3 adjacency limit and the ditch exclusion.

4 A No, because I -- I did not.

5 Q The Army and Corps indicated that there had been
6 discussions about recirculating the rule for a second round
7 of public comment after substantive changes were made to the
8 rule but that recirculating was ultimately decided against.

9 Were you or anyone else, to your knowledge, at OIRA
10 part of such discussion?

11 A No, we were not.

12 Q Did you make any recommendation to possibly
13 recirculate for another round of public comment or
14 interagency review after changes were made to the final
15 draft?

16 A I asked Jim Laity his thoughts on the subject
17 because that's something that had been raised in one of the
18 E.O. 12866 meetings. So, after the meeting, I recall asking
19 Jim Laity his thoughts on it, and he let me know that that
20 this -- he did not think there would be value added in that.

21 Q And when you say, "that," are you referring to
22 another round of public comment or another interagency
23 review?

24 A Another round of public comment.

25 Q Did you review the economic analysis for the rule?

1 A Yes, I did.

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

4 A No, I was not.

5 Q The Corps reported to the committee that the EPA
6 grossly overestimated the amount of compensatory mitigation
7 required under Section 404 of the Clean Water Act and that
8 such benefits are traditionally accounted for as costs.

9 Did you discuss these specific costs with the EPA?

10 A No, I don't believe I did.

11 Q Were you aware of any effort to approach the WOTUS
12 rulemaking and analysis with the goal of showing the rules
13 benefits outweighed its costs?

14 A I don't -- there was -- no, I'm not aware of any
15 such discussion, no.

16 Q You don't recall receiving any comments asking the
17 agencies whether they could increase the benefits to more
18 appropriately align with --

19 A I don't recall receiving any comment like that
20 from any of the agencies.

21 Q Within any of the offices within EOP?

22 A No, I don't recall that, any discussion on that,
23 no.

24 Q Did you receive or were you aware of any
25 suggestion or direction that OIRA help the agencies

1 emphasize the rule's benefits?

2 A No. It wouldn't have been our place to help them
3 with something like that.

4 Ms. Aizcorbe. I'm going to introduce our next exhibit.
5 Well, actually, this is a repeat. Never mind. I'll take
6 that back.

7 BY MS. AIZCORBE:

8 Q So, we're going back to Exhibit 3, which is an
9 email dated May 8 from Greg Peck to you and Mr. Schmauder.

10 A Mm-hmm.

11 Q At the top, Mr. Peck says -- actually,
12 let's -- apologize.

13 Let's look at the second email here on Friday, May 8 at
14 5:06 p.m. from you to Mr. Peck and Mr. Schmauder. The last
15 sentence of that email says, "Finally, while I don't
16 specifically say it in my comments, I'm assuming there will
17 be significant changes to the economic analysis due to the
18 new changes we have recently discussed." EPA responds, "I'm
19 confused. I thought OMB was comfortable with the economic
20 analysis. Who is raising concerns that will require
21 significant changes to the economic analysis?"

22 A Mm-hmm.

23 Q What new changes are you referring to in this
24 chain?

25 A I don't -- well, I don't recall the exact

1 comments. I recall this exchange.

2 Q So, you don't recall the changes. Do you recall
3 addressing Mr. Peck's concerns?

4 A Yes. He was -- I recall this email because it was
5 a cause of frustration for me, because I -- I had spoken to
6 him on the phone prior to this email and had communicated to
7 him that our economist, Amanda Thomas, had reviewed the RFA
8 and did not have any significant concerns. I did not mean
9 to communicate that nobody else had concerns. He had -- in
10 this email he had thought that I was replying that OMB would
11 have no comments.

12 But then, when I received comments from other agencies,
13 I passed those on. So, he had either -- he had
14 misunderstood my characterization of the nature of the
15 nature of the comments OMB would have. I don't recall
16 exactly which agencies submitted those comments or what the
17 comments were.

18 Q And you don't recall whether the changes are
19 something that an agency would have recommended or something
20 that was actually adopted at that time, a change that had
21 been actually adopted at the time?

22 A Yeah, I don't -- I don't remember any -- what
23 those comments were. I just remember he was surprised that
24 I was sending any comments because he thought that I had
25 said that we would not have any.

1 Q Okay. Okay. Now, we'll move forward to
2 introducing the next exhibit. I think we're on to 13.

3 Mr. Longani. Fourteen, yeah.

4 Ms. Aizcorbe. Okay. I didn't know if you actually
5 numbered the last one. Thank you.

6 [Dorjets Exhibit No. 14 was marked
7 for identification.]

8 BY MS. AIZCORBE:

9 Q So, we were asking you a little earlier about your
10 knowledge about the rule before you came on board.

11 A Mm-hmm.

12 Q And I realize that this email exchange occurred in
13 2013 before you were part of OIRA. I'll direct you to this
14 December 12, 2015, email under subsection two, where Mr.
15 Laity tells Mr. Peck and Mr. Schmauder that "a lot of
16 stakeholders are complaining that the rule reads like
17 substantive decisions have already been made and includes no
18 alternatives as required by Executive Order 12866. This is
19 a fair concern."

20 Where you aware of these concerns when you took over
21 review of the rule?

22 A No, I was not.

23 Q Did you ever discuss the agency's discussion of
24 alternatives with Mr. Laity or anyone else at OIRA?

25 A I don't recall.

1 Q You said earlier that you did not review the EPA's
2 connectivity report. Is that correct?

3 A Yes.

4 Q Okay. Mr. Laity informed the committee that there
5 was some discussion regarding the fact that the report was
6 not finalized before the agencies undertook drafting of the
7 final rule.

8 A Were you a part of any of these discussions?

9 A No, I was not.

10 Q Were you aware that the report was not finalized
11 when you joined OIRA?

12 A No, I was not.

13 Q In your two years with OIRA, have you experienced
14 an agency finalizing the scientific basis for a rule while
15 concurrently finalizing that rule?

16 A I don't know because I don't know if there is
17 other science, other analysis being done. I can only speak
18 to the things that are in front of me. So, I don't know
19 what else they may be doing outside of the review process.

20 Q In the December 12 email under subsection one, Mr.
21 Laity discusses complaints towards the second half of that
22 paragraph, including those submitted by Congress that, "we
23 are letting the rule get ahead of the science and should not
24 propose the rule until the SAB review is complete." He
25 continues, "If we can show that the report already went

1 through a round of peer review, which was hopefully
2 favorable and was already revised once to address peer
3 review comments, this will help a lot to address concern."

4 Do you recall addressing either of these issues, first,
5 not proposing the rule until after the board's review, and
6 second, whether the peer review was favorable with anyone at
7 OIRA?

8 A No, I don't recall being involved in any of these
9 discussions.

10 Q Do you recall discussing any of the peer review?

11 A In fact -- sorry. Not only did I -- I want to
12 clarify. It's not that I don't recall; it's I was not
13 involved in any of these discussions.

14 Q Okay. Did you review the comments made either
15 during the peer review meeting or the SAB review?

16 A I'm sorry. Can you repeat the question?

17 Q Did you review any of the comments that came out
18 of the peer review or the Scientific Advisory Board's
19 review?

20 A No, I did not.

21 Q Why not?

22 A Because I would not -- that's not OIRA's role in
23 the review process.

24 Q OIRA does not engage in reviewing comments that
25 come out of a peer review; is that correct?

1 A That is -- I can't speak to other people. I have
2 never done it, and I'm not aware of that being a role.

3 Q Mm-hmm. So, when Mr. Laity says that he had hoped
4 that that review was favorable, you're saying that it would
5 not be OIRA's role to go back and check whether those
6 comments were favorable?

7 A That is correct. Yes. I --

8 Q Did you speak to anybody at the EPA or Army Corps
9 about either of these reviews?

10 A No, I did not.

11 Q Did you discuss the connectivity report with
12 anyone at the Corps?

13 A I was aware during the review of its existence. I
14 don't recall if I discussed it with the Corps or EPA
15 specifically. But I was told by one or the other of its
16 conclusions.

17 Q Were you aware of the role that the Corps played
18 in its development?

19 A No, I was not.

20 Q Were you aware of comments from the Army's
21 Engineer Research and Development Center concluding that the
22 report science needed to be broadened in order to support
23 the rule in terms of supporting the connectivity between
24 tributaries, adjacent wetlands, and isolated water bodies?

25 A No, I'm not aware of those comments.

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

3 A Yes, I did.

4 Q Are you aware of whether Amanda Thomas also
5 reviewed both of those documents?

6 A I -- it would be uncommon for her to review the
7 technical support document for a rule.

8 Q Why is that?

9 A Because as the economist, it's her job to review
10 the economic analysis. And unless she would ask -- unless
11 something comes up in the economic analysis referencing that
12 type of a support document and she wants to see, it's
13 not -- that just wouldn't be part of her review.

14 Q Are you aware of when the Army and the Corps
15 received copies of the economic analysis or technical
16 support document?

17 A No, I am not.

18 Q Nobody communicated to you that they did not have
19 an opportunity to comment on them before they were submitted
20 to OIRA?

21 A No.

22 Q Did you identify any lapses in your review of the
23 economic analysis and technical support document as far as
24 the information on how the EPA obtained their results?

25 A No, I wasn't aware to communicate any lapses, no.

1 Q The chief of the Corps regulatory program
2 expressed those concerns to us, that the Corps identified
3 such lapses. She also said that the data in the economic
4 analysis was not reflective of the data they provided the
5 EPA.

6 Were you aware at any point that the Corps felt that
7 the analysis was not a joint product?

8 A No, that was never brought to my attention.

9 Q The EPA calculated an increase in jurisdiction
10 from 2.7 percent in the proposed rule to 4.65 percent in the
11 draft final rule. The Corps informed the committee they
12 could not speak to what accounted for this increase in
13 jurisdiction.

14 Did you speak to anyone at the EPA or Corps about this
15 change?

16 Mr. Luftig. I'm sorry. He has not testified to having
17 any knowledge of that. So, do you want to ask him whether
18 he has knowledge of that to see whether he had conversations
19 with anyone about it

20 BY MS. AIZCORBE:

21 Q We've been informed by the chief of the regulatory
22 program at the Corps that this increase occurred, and she
23 couldn't speak to what the justification was. And so, my
24 question to you was whether you spoke to anybody at the EPA
25 or Corps or Army about any increase in jurisdiction of the

1 rule.

2 A No, I don't recall having that conversation.

3 Q Were you aware that there was an increase at all?

4 A No. I only took the final rule at its face.

5 Q Were you aware of when the agencies began drafting
6 the final rule?

7 A No, I'm not.

8 Q Is there a reason why not?

9 A I -- there was no reason for me to know when they
10 start drafting a rule.

11 Q You mentioned earlier that you came on when the
12 draft final rule was submitted to OIRA but that you had
13 received a briefing before it was.

14 A Mm-hmm.

15 Q So, I was just curious as to whether or not you
16 had received any information about the status of that rule
17 at that point.

18 A Only that we -- when we would expect, more or
19 less, for it to be submitted.

20 Q Did the Corps at that point give you -- or did the
21 EPA or Army at that point give you any indication of when it
22 would be submitted?

23 A Well, I don't remember specifically, but generally
24 that is one of the main purposes of those briefings, is to
25 give you a high-level summary of what's coming. And then,

1 when we should expect it so we could start planning around
2 that. So, I have no reason to think they didn't.

3 Q Do you recall whether the Corps was present at
4 that briefing?

5 A I do not recall.

6 Q At any point in the process did you inquire who
7 was drafting the final rule?

8 A Individuals?

9 Q Either the EPA or the Army or the Corps.

10 A No.

11 Q The connectivity report was primarily, if not
12 wholly, an EPA document. So, my question was just regarding
13 who was involved in the drafting because the Corps reported
14 to the committee that they didn't know who drafted it.

15 A I have no knowledge of who drafted any of those
16 documents.

17 Q Okay. At any point did you become aware of the
18 Corps lack of engagement in the rulemaking?

19 A I --

20 Mr. Luftig. I don't think the witness has testified to
21 a lack of engagement.

22 Mr. Dorjets. Yeah.

23 BY MS. AIZCORBE:

24 Q The Corps had informed the committee that they did
25 not participate in a meaningful manner in the rulemaking

1 process. So, I was curious if that was ever brought to your
2 attention as a concern.

3 A I have no reason to think that that was a concern.

4 Q Are you aware of the so-called Peabody Memoranda?

5 A Can you be more specific?

6 Q They were memoranda executed by senior-level
7 officials at the Corps, speaking about serious legal,
8 scientific, and other deficiencies of the rule.

9 A I'm aware that there was a memo, I believe, from
10 Peabody that was leaked. That's the only memo I'm aware of.
11 I don't know if that's the -- that one to which you're
12 referring.

13 Q It is. Do you recall how you became aware of this
14 memo?

15 A I believe it was trade press.

16 Q Did you discuss the memo with anybody at OIRA?

17 A I hadn't read the memo. I was just aware that
18 there was a memo that was leaked.

19 Q Have you reviewed other Army Corps rules during
20 your time with OIRA?

21 A Yes. I'm currently reviewing one.

22 Q In your experience, has the Corps ever expressed
23 dissension over an ongoing rulemaking of its own?

24 A Dissension with whom?

25 Q With anything within the rulemaking, within any of

1 the text, any of the analysis, any of the data that's used
2 in the scientific conclusions.

3 Have you ever had any issues with the Corps about what
4 it substantively the basis of one of its own rules?

5 A I have never -- it's hard -- I don't know how to
6 answer that. At the -- in the current rule that I'm
7 reviewing of the Corps, they have not dissented against
8 their own position. They disagree with other agencies, but
9 I'm not aware of any dissension within the Corps, if that's
10 what you mean.

11 Q How would OIRA normally handle a situation where
12 one party to a joint rulemaking expresses disagreement with
13 the final version of its rule?

14 A I -- since I've only done one joint, I don't know
15 how to say normally. I don't know what normal is, I guess.

16 Q Okay. As we referenced earlier, specific distance
17 thresholds were added to the draft final rule. Do you
18 recall when they were added?

19 A I recall this is one of the last issues, probably
20 in the last couple -- towards the end of the review,
21 probably the last week or two.

22 Q Did the agencies discuss including these limits
23 with you or anyone else at OIRA?

24 A Yes. This was an issue that we had raised, that
25 OIRA had raised and had sought to revise. So, we -- we had

1 discussions in the course of trying to resolve that concern.

2 Q And did you discuss their inclusion with both the
3 Army and EPA?

4 A Maybe -- I just want to -- clear we're talking
5 about the same thing. So, there was -- there were bright
6 lines that were included in the draft final rule as it was
7 submitted. I don't know the genesis of that.

8 In the course of the review, OIRA sought to revise
9 those bright lines, so there were discussions with the Corps
10 and the EPA about that aspect of them. So, I guess --

11 Q Regarding the second part of what you just said,
12 the changes that were made, the revisions --

13 A Mm-hmm.

14 Q You just said, "the Corps and EPA." Do you mean
15 the Army and EPA or --

16 A I'm sorry. I mean, the Army. Thank you for
17 clarifying.

18 Q Sure. Were you ever given any information
19 regarding the scientific basis for the limits or how they
20 were developed? You just mentioned that you were not a part
21 of their original inclusion. But were you aware of any
22 scientific basis for their development?

23 A For which conclusions? For the bright lines? I'm
24 sorry.

25 Q Correct.

1 A No, I was not. I know that that was a factor that
2 was being discussed. I know -- but I don't recall the
3 specifics or how -- what role it played.

4 Q When you say it was being discussed, do you recall
5 who was primarily leading that effort on behalf of OIRA?

6 A I don't recall OIRA being involved in that effort.
7 The bright lines ultimately -- I remember it was an
8 environmental -- it was a decision dealing with
9 environmental impacts. So, it was outside of the OIRA
10 normal review process.

11 Q And what do you mean by it was outside of the OIRA
12 review process because it involved environmental impacts?

13 A The final decision on how -- there was a NEPA
14 impact of those bright lines that is not part of OIRA's
15 review. So, the ultimate decision on how that got -- was
16 not part of -- I was not personally involved in those
17 discussions.

18 Q Okay. Are you aware of whether public comments on
19 specific thresholds were solicited?

20 A No, I am not.

21 Q The Corps shared some concerns with the committee
22 regarding implementation of these limits. Did you inquire
23 with either the EPA or Army how the limits would be
24 enforced?

25 A I don't recall.

1 Q You just mentioned the NEPA analysis included in
2 the rule. Did you review the Army's NEPA analysis for the
3 rule?

4 A No. That would not be OIRA's role.

5 Q And why do you say that?

6 A Because it's not OIRA's role to review the NEPA
7 analysis. I have never reviewed one, and I don't believe
8 it's our role to review that.

9 Q Have you ever been explicitly told that you're not
10 to review a NEPA analysis?

11 A No, but I've never been told to review one.

12 Q Okay.

13 A I guess, from day one when I started and I was
14 being trained by my supervisor on how to do my job, I was
15 never told that that is part of my job to review, and it's
16 never come up as part of it.

17 Q Are you aware of whether other desk officers like
18 Mr. Levenbach perhaps, who deals with the Army Corps on a
19 routine basis, would have reason to analyze a NEPA -- or
20 look at a NEPA analysis because he deals with an agency who
21 does it?

22 A I can't speak to what my desk officer and my
23 colleagues would do.

24 Q Okay. It's just our understanding that Executive
25 Order 12866 requires the administrator to provide guidance

1 on ensuring that all applicable laws are complied with.

2 A Mm-hmm.

3 Q So, my question to you is why you don't think that
4 that's an OIRA responsibility.

5 A That's a fair question. It's because it's CEQ's
6 responsibility statutorily to ensure that all rules comply
7 with NEPA. So, OIRA will defer to CEQ. When I distribute a
8 rule to CEQ and they come back and say, "no comment," for
9 example, that provides me comfort that the rule satisfies
10 NEPA requirements. So, I don't need to get into the details
11 myself.

12 Q Were you aware at any point that the Army
13 completed two separate environmental assessments for the
14 rule?

15 A No, I'm not aware of that.

16 Q Were you informed that the drafter of the first
17 environmental assessment, Chip Smith, had contact with OIRA
18 about his assessment?

19 A I'm not aware of that, no.

20 Q Did you engage with anyone else at the agencies
21 about the NEPA analysis?

22 A No, only maybe just to make sure that there was
23 one for our satisfaction but nothing specific, no.

24 Q Do you recall whether an environmental assessment
25 or NEPA analysis was included in the rule that was submitted

1 to OIRA for final review?

2 A It was not, and that is common. I don't recall
3 I've ever had one included as part of the review package.

4 Q When would it be included?

5 A It wouldn't have been.

6 Q And why is that?

7 A It's just not -- as I mentioned, it's not OIRA's
8 role to review the environmental documents, so they're not
9 sent to us as part of the review package.

10 Q All right. Let's move to the next exhibit.

11 [Dorjets Exhibit No. 15 was marked
12 for identification.]

13 So, I share this email just to clarify our discussion
14 about the NEPA analysis.

15 A Mm-hmm.

16 Q So, in this email, towards the bottom, on May 13,
17 2015, Greg Peck of EPA emails you and Craig Schmauder of the
18 Army, stating, "Craig is making great progress with the EA
19 FONSI."

20 Can you explain the statement that he made to you in
21 light of the fact that you weren't reviewing the NEPA
22 analysis?

23 A No. I -- I don't know the context.

24 Q You don't know about Craig Schmauder's involvement
25 with the Army Corps' EA?

1 A I know he was involved in the discussions, but I
2 don't know to -- the specific context to precipitate this
3 email. I don't recall what this -- what the context was of
4 this.

5 Q Outside of this reference, you didn't discuss the
6 environmental assessment or FONSI with anyone?

7 A No, I did not.

8 Q We were discussing earlier the communication that
9 Mr. Shelanski had with other offices within the Executive
10 Office of the President regarding modifying the 4,000-foot
11 limit --

12 A Mm-hmm.

13 Q -- to include the 100-year floodplain. Mr. Laity
14 informed the committee that the change was done to more
15 accurately reflect the FONSI from the NEPA analysis.

16 Were you aware of that all?

17 A No, I was not.

18 Q Okay. Do you recall at any point recommending
19 that the agencies take more time to conduct more science,
20 assess alternatives, fully consider public comments, or any
21 other reason?

22 A No, I never --

23 Q In light of the various concerns raised about the
24 rule and its development, did you or anyone else at OIRA or
25 OMB discuss returning the rule for further work and

1 consideration?

2 A No, that was never a consideration.

3 Q Do you typically review agency's compliance with
4 Executive Order 13175, Consultation and Coordination with
5 Indian Tribal Governments?

6 A I'm aware that that is -- or under the Executive
7 Order, I'm aware that OIRA needs to make sure that agencies
8 are complying with all executive orders, so that would be
9 one. But that is not something I spend a lot of time doing,
10 no.

11 Q Can you explain how you did so with respect to
12 this rulemaking?

13 A There is a section in the preamble where agencies
14 are required to address compliance with various executive
15 orders. I believe that is one of them, so I would have read
16 that section in the course of my review and then moved on
17 unless I had a reason to doubt anything or else a concern
18 had been raised to me by a stakeholder.

19 Q And you're saying you did not receive any -- such
20 concerns from a stakeholder in this case?

21 A I don't recall getting any concerns that
22 anybody -- that there was not -- no compliance that --

23 Q And you don't recall having any concerns upon
24 reading that section in the preamble?

25 A I -- I recall not having any concerns because I

1 don't -- with that section.

2 Q Is it typical for OIRA's ensuring agency's
3 compliance with executive orders that you would simply read
4 what is in the preamble and the agency's representations
5 there and wait for any red flag to be raised before you ask
6 questions? Or do you affirmatively go to an agency to get
7 them to make a representation to you that they've complied?

8 A No, I would never -- I would -- that would take
9 too long, to ask for positive confirmation of everything
10 that they're representing in a preamble, unless I have
11 reason to doubt it, which could either be because it's
12 raised by somebody else or because something smells funny to
13 me when I'm reading it maybe.

14 Q Mm-hmm.

15 A But short of that, I would -- it would not be
16 common for me to ask an agency to validate something they
17 did.

18 Q The final rule references that EPA's consultation
19 process included multiple webinars and national
20 teleconferences as a way to conduct this consultation. The
21 Army and Corps indicated to the committee that this type of
22 informal outreach does not satisfy government to government
23 consultation for purposes of the executive order.

24 Are you saying that that didn't also raise any sort of
25 concern on your side?

1 A I can't -- I have no knowledge of -- to the extent
2 to which that does or does not satisfy. It was not a
3 concern that was raised to me, and I was satisfied with that
4 upon reading it, yeah.

5 Q Are you given any guidance from OIRA or within
6 OIRA as to what might satisfy any of your executive order
7 obligations?

8 A Yes.

9 Q And what's -- what are the nature of that -- of
10 those --

11 A As needed. If I -- I've had conversations with my
12 branch chief or with colleagues. If I have questions about
13 compliance with an executive order, there is certainly
14 discussion. There's a lot of discussions about these types
15 of matters. So, that is certainly something we could
16 discuss.

17 Q And you never discussed with EPA their efforts to
18 conduct tribal consultations?

19 A I recall being -- I recall not having any issue
20 with that section when I read it and nothing being raised to
21 me.

22 Q At any point did the EPA make any representation
23 to you that it complied with its responsibilities under the
24 executive order besides the preamble?

25 A No. I don't recall it ever being the subject of

1 discussion.

2 Q Are you aware of whether the agencies conducted
3 outreach with all 50 states regarding the rule?

4 A I don't know if agencies ever -- I know that there
5 are organizations that represent states that generally are
6 the prime point of contact for such -- a lot of these
7 things. So, they may very well have, but I know that they
8 were involved with those organizations, so I can't speak to
9 how well they represent all 50 states or not.

10 Q At any point did you ask about the -- the
11 consultations that agencies undertook to fulfill their
12 obligations under Executive Order 13132 on federalism?

13 A I don't recall having any concern with that. I
14 can't -- I don't recall whether it was because I had the
15 discussion or because I had been satisfied with the way it
16 was represented. But I don't recall having any concern with
17 that specific aspect of it.

18 Q Was there anybody else at the final stage of the
19 rulemaking process who is responsible at OIRA to look at the
20 representations made by agencies in a rule, in their
21 preamble --

22 A Mm-hmm.

23 Q -- to ensure compliance with executive orders? Or
24 is that solely within the purview of the managing desk
25 officer or lead desk officer?

1 A It's possible that other -- a lot -- lots of
2 reviewers will review a rule, so it's certainly -- a concern
3 could be raised by any number of different reviewers within
4 the White House or within other agencies. And their -- and
5 it's their job to communicate those to me. I am only one of
6 many people who is reviewing the rule. I know it's OIRA
7 that has responsibility to -- for consistency with executive
8 orders. But we certainly rely on some -- on all the other
9 sets of eyes that are reviewing it.

10 Q As you know, the EPA concluded and certified that
11 the rule does not have a significant economic impact on a
12 substantial number of small entities under the Small
13 Business Regulatory Enforcement Fairness Act or SBREFA.

14 When did you become aware that the EPA certified this
15 role?

16 A When the rule was submitted and I read the
17 economic analysis; I read the conclusion that you just read.

18 Q Did you have any discussions with Mr. Laity or
19 anyone else at OIRA about the SBREFA certification?

20 A No, I did not.

21 Q About why the agency had not concluded an SBAR
22 panel or regulatory flexibility analysis?

23 A I can't speak to the latter. I know that there
24 was no SBAR panel.

25 Q Mm-hmm.

1 for identification.]

2 BY MS. AIZCORBE:

3 Q I'm only going to be referencing the first
4 sentence of the fourth paragraph.

5 A Mm-hmm.

6 Q So, this is a page from the EPA's draft document
7 entitled, "Final Summary of the Discretionary Small Entity
8 Outreach for EPA's Planned Proposal of Revised Definition of
9 the Waters of the United States." On page three of this
10 document, in the fourth paragraph that I just highlighted
11 for you, the EPA states that the rule does not have a
12 significant direct economic impact.

13 Are you aware of whether this was the standard that the
14 EPA employed in deciding not to conduct a regulatory
15 flexibility analysis and SBAR panel?

16 A I'm not aware of any basis for those decisions.

17 Q Do you know of anything in SBREFA that limits an
18 agency to only consider direct costs in its decision whether
19 to certify a rule?

20 A No, I can't speak to that. I don't know.

21 Q Did you receive any guidance from anyone at OIRA
22 as to how this part of SBREFA is interpreted?

23 A No, I don't recall the SBREFA issue being
24 discussed as part of the review at all.

25 Q As a part of the review that you were engaged in

1 in the final rule?

2 A Yes.

3 Q Okay. Are you aware of whether OIRA has the
4 ability to question an agency's certification under the RFA?

5 A To the extent that a concern is communicated to us
6 and is raised, I can -- we can certainly ask the agency for
7 the basis of something.

8 Q And so, in this case, the Office of Advocacy as
9 well as national industry groups representing small
10 businesses did, in fact, raise concerns, saying that the
11 rule was improperly certified. Can you explain then why you
12 didn't discuss this with anyone at OIRA or the agencies?

13 A So, I can't -- I can't speak to -- I don't recall
14 the other outside groups, their representation of it. I do
15 recall the SBA advocacy raising this concern to me. I did
16 discuss this with -- this was a concern I certainly raised
17 to my supervisor and with the agencies, and we were
18 satisfied with the way that this was resolved and the way it
19 was represented in the final rule.

20 Q And by your supervisor you are speaking about Jim
21 Laity?

22 A Yes.

23 Q And can you explain a little bit about the
24 conversation you had with him about this certification?

25 A Whenever -- it's common, though, if an agency

1 disagrees with a promulgating agency on something that's
2 substantive like this that I would bring it to his attention
3 as an FYI and see if he has any guidance upon the
4 resolution. I let him know that SBA was not agreeing -- it
5 was not agreeing with the certification in this rule, and
6 asked him on he thought I should proceed.

7 Q And what did he advise?

8 A He advised that this is -- it's ultimately the
9 promulgating agency's prerogative and discretion on how to
10 certify a rule under the Regulatory Flexibility Act. SBA
11 advocacy's free to disagree, and that's certainly their
12 prerogative. And it's our job to communicate that to the
13 promulgating agency because SBA advocacy has certain
14 mechanisms available at its disposal to publicly disclose
15 these things.

16 So it's our job to make sure that, in this case, EPA
17 and the Army were aware of this, that at the end of the day
18 if they were comfortable with the way it was being
19 represented that was their decision to make, and that --

20 Q Are you aware, or have you worked out similar
21 arrangements for rules, that informal or voluntary outreach
22 be conducted in lieu of a Small Business Entity outreach
23 effort under RFA or SBREFA?

24 A I'm not aware of one or the other if that may have
25 happened or -- I'm not aware.

1 Q Based on your review of the Small Business
2 comments do you believe a rule would have had a greater than
3 de minimis impact on a small -- substantial number of small
4 entities?

5 A It's not my place to agree or disagree with that
6 statement.

7 Q Did you at any point discuss with the EPA their
8 ability to voluntarily complete a Regulatory Flexibility
9 Analysis for conduct an SBAR panel?

10 A No, I don't recall getting into the specifics
11 like that.

12 Q SBREFA provides that a chief counsel for advocacy
13 may waive the panel process based on an agency's
14 consideration of these concerns collected from small
15 entities. Do you recall the chief counsel making such a
16 waiver in this case?

17 A I'm not aware one way or the other.

18 [Dorjets Exhibit No. 17 was marked
19 for identification.]

20 Q Towards the bottom of this page there's an email
21 exchange between Kia Dennis of the Office of Advocacy and
22 you. Kia, in the second sentence of her email on May 8th at
23 7:44 a.m., states "I understand that this rule is on a fast
24 track, but I do want to see EPA's considered response to
25 Advocacy's comments. They are required by the RFA statute

1 to respond to our comments, specifically. I don't see a
2 response in the preamble. I assume it is in the 'response
3 to comments' document. Will that document be circulated
4 soon?"

5 Do you recall having this exchange with Kia?

6 A Yes, I do.

7 Q You mentioned that the EPA and Corps are still
8 preparing their pass back. Do you recall when the
9 information was shared with the Office of Advocacy?

10 A No, I do not.

11 Q Do you recall having any conversation with the EPA
12 or Army about their responsibility to respond
13 individually --

14 A Yes.

15 Q -- to Advocacy?

16 A I'm sorry.

17 Q Go ahead, that's fine.

18 A Yes, I recall this exchange. I had communicated
19 SBA's concern to EPA and the Army by telephone, and received
20 their response that communicated -- and this was me trying
21 to get clarity whether SBA required the two agencies to
22 actually provide written comments and not just communication
23 by phone of what I'd been told.

24 She had told me yes, she does want written response.

25 So I then had gone back to the agency and said I need to see

1 the written response. I don't recall the date of when, but
2 I do recall this issue was resolved.

3 Q Do you recall what the EPA said in response to
4 your communication to them?

5 A No, I just recall them putting what they had
6 explained to me by phone on paper.

7 [Dorjets Exhibit No. 18 was marked
8 for identification.]

9 Q One final exhibit, number 18. This is Exhibit 18.
10 Towards the bottom of the first page there is an email from
11 you to Kia Dennis of Advocacy on May 13th at 7:36 p.m. The
12 second sentence of that email says "Because the agency is
13 certifying no significant impact on a substantial number of
14 small entities and not preparing a final regulatory
15 flexibility analysis, that provision wouldn't apply
16 requiring the EPA to individually respond."

17 Ms. Dennis responds to you disagreeing that the statute
18 can be interpreted several different ways. You ultimately
19 pass this along to Mr. Peck and Mr. Schmauder at the EPA and
20 Army, and you state "Passing along SBA's response. Not sure
21 I want to get in the middle of this, but let me know what
22 you think, if you think that's fast. Vlad."

23 Do you recall what response you received, if any, from
24 the EPA in response to this email?

25 Mr. Longani. Actually, if I --

1 Ms. Aizcorbe. Sure.

2 Mr. Longani. Just to be clear, the line that you're
3 referring to actually she says -- she does agree. She
4 understands the statute can be interpreted the way the
5 EPA -- Christina, your preface was the agencies disagree
6 with it, but --

7 Ms. Aizcorbe. Can we go off the record?

8 [A brief recess was taken.]

9 Ms. Aizcorbe. We can go back on the record.

10 BY MS. AIZCORBE:

11 Q As I mentioned, in response to Ms. Dennis'
12 email -- response to your email from Ms. Dennis, excuse me,
13 Ms. Dennis responds that the statute can be interpreted the
14 way EPA has interpreted it, but that she disagrees in that
15 there should be some sort of direct response to the Office
16 of Advocacy.

17 My question to you was that in passing along SBA's
18 response was there any follow up after this was shared with
19 the EPA or Army?

20 A I don't recall the exact way this was resolved,
21 but I don't -- but I also don't recall there being any
22 outstanding issues, so I have a reason to think that this
23 was satisfactorily resolved in one way or another.

24 Q Do you recall speaking to Ms. Dennis after this
25 email exchange?

1 A I don't recall, no.

2 Q So once you sent this off to the EPA and Army you
3 just assumed that if you didn't hear anything additional
4 that it was resolved?

5 A No, I -- what I'm saying is I don't recall how
6 this was resolved. I'm just comfortable that it was
7 resolved in one way or another.

8 Q Okay. Did you discuss at any time this exchange
9 with Mr. Laity or anyone else at OIRA?

10 A No, I would not have -- not this specific
11 exchange, no.

12 Q Not that there was some sort of disagreement in
13 whether there needs to be a response to the Office of
14 Advocacy?

15 A No, because I recall this being resolved in one
16 way or another. There was no reason to elevate it to my
17 boss.

18 Q Just a few clean-up questions before we break.
19 You mentioned in my colleague's earlier hour that if you
20 felt it was necessary that the agency needed additional time
21 to conduct a substantive review during the interagency
22 process that you would have asked somebody within OIRA to
23 afford additional time. Is that accurate?

24 A If I -- to extend the review period for --

25 Q Sorry, to provide additional time to the agency,

1 seeking additional time?

2 A That's -- I'm sorry, to provide additional time to
3 individual agencies, giving them more time, or to extend the
4 whole review?

5 Q If an agency wishes to have an extension of the
6 time to review a rule, I mean it could be one agency, it
7 could be all of them, you stated earlier that if you felt it
8 was necessary for an agency to have additional time --

9 A Yeah.

10 Q -- to conduct a substantive review you would ask
11 for it. Is that an accurate characterization?

12 A I would if I thought it was necessary, but it's
13 not something I've ever done because it's -- we -- it's so
14 common to agencies to ask for more time that it's sort
15 of -- that's the bound we all work with, so I work
16 for -- that's why, I guess in theory if I thought it was
17 necessary I would have, yes.

18 BY MS. ROTHER:

19 Q Could you describe what, theoretically, might make
20 you think that it would be necessary given that you believe
21 that you would do it if it was necessary, but in the many
22 rules that you've reviewed you've never needed to.

23 A I guess I don't -- it's hard for me to guess what
24 scenario. I can envision because -- agencies are always
25 asking for more time and it's my job to always be the bad

1 cop and lay down the law and no, I'm sorry, or, like, fine,
2 you can have another day or two. But that's the way the
3 process works so in theory there might be a scenario where a
4 situation arises where I need to extend more time. I just
5 don't know what that would be. It's hard for me to guess.

6 BY MS AIZCORBE:

7 Q You mentioned earlier that you give two to three
8 weeks for most reviews. Would that include any type of
9 rule -- small, large, complex, non-complex -- is there a
10 standard?

11 A No, and two or three -- if the rule is
12 exceptionally small I could give even less time, but I don't
13 recall ever giving more than -- maybe I gave more
14 than -- maybe gave four weeks on one where there was
15 no -- no back-end deadline of any sort, but three is very
16 common; two in many cases.

17 Q And just to clarify, you don't recall in this case
18 what the reason was for shortening the two-week period in
19 this case. Is that correct?

20 A No, since there was -- it would have been
21 communicated to me that there was a date by which OMB sought
22 to conclude review. I wanted to buy myself as much time as
23 possible to do that review. So since the two weeks was a
24 common amount of time to give anyway, I took discretion to
25 give it for this review to give myself more time to

1 get -- resolve all the issues.

2 Q I guess my question is more towards the fact that
3 your original email said a certain date, and then you went
4 back to agencies and shortened that period of time, and I
5 just wanted to make certain I understood that you don't
6 recall what the justification was or what the reason was for
7 needing to shorten that period of review.

8 A Yeah, I don't recall whether it was something I
9 was told or whether I felt that I needed more time. I
10 honestly don't remember why I did that.

11 Q And when you said you needed more time are you
12 referring the time that you need to compile all of the
13 comments that you receive the interagency review?

14 A And just to do the rest of my job, to review all
15 the comments, identify the issues, resolve them with the
16 agencies. I don't recall exactly why I did that.

17 Q But you believe that it would have been a
18 direction that you received from somebody else in OIRA, that
19 was not your own judgement call?

20 A It could have been. I don't recall exactly why I
21 did that.

22 Ms. Aizcorbe. I think we are out of time. Off the
23 record.

24 [Recess taken from 1:19 to 2:14 p.m.]

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

2 Mr. Longani. Let's go back on the record. All right,
3 good afternoon Mr. Dorjets. Continuing our interview, just
4 a few more questions for you.

5 BY MR. LONGANI:

6 Q In the last hour when Majority colleagues asked
7 you about the changes that were made to the final rule,
8 towards the end of the rule, on specifically changes to the
9 4,000 foot issue related to the 100 year floodplain, is it
10 unusual to see changes to rules made in the latter stages of
11 the rulemaking process?

12 A No, in fact, it's quite common.

13 Q Why is that so?

14 A Because, generally, there
15 are -- that's -- generally the rule can't conclude until all
16 issues are resolved, and to the effect that there are
17 issues that still need to be resolved it's, by definition,
18 going to be the last thing you do before you conclude a
19 rule.

20 Q And at this point when OIRA is making a decision
21 with the promulgating agencies about the floodplain issue,
22 my Majority colleagues asked you about why this wasn't
23 circulated, again, to all the agencies for another review.
24 Is it fair to say that if a specific agency had an equity
25 interest in the issue that was involved in the last-minute

1 change, you would, or OIRA would, indeed, circulate that
2 change to the specific agency in question?

3 A Yes, but from my experience if an agency has
4 significant equity in an issue like that at that stage in a
5 review they would have been involved in the actual
6 discussion and negotiation on how to resolve it. So I, from
7 my experience, it's -- if an agency has sufficient equity
8 they're already involved so they don't need to be told about
9 how it got resolved.

10 Q And another issue that my colleagues talked about
11 was the changes to the ditches exclusion which took place.
12 Every time there's a change that is made to a rule, do you
13 ask the promulgating agencies for the specific scientific
14 explanation as justifying the change?

15 A No, I do not. I have to trust them to know the
16 science behind it.

17 Q And what would be the result to the rulemaking
18 process, generally, if at every single change that took
19 place you then had to turn around and ask for the scientific
20 and/or economic justification for that change?

21 A I mean, it would extend the review exponentially
22 and then have further consequences on our ability to review
23 other rules.

24 Q You were also asked by my colleagues about the
25 issue of a second comment period. At this point in the

1 rulemaking process there had been over a million comments
2 submitted to the agencies during public comment period. Is
3 that approximately correct?

4 A Yes.

5 Q And, in fact, the public comment period had been
6 extended two times during the proposed rule to cover over
7 200 days. Is that correct?

8 A Yes.

9 Q Is it fair to say that it would be unusual having
10 had such an extensive comment period to then reopen the rule
11 for a second comment period?

12 A Yes, I have never been involved in a review of a
13 rule where we had a second comment period.

14 Q You were also asked about the issue of getting
15 direction in terms of weighing the costs and benefits of the
16 rule. Do you remember that discussion?

17 A Yes, I do.

18 Q Did anyone at EOP instruct you to analyze the rule
19 so as to make certain that the benefits outweighed the
20 costs?

21 A No.

22 Q Did anyone at OIRA ever instruct you, or ask you,
23 to make certain that the benefits outweigh the costs?

24 A No.

25 Q As to the Clean Water Rule?

1 A No.

2 Q Self-explanatory. I just wanted to be clear. And
3 your answer to that is?

4 A No.

5 Q I'm going to ask you to take a look at Exhibit 3
6 again. Now during the last hour you talked briefly about
7 your response to Mr. Peck and Mr. Peck's concerns about the
8 significant, well, significant changes to the economic
9 analysis. Do you remember that?

10 A Yes.

11 Q Mr. Dorjets, is it fair to say that your
12 suggestion that there would be significant changes was
13 designed to address the fact that there were comments that
14 were going to be coming from other people besides Amanda
15 Thomas?

16 A Yes.

17 Q And is it fair to say that you boldly assured Mr.
18 Peck that Amanda Thomas was basically satisfied with the
19 economic analysis, but that there were other entities,
20 including people at OIRA, OMB, and other agencies, that
21 might have comments?

22 A Yes, that is -- that was my intent.

23 Q Okay. And those significant changes would have
24 been responds to people besides Amanda Thomas's -- excuse
25 me, let me be clear. Those significant changes would have

1 been in response to people's comments besides Amanda Thomas
2 relating to the economic analysis. Is that correct?

3 A Those --

4 Q Agencies and --

5 A -- those comments would have been the ones
6 submitted by other agencies in response to my distribution
7 of the RIA seeking their comment.

8 Q Okay. Let me ask you to take a look at Exhibit 14
9 again.

10 A Okay.

11 Q Are you familiar with this email at all from
12 Exhibit 14? Did I mislabel it?

13 A Sixteen?

14 Q Oh, sorry.

15 A Can you repeat the question?

16 Q Yes. Are you familiar with this email?

17 A No, I'm not.

18 Q Have you ever seen it before today?

19 A No, I have not.

20 Q Do you have any context to this email whatsoever?

21 A No, I do not.

22 BY MS. BERROYA:

23 Q You don't appear to be copied on this email, do
24 you?

25 A No, I am not.

1 Q When were you first put on the Clean Water Rule
2 again?

3 A Whenever it was submitted to OIRA. I don't
4 recall when that was. That would have been sometime in
5 2015.

6 Q So several years after this email was sent in
7 Exhibit 14, correct?

8 A Yes.

9 Q So any statements you made about Exhibit 14 would
10 have been speculation?

11 A Yes.

12 BY MR. LONGANI:

13 Q Mr. Dorjets, you have never read the Connectivity
14 Report, is that correct?

15 A Yes, that's correct.

16 Q And have you read the executive summary?

17 A No, I have not.

18 Q Okay. In fact, most of the work that was done on
19 the Connectivity Report was done before you got involved.
20 Is that correct?

21 A I believe so, yes.

22 Q Okay. Another issue that you talked about last
23 hour involved the NEPA analysis. Do you remember that?

24 A Yes, I do.

25 Q And I believe you said that you did not do -- or

1 you did not have much of a role in that. Is that correct?

2 A Yes, that's correct.

3 Q And at any point during that process do you
4 remember having any discussions with anyone at EPA about the
5 NEPA process, or the Corps?

6 A I was -- I was aware that there would be,
7 depending on the environment, whether there -- sorry, let me
8 start over. I was aware that there would be NEPA
9 implications based on whether or not the Corps needed to do
10 an environmental impact analysis or statement. But I was
11 not involved in any of the thinking behind the specifics of
12 those of implications.

13 Q When the Committee spoke to Mr. Laity in response
14 to a question about whether or not he typically reviewed an
15 agency's NEPA analysis his answer was "No." And when asked
16 to explain why, he said it's really not the responsibility
17 of OIRA. Would you agree with Mr. Laity?

18 A Yes, I would.

19 Q And, in addition, the Committee asked Mr. Laity
20 about any contact he had with Mr. Chip Smith that related to
21 the enviro -- excuse me -- to the NEPA, and in response to
22 that question, he said that he had, indeed, worked closely
23 with Chip, and that it could well have been him that had
24 those conversations with Mr. Smith regarding the NEPA.

25 Do you have any reason to doubt Mr. Laity's remembrance

1 of what took place and who was in touch with Mr. Smith as it
2 relates to the NEPA process?

3 A No, I have no reason to doubt that.

4 Q In the last hour, you briefly talked about tribal
5 consultations; is that correct?

6 A Yes.

7 Q I'm going to go through a couple of things with
8 you related to the tribal consultations.

9 Mr. Dorjets, according to the final rule it states, and
10 I quote, "The agency began consultation with federally
11 recognized Indian tribes on the Clean Water Rule defining
12 waters of the United States in October of 2011, and that is
13 a consultation and coordination process including providing
14 information on the development of an accompanying science
15 report on the connectivity of streams and wetlands continued
16 in stages over a four-year period until the close of the
17 public comment period on November 4th, 2014."

18 Do you have any reason to doubt that?

19 A No.

20 Q As far as you're concerned, does Executive Order
21 13175 set out the requirements for tribal consultation?

22 A I'm sorry. Could you repeat the question?

23 Mr. Longani. Yeah. Actually, do you know what? Let
24 me mark this as Exhibit 19.

25 [Dorjets Exhibit No. 19 was marked

1 for identification.]

2 BY MR. LONGANI:

3 Q Just take a minute to familiarize yourself with
4 that exhibit, Mr. Dorjets, and just look up at me when
5 you're done.

6 A Okay. [Examining document.]

7 Q Okay. Mr. Dorjets, are you familiar with the
8 document I've placed in front of you which has been marked
9 as Exhibit 19?

10 A Somewhat.

11 Q Okay. It's titled Executive Order 13175,
12 Consultation and Coordination with Indian Tribal Government;
13 is that correct?

14 A Yes.

15 Q As far as you're concerned, does Executive Order
16 13175 set out the requirements regarding tribal
17 consultations?

18 A As far as I know.

19 Q The final rule further states that in 2011 close
20 to 200 tribal representatives and more than 30 tribes
21 participated in the consultation process, which included
22 multiple Webinars and national teleconferences and
23 face-to-face meetings.

24 Any reason to doubt that that's an accurate statement?

25 A No, no, no reason.

1 Mr. Longani. Make sure you mark that.

2 [Dorjets Exhibit No. 20 was marked
3 for identification.]

4 Mr. Longani. thank you.

5 BY MR. LONGANI:

6 Q This is Exhibit No. 20. I ask you to take a quick
7 look at that Mr. Dorjets, and I'm going to direct your
8 attention to a specific portion in just a minute.

9 A Okay.

10 Q Mr. Dorjets, on page 4, I'm going to ask you to
11 look at the last paragraph, fourth sentence, starting with
12 "October 12th, 2011." Look up at me when you're done
13 reading it, and I'll read it out loud for the record while
14 you're reading it.

15 "On October 12th, 2011, EPA sent a tribal consultation
16 notification letter to all federally recognized tribal
17 leaders via mail and email inviting tribal leaders to
18 participate in consultation and coordination events and
19 provide comments to EPA in coordination with the Army."

20 Do you see that?

21 A Yes, I do.

22 Q Any basis to believe during your review of the
23 final rule that that statement is not true?

24 A No, no basis at all.

25 Q Okay. Mr. Dorjets, are you familiar with the

1 EPA's policy on consultation and coordination with Indian
2 tribes?

3 A No, I am not.

4 Mr. Longani. Hand me Exhibit 12. Thank you.

5 This is Exhibit No. 21.

6 [Dorjets Exhibit No. 21 was marked
7 for identification.]

8 Mr. Longani. There you are, sir.

9 Mr. Dorjets. Thank you.

10 BY MR. LONGANI:

11 Q I'm going to ask you to take a look at that as
12 well.

13 A Okay.

14 Q Mr. Dorjets, I'm going to ask you to look at page
15 7, second paragraph, Part D, how consultation occurs. Now,
16 during the last round, my Majority colleagues questioned you
17 about the process by which the EPA received feedback from
18 tribes; is that correct?

19 A Yes.

20 Q According to Part D of this exhibit titled "EPA
21 Policy and Consultation in Coordination with Indian Tribes,"
22 dated May 4th, 2011, the first sentence under Section D at
23 page 7 states, "There is no single formula for what
24 constitutes appropriate consultation, and the analysis,
25 planning and implementation of consultation should consider

1 all aspects of the action under consideration."

2 Did I read that correct?

3 A Yes.

4 Q Based on the EPA's policy, is it reasonable to
5 conclude that tribal consultations could include such things
6 as Webinars, teleconferences, and face-to-face meetings?

7 A Yes.

8 Q Thank you.

9 Hence, would OIRA in its review take any issue with the
10 EPA conducting tribal consultations pursuant to their
11 internal policy on tribal consultations?

12 A No.

13 Q And the agencies concluded that the rule would not
14 have an impact on the tribes as specified under Exhibit
15 Order 13175. Is that your understanding?

16 A I believe so, yes.

17 Q Do you have any basis to challenge the agencies'
18 conclusions?

19 A No, because no -- no issue was raised for me by
20 any of the stakeholders or reviewers. So I had no reason to
21 challenge the results.

22 Q Mr. Dorjets, you also were briefly questioned on
23 the issue of federalism and consultation relating to the
24 agency's consultation with states; is that correct?

25 A Yes.

1 Q In my prior hour, I read you a quote from Ken
2 Kopocis, the former Deputy Assistant Administrator of EPA's
3 Office of Water; is that correct?

4 A Yes.

5 Q You may remember --

6 A Yes.

7 Q -- that I did.

8 A Yes.

9 Q And I said "former." He may still be. I don't
10 know. So at that time in 2015 he was.

11 He also said, and I'm quoting again from the March
12 18th, 2015 hearing of the Water Resources and Environment
13 Subcommittee; he said, quote, "At our last meeting with the
14 states, which was scheduled for two hours, it was a little
15 over an hour, and that meeting ended because, quite frankly,
16 the state have run out of things they wanted to talk with us
17 about."

18 Do you have any reason to disagree with Mr. Kopocis'
19 conclusion relating to states?

20 A No. In fact, some of the states had come in to
21 meet with me under E.O. 12866 meetings, and I don't recall
22 them raising any concerns that rose to my -- something I
23 needed to resolve.

24 Q Now, in the last hour we also briefly discussed
25 the issue of compliance with the Regulatory Flexibility Act;

1 is that correct?

2 A Yes.

3 Q I mentioned to you that the GAO had conducted a
4 review of the agency's compliance with all relevant
5 administrative requirements, including the economic analysis
6 and the EPA. Do you remember that?

7 A Yes.

8 Q And that concluded that, indeed, the agencies had
9 complied with the regulation flexibility analysis
10 requirements. Do you have any reason to disagree with the
11 GAO?

12 A No, I don't.

13 Q Jim Laity told the Committee that it was
14 ultimately the agencies that are responsible to assure
15 compliance with the RFA. Do you have any reason to disagree
16 with that?

17 A No, that's correct.

18 Q And I want to ask you to look at Exhibits 15 and
19 17. Now, Exhibit 17, top email, the email from Kia Dennis
20 to you on May 11, 2015, at 6:49 a.m., in which Kia Dennis
21 says, "Under the RFA, the agency is required to respond to
22 our comments individually. If others made the same
23 comments, the agency can have the same response. I always
24 advise the agency to make it clear though that they are
25 responding to our comments so that they meet their RFA

1 obligations."

2 Now, you were asked in the last hour about the response
3 to that.

4 A Un-huh.

5 Q And I want you to now look at Exhibit 15, if you
6 don't mind, and if you could read the email at the top from
7 Gregory Peck to you and Craig Schmauder. Could you just
8 take a moment to read that and let me know if that, in
9 essence, was the response by the agencies to the SBA's
10 concerns? The advocacy.

11 A [Examining document.] Okay.

12 Q And I'll repeat my question. Is that email,
13 Exhibit 15, the response to Kia Dennis' issue with receiving
14 comments?

15 A Partially. It also references that Mr. Peck plans
16 to include responses to each of the comments within the
17 document's body itself, and so I have no reason to think
18 that he did not do as he had indicated and provided that
19 document for me to send back to Kia Dennis.

20 Q So, indeed, Kia Dennis' request for individual
21 comments was met by Mr. Peck, placing those comments within
22 the master responses document?

23 A Yes.

24 Q Sorry.

25 A In fact, itemized responses to each of the

1 comments that she had raised.

2 Q Sorry. I don't know the specific name of the
3 document that would contain all of the responses.

4 And you also had a series of questions related to the
5 SBAR panels and the whole process more generally; is that
6 correct?

7 A Yes.

8 Q Is it fair to say that you were not involved in
9 the decision with respect to certification that had taken
10 place prior to your arrival at OIRA?

11 A I don't know when that decision took place because
12 I wasn't involved in it.

13 Mr. Longani. Okay.

14 BY MS. BERROYA:

15 Q Are you aware of the decision having been made
16 prior to your involvement in the Clean Water Act?

17 A Since it was already represented in the -- in the
18 preamble, when it was submitted to me I assumed it was done
19 at some point before then, and my involvement began on that
20 day. So, yes, it would have been at some point before my
21 involvement.

22 Mr. Longani. We're almost done. I just need a moment
23 here.

24 BY MR. LONGANI:

25 Q On the issue of the certification, would you have

1 supported concluding the rule through OIRA if you had any
2 significant address concerns regarding the small entity
3 certification?

4 A No.

5 Q You also were asked a little bit about the issue
6 of direct and indirect effects at the appropriate baseline;
7 is that correct?

8 A Yes.

9 Q Mr. Laity told the Committee that the decision to
10 accept EPA's determination to certify the rule was largely a
11 legal determination that turned on the discussion of what is
12 a direct and indirect effect and what is the appropriate
13 baseline. Would you agree with that?

14 A Yes, that is correct.

15 Q And was the decision to accept EPA's determination
16 made at OIRA by a person at the appropriate level, to your
17 knowledge?

18 A The decision to accept or to make the -- sorry.

19 Q To accept, OIRA's decision to accept.

20 A Yes, this was an issue that was discussed
21 internally. It was raised to my supervisors, and they
22 communicated to me this was ultimately a legal decision and
23 not ours to make.

24 [Counsel conferred.]

25 BY MR. LONGANI:

1 Q Mr. Dorjets, was one of the purposes of the Clean
2 Water Rule to ensure that our drinking water is safe in the
3 United States?

4 A Yes.

5 Q And would the Clean Water Rule have an impact on
6 the ability to ensure clean drinking water for the people in
7 this country?

8 A Yes.

9 Q Mr. Dorjets, all waters of the United States are
10 considered navigable waters for the purpose of the Clean
11 Water Act, correct?

12 Do you know?

13 A I would want to think about that to see if there's
14 a -- before generalizing "all."

15 Q Sure. Would you agree that many rivers in the
16 United States --

17 A Yes.

18 Q -- are considered navigable for purposes of the
19 Clean Water Act?

20 A Yes.

21 Q The rule goes well beyond those easily
22 identifiable rivers and other known waterways, correct?

23 A Yes.

24 Q And in fact, the reason the rule discusses or one
25 of the reasons the rule discusses ditches, wetlands, prairie

1 potholes and other water bodies is because it was not so
2 clear how those related to navigable waters, therefore to
3 our sources of drinking water, prior to this rule
4 clarification; is that correct?

5 A Yes.

6 Mr. Longani. Give me 18 please.

7 This is going to be Exhibit 22. Thank you.

8 [Dorjets Exhibit No. 22 was marked
9 for identification.]

10 BY MR. LONGANI:

11 Q I'm just going to ask you to take a look at this.
12 Exhibit 22 is an EPA press release, dated May 27th, 2015,
13 entitled "Clean Water Rule protects streams and wetlands
14 critical to public health, communities, and the economy."
15 Do you see that?

16 A Yes.

17 Q In that press release, Administrator McCarthy
18 says, and I quote, "For the water and the rivers and the
19 lakes in our communities that flow for our drinking waters
20 to be clean, the streams and wetlands that feed them need to
21 be clean, too."

22 Do you agree with that, if you know?

23 A Yes.

24 Q Mr. Dorjets, is it your understanding that the
25 ultimate policy decision makers have an obligation to accept

1 and incorporate every single recommendation that is made by
2 a career staff person?

3 A No, that is not.

4 Q Any evidence to suggest that any part of this rule
5 was forced upon the Army or the Corps by the EPA?

6 A No, no, there is not.

7 Q And in fact, you spoke to the EPA and the Army on
8 a regular basis; is that correct?

9 A Yes.

10 Q In fact, on a daily basis?

11 A Yes.

12 Q And at any point during that process, you never
13 felt that any aspect of this rule was being forced upon the
14 Army or the Army Corps by the EPA; is that correct?

15 A Correct.

16 BY MS. BERROYA:

17 Q Did anything seem unusual or inappropriate about
18 the interactions between the EPA and the Corps?

19 A No. And the Army?

20 Q Yes. Thank you.

21 A No, not at all.

22 BY MR. LONGANI:

23 Q Any evidence to suggest this rule was
24 inappropriately influenced by politics?

25 A No.

1 Q Any evidence to suggest that this rule was not
2 grounded in science?

3 A Any evidence to suggest this rule was not grounded
4 in economics?

5 A No.

6 Q If at any point you wanted to speak to someone,
7 for example, within the Army Corps, was there anyone
8 preventing you from doing so?

9 A No.

10 Mr. Longani. We're almost done.

11 [Counsel conferred.]

12 [Dorjets Exhibit No. 23 was marked
13 for identification.]

14 BY MR. LONGANI:

15 Q I'm going to show you what's been now marked
16 Exhibit 23. This is an email from Mr. Johansson to you and
17 from you to Mr. Johansson.

18 My Majority colleagues had asked you about the deadline
19 and how the deadline had been moved from May 11th to May
20 8th; is that correct?

21 A Yes.

22 Q And in fact, here we are on May 12th, 2015. I'd
23 like you to read the email in the middle from you to Mr.
24 Johansson for a moment, and when you're done reading that,
25 just look up at me, please.

1 A [Examining document.] Okay.

2 Q Now, Mr. Dorjets, here we are on May 12th, 2015,
3 after not only the May 8th deadline, but after the original
4 May 11th deadline; is that correct?

5 A Yes.

6 Q And here it seems you are soliciting further
7 comments from Mr. Johansson; is that correct?

8 A Yeah, I'm asking him to provide feedback on the
9 pass-back of the promulgating agencies.

10 Q And so even though there was a deadline of May
11 8th, would you agree that the process for considering agency
12 comments and the interagency review process continued past
13 that stage?

14 A Certainly. It's a very fluid process. You -- you
15 tend to go back and forth between agents of the promulgating
16 agencies and the reviewing agencies as many times as needed
17 until you feel that the issue has been satisfactorily
18 resolved. It's -- you find something and you go almost to a
19 negotiation role.

20 So in this case I was providing, I think, after several
21 rounds of sending the updated language from EPA to USDA, and
22 if necessary I would have gone back to EPA with revised
23 language, and so forth, until that issue was resolved.

24 Q And so at this stage after six years of review, at
25 least one round of pass-back on the final rule's economic

1 analysis, did you feel it was appropriate to move the rule
2 forward in the process?

3 A Yes, I -- I recall being satisfied that all of the
4 issues had been resolved to my satisfaction.

5 Q And if Mr. Johansson hypothetically had brought up
6 an issue that heretofore you had not analyzed and that was
7 new to you, but would have required you to push the deadline
8 back another day or two, would you have done so or would you
9 have asked your supervisors to do so?

10 A I would have certainly brought that to the
11 attention of my supervisors, and because something like that
12 would have required their involvement, but I would
13 definitely have brought that to their attention.

14 Mr. Longani. I'm going to mark Exhibit 24.

15 [Dorjets Exhibit No. 24 was marked
16 for identification.]

17 BY MR. LONGANI:

18 Q Mr. Dorjets, I'm going to ask you to read Exhibit
19 24 please.

20 A [Examining document.] Okay.

21 Q Now, in this email, which I actually now think you
22 have seen before, on May 27th, 10:56 a.m. --

23 Ms. Berroya. I think maybe not because it's another
24 exhibit.

25 Mr. Longani. I believe now that I'm -- I believe it

1 might be.

2 Ms. Berroya. Okay. That's fine. You can just
3 withdraw it.

4 Mr. Longani. Yes.

5 [Dorjets Exhibit No. 24 was
6 withdrawn.]

7 Mr. Luftig. Exhibit No. 6.

8 Mr. Longani. Yes, yes.

9 Mr. Luftig. That's fine.

10 Ms. Berroya. Let's put Exhibit 24 aside, and I'll
11 substitute Exhibit No. 6 so that we're always referring to
12 the same exhibit.

13 Mr. Longani. Let's do that.

14 Mr. Luftig. Okay.

15 BY MR. LONGANI:

16 Q Okay. So, Mr. Dorjets, I want to go back to that
17 for a brief moment.

18 A Un-huh.

19 Q In the email at 10:56 a.m. on May 27th, 2015, you
20 tell Mr. Johansson, "By the time I got your message we had
21 already wrapped up the RIA and it would have been extremely
22 difficult to re-open it at that point."

23 Do you recall the content of Mr. Johansson's message?

24 A Not specifically, no.

25 Q Do you believe that you --

1 Mr. Luftig. Hold on. This is off the record.

2 [Discussion held off the record.]

3 BY MR. LONGANI:

4 Q And in this email, you tell Mr. Johansson that,
5 "By the time I got your message we had already wrapped up
6 the RIA and it would have been extremely difficult to re-
7 open it at that point." Do you recall the content of Mr.
8 Johansson's message?

9 A No, I do not.

10 Q Okay. If the content had been something to that
11 nature, do you think you would have recalled it?

12 A Hard to say.

13 Q Okay. And --

14 BY MS. BERROYA:

15 Q If the content had been substantive in nature, do
16 you think that you would have then made an effort to include
17 those comments?

18 A Yes. Yes.

19 Q Do you think if those comments had been
20 substantive in nature you would have recalled them?

21 A I would, I would like to think I would have
22 recalled needing to try to reopen, to push back this
23 deadline to accommodate them. I don't know if I would
24 remember the specific substance of the comment, but the
25 process of having to go back and extend deadlines would have

1 involved probably my supervisors at that point. So I would
2 have remembered the process.

3 BY MR. LONGANI:

4 Q Okay. And in your email at 11:10 a.m., at the top
5 of the page, to Mr. Johansson, you stated that, "You sent
6 agency comments to the EPA -- that were received by the
7 specific deadline. But even then there was only so much I
8 could do." What did you mean by "There was only so much I
9 could do?" In other words, let me rephrase that. Was
10 there, was this another way or another -- was this a
11 sentiment that you would often express to agencies who were
12 frustrated about the timeline?

13 A Yes. It is very consistent with the type of
14 messages I'd send.

15 Q I believe we're done. Just give me one moment.
16 Mr. Dorjets, at the end of the review process, did anything
17 about the rule review process itself concern you?

18 A No, it did not.

19 Q If you would have had any concerns, would you have
20 brought those concerns to the attention of Mr. Laity, Mr.
21 Mancini, or the administrator?

22 A Yes, I would have. I would have.

23 BY MS. BERROYA:

24 Q Okay, Mr. Dorjets, our colleagues in the last
25 hour, referred to the -- that the agencies put together.

1 Was this the first time you'd seen that summary?

2 A Yes, it was.

3 Q Had you ever discussed it with the agencies prior
4 to the --

5 A No.

6 Q You mentioned earlier in the first hour, when I
7 was asking you what your current roles are as the desk
8 officer and what that entailed with respect to your review
9 of the final rule. Can you walk us through that process a
10 little bit from start to finish? When OIRA receives a final
11 draft rule, and how that looks as far as the duty desk
12 officer is concerned?

13 A From start to finish?

14 Q The final rule period and what your
15 responsibilities are.

16 A Okay, certainly. Feel free to stop me if I
17 start --

18 Q Sure.

19 A -- going off on tangents on this.

20 Q You can keep that high level as well, just so we
21 generally have a better understanding of what your main
22 responsibilities are.

23 A Certainly. One of first things I'll do is
24 distribute the rule to reviewers. Both within various White
25 House policy councils, and in other agencies. And then give

1 them a period of time to read it and provide comments back.
2 So there's one track of obligations that deals with
3 resolving any issues that those reviewers identify and
4 working with the promulgating agency to gain satisfaction
5 that those issues are resolved, at a satisfactory level.
6 There's a separate path, which is meeting with public
7 stakeholders, in meetings under E.O. 12866. The purpose of
8 that is to give an opportunity for the public to voice their
9 concerns on a rule. So then there is a separate path
10 of -- the desk officer has to make a judgement call to
11 decide which of those concerns they find compelling enough
12 to try to fight for. Because there's a lot of concerns that
13 are raised. Some are more substantive than others. So
14 there's a separate track of trying to work through those
15 issues. And then there's a third path, which is, I may in
16 reading the rule, form my own concerns, from an OIRA equity,
17 that I may raise with the promulgating agencies. And then
18 it's a process, in a process of trying to resolve those
19 until the rule is ready for conclusion.

20 Q Okay. And with respect to the 12866 meetings, so
21 that occurs at the final rule stage as well as the proposed
22 rule stage, is that correct?

23 A Yes.

24 Q And so do you often meet with the same groups with
25 the proposed and the final rule stage?

1 A Yes.

2 Q Who is the primary OIRA staffer who took those
3 12866 meetings during the final rule review?

4 A Me.

5 Q Were any other OIRA staff joining those meetings?

6 A Jim Laity attended if not every single one, a vast
7 majority of them.

8 Q You mentioned earlier that Katie Johnson was a
9 policy officer. Are there any other policy officers at the
10 office who would have worked on this rule or otherwise been
11 exposed to it?

12 A Only Katie Johnson and Howard Shelanski.

13 Q And did Katie Johnson to your recollection go to
14 any of these 12866 meetings?

15 A No, it was that she -- it would have been very
16 uncommon. She's never attended any of the meetings that I
17 recall.

18 Q Do you recall approximately how many 12866
19 meetings you took?

20 A Over 40. And, and most of those meetings were with
21 multiple stakeholders. I recall at one point trying to
22 count how many individual organizations had come in, and I
23 recall it was well over a hundred in those 40 meetings.

24 Q Is that about the same number that you've taken on
25 other final rules you've reviewed?

1 A No, that is significantly more than any other rule
2 I've done. In general I think it's rare to have more than
3 10, so this was an exceptional number.

4 Q What gives you the impression, besides just sheer
5 number, that it was exceptional? Did you have any reason
6 for believing?

7 A Just in talking with colleagues about getting a
8 sense about how many, how many E.O. 12866 meetings they
9 normally have on rules. I know that while it's not the
10 highest, it's certainly on the higher end.

11 Q You were talking earlier about substantive
12 comments that you received in review, in the final making
13 review. Are you in -- when you were speaking about those
14 comments, were you speaking about comments from agencies, in
15 addition to comments from the public, or were you just
16 speaking about the interagency agency councils?

17 A Sorry, can you repeat that?

18 Q Earlier our colleagues were asking, if you had
19 seen a comment that was substantive, would you consider, you
20 know, granting more time?

21 A Mm-hmm.

22 Q Or going to speak to your supervisors about that
23 comment? And so I was just wondering if that was limited to
24 the comments you received in inter-agency review or also
25 inclusive of public comments that you would have received.

1 A Yeah, that would be any of those three tracks I
2 mentioned. Any way that a comment -- if there's a concern
3 that is brought to my attention in like, any method, if I
4 felt it was compelling and worth resolving, I would have
5 done everything I could to resolve it.

6 Q And you're saying in this final review stage of
7 WOTUS, you did not receive any comments that rose to that
8 level?

9 A That rose -- could you clarify to what level?

10 Q That were substantive enough that warranted you
11 going to your senior leadership to ask for more time or to
12 address those comments with that senior leadership within
13 OIRA?

14 A Right. That is correct. There was -- I did
15 not -- I felt that all issues were resolved during the
16 review period and at no point did I ask for additional time.

17 Q So it's not that you were saying that there
18 weren't substantive comments, it's just that they were all
19 resolved in your opinion?

20 A Exactly.

21 Q Okay. You also mentioned earlier that you had no
22 concerns with the Small Entities Certification. But just to
23 clarify, you did discuss that with Mr. Laity, is that
24 correct?

25 A Yes, it is.

1 Q Okay. So you were concerned enough to ask the
2 question about the certification, is that correct?

3 A I was concerned because SBA advocacy was
4 disagreeing. I did not know how much weight to put on that
5 and what to do with it, so that was enough for me to ask for
6 guidance.

7 BY MS. AIZCORBE:

8 Q I have one exhibit to enter. This will be Exhibit
9 24. You're probably aware of this document. I will be
10 referencing page eight. Unfortunately the document does not
11 have page numbers, but that's if you were to count each side
12 of the page. And this is a copy of Executive Order 12866.
13 And I'm referring section, Subsection B, entitled, "OIRA
14 Responsibilities." We spoke a little bit about this
15 earlier, and the scope of OIRA's responsibilities in the
16 rule review. I just wanted to make sure we were clear. So
17 I'll read the first sentence. "The administrator of OIRA
18 shall provide meaningful guidance and oversight, so that
19 each agency's regulatory actions are consistent with
20 applicable law, the President's priorities and the
21 principles set forth in this executive order, and do not
22 conflict with the policies or actions of any other agency."
23 With respect to that second clause, "Do not conflict with
24 policies or actions of any other agency" can you explain a
25 little bit about how that is interpreted in practice at

1 OIRA?

2 A When one of the aspects of this executive order is
3 a determination of significance for a rule, one of OIRA's
4 responsibilities is to determine whether a rule is
5 significant by the conditions set out in the executive
6 order. One of those conditions speaks specifically to
7 the -- a rule is significant if there's a potential of it to
8 adversely or negative -- somehow impact another agency. And
9 it is OIRA's responsibility to work with those agencies to
10 make sure that the, there is no adverse impact. I believe,
11 while I can't speak specifically to the intent of the
12 writers of this, I believe it is getting to that aspect of
13 OIRA's responsibility.

14 Q And in the case of WOTUS, this was, this rule was
15 determined to be economically significant, is that correct?

16 A I don't recall. I believe so, but I don't recall
17 for certain.

18 Q Do you believe the level of significance would be
19 applicable based on this definition in the executive order?

20 A I'm sorry. What do you mean?

21 Q I'm asking if WOTUS would rise to the level of
22 OIRA's review, essentially. Because we're looking at this
23 clause, "Do not conflict with the policies or actions of
24 another agency". I'm asking if that would be applicable to
25 your review of WOTUS.

1 A So I mean, this might -- I don't mean to nitpick
2 on it. Because there was a separate section of this
3 executive order that speaks specifically to what would
4 require OIRA review. So if we're going to bring in a rule
5 for review, we would reference that specific language. So
6 that's why I don't want to try to speculate as to whether
7 this language here speaks to significance. There's a
8 separate section that addresses that.

9 Q Right. And I'm not speaking about the
10 significance determination. I'm more speaking to what OIRA
11 does to ensure that a rulemaking does not conflict with the
12 policies or actions of another agency.

13 A So to the extent that any agency raises a concern,
14 to the effect that they -- about a rule possibly having a
15 negative impact, we would certainly look into those issues
16 and try to resolve them.

17 Q Okay. And your role in resolving those issues,
18 from what we've seen from some of the documentation, is that
19 you would collect those comments from agency and interagency
20 review, and then send those to rulemaking agencies so that
21 that could be resolved at that level, is that correct?

22 A Yes, that is correct.

23 Q Okay. And to your knowledge, in this case,
24 everything that you received from agencies was sent to the
25 agencies to resolve, is that correct?

1 A Every -- yes. All of the comments I received from
2 the agencies I forwarded onto EPA and the Army.

3 Q And your comments earlier about whether the
4 agencies would have -- the rulemaking agencies would have
5 time to address or consider those comments or concerns from
6 other agencies was said more in light of trying to get the
7 interagency group to respond in a timely manner? It
8 actually had no bearing on whether the EPA or Army would
9 actually consider those comments, is that correct?

10 A Yes. I had no reason to think that EPA and the
11 Army would not be able to consider those comments. It was
12 really a motivating incentive for them to get comments to me
13 as early as possible.

14 Q Okay. You have no knowledge of an agency not
15 considering comments from interagency review before a final
16 rule is promulgated, do you?

17 A It -- no. I don't. I mean, it's hard for me to
18 speculate what happens in an agency outside of my knowledge.
19 But I have never been involved in a situation where I submit
20 a comment to an agency and then they disregard it because of
21 timing.

22 Q On the next page, under subsection, it would be
23 B4D, the executive order continues that, "After the
24 regulatory action has been published in the federal register
25 or otherwise issued to the public or after the agency has

1 announced its decision not to publish or issue the
2 regulatory action, OIRA shall make available to the public
3 all documents exchanged between OIRA and the agency during
4 the review by OIRA under this section." Are you aware of
5 who coordinates making those documents public after a
6 rulemaking?

7 A There is -- we have -- there's a website, there's
8 a mechanism. Our IT people push certain documents to the
9 public facing side of it. That's as much as I know about
10 that.

11 Q So as a desk officer leading the review of a rule,
12 are you required at the end of a rulemaking to submit a set
13 of documents to whatever entity it is that posts them?

14 A No, we have an internal mechanism that once
15 there's a final document that's agreed upon -- by OIRA, by
16 the promulgating agency, by everybody -- and there's a final
17 version, it is uploaded into this mechanism, and that's
18 approved in that mechanism so that there's, there's no
19 confusion about what everybody agreed to. And then I believe
20 it's made public -- it's pushed from that mechanism to the
21 website.

22 Q So this provision is interpreted only to include
23 those documents that had been agreed to by all rulemaking
24 agencies and OIRA?

25 A I don't know if I can speak to how to interpret

1 this. All I know is what we do.

2 Q Okay. Are you referring to something other than
3 the final rule as it's, as it's approved by OIRA, or are
4 there other documents that would go through that process
5 that you would describe?

6 A I honestly, I actually don't know exactly which
7 documents are produced to the public. It's something that
8 I'm not involved in directly. I just know that there is a
9 mechanism by which certain documents are made public facing
10 at a certain point.

11 BY MR. LUFTIG:

12 Q I think there's -- just to be clear, do you know
13 how this is implemented?

14 A No, I do not know.

15 BY MS. ROTHER:

16 Q Are you aware of who in the agencies is
17 responsible for compiling records from the docket or
18 documents for the administrative record, with respect to
19 rulemakings? Is OIRA at all involved in that process?

20 A No.

21 BY MS. AIZCORBE:

22 Q In the course of your time working on this rule,
23 did you ever receive or were you aware of any suggestion or
24 direction to conduct your review in a particular manner?

25 A No.

1 Q Did you receive any specific guidance with respect
2 to your review by anybody in OIRA or the Executive Office of
3 the President?

4 A No, I did not.

5 Q Did you ever receive or were you aware of any
6 suggestion or direction approve or remove the rule through
7 the review process or to ensure its completion?

8 A No, I did not.

9 Q In your time with OIRA, outside of working on
10 WOTUS, have you ever received such direction to make sure a
11 rule makes it through the review process?

12 A No, I have not.

13 Q Is that also the case for any of the
14 administration's other environmental proposals?

15 A Excuse me?

16 Q Have any of the other --

17 A The Clean Water Rule?

18 Q I'm asking about any, outside of WOTUS, if he has
19 received any instruction to ensure the passage of any of the
20 other environmental regulations. And I ask because we've
21 been informed that the Clean Water Rule was a part of a
22 package and the timing was depending on other environmental
23 proposals within the administration's package of
24 environmental regs. And so I'm asking if you received any
25 different instruction with respect to any other

1 environmental regulations that you've reviewed during your
2 time at OIRA.

3 A I didn't -- I wasn't involved in any rules that
4 were part of any package with this. And so I didn't -- I
5 didn't, in general. I've never received any such guidance.

6 Q Were you ever told of any way or feel pressured to
7 achieve a specific result with respect to this rulemaking or
8 its analysis?

9 A No.

10 Q Were you ever told that your communications with
11 this rule would have to be treated in a certain manner or
12 first go through anybody else at OIRA?

13 A No.

14 Q That they would first be, have to be run by any
15 senior staff?

16 A No.

17 Q At any point were you told not to speak directly
18 with the Corps about the rulemaking?

19 A No.

20 Q Did you ever discuss your conversations with the
21 Corps with the Army as far as how frequently you were
22 communicating with the Corps or the content of which your
23 discussions with the Corps involved?

24 A I didn't communicate directly with the Corps. I
25 communicated with Craig Schmauder of the Army.

1 Q Okay. And could you remember what you said
2 earlier about whether you'd had any direct communications
3 with the Corps or not?

4 A They might have participated in some meetings.
5 They might have been, participated in some conference calls.
6 But Craig Schmauder was my main point of contact.

7 Q Are you aware of any discussions or efforts to
8 include any language from the Waters of the United States
9 Rule in any other regulatory activity that you're reviewing
10 right now?

11 A You're asking about rules currently under review?

12 Q Or anything that is proposed or not formally
13 submitted to OIRA. Is there -- are you aware of any
14 discussion of including language from the WOTUS rule in any
15 other regulatory proposals?

16 Mr. Luftig. My understanding is OIRA doesn't talk
17 about rules currently under review. So to the extent you
18 can answer the question within the boundaries of what OIRA
19 can talk about.

20 Q And that's not to the public. And we are
21 Congress. So I just want to make that distinction that we
22 would expect an answer to be provided to what you would be
23 able to provide Congress. To the extent that you are aware
24 of and comfortable answering, that's the expectation.

25 Mr. Luftig. Sorry, I misspoke. I meant to Congress,

1 not the public.

2 A There are rules that I have reviewed and I'm
3 currently reviewing that made reference to some of the terms
4 that are defined by this rule. They make reference to, this
5 regulatory, this regulation applies to the Waters of the
6 United States, which has obviously just been, which is being
7 defined by this rule. So there's references. So by
8 extension, to the effect that something is defined here that
9 would carry through and impact other regulations. But
10 there's no specific language that is being -- it's more
11 definitions by extension.

12 Q Are you finding that is a common practice in
13 several rulemakings that you're reviewing or is there just
14 one specifically that you're reviewing that makes that
15 reference? And I ask again, because --

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

17 Ms. Aizcorbe. Sure.

18 BY MS. AIZCORBE:

19 Q We're back on the record. Who at OIRA is handling
20 the Nationwide Permit Rulemaking for this May 17 cycle?

21 A I am.

22 Q And we have been informed that EPA has proposed
23 including part of the WOTUS proposal in the upcoming
24 rulemaking. Are you aware of discussions or efforts to
25 include WOTUS in this proposal?

1 A I can't discuss a rule that we are currently
2 negotiating. Currently -- it's currently under review.

3 Q Are you aware of language being included in any
4 other proposals or completed packages?

5 A There are -- I am aware, although I can't recall
6 specific instances -- of certain terms, like, the "Waters of
7 the United States" appearing in other rules. It's possible
8 that some of the other terms might appear in other rules
9 also, but not the, not entire language or a section like
10 that.

11 Q Have you had any discussions with the EPA about
12 the pending stay of WOTUS in the courts?

13 A No, I haven't discussed this rule with them since
14 the conclusion of it.

15 Q Are you aware of the EPA's efforts to promote the
16 rule through the use of social media during its development?

17 A I am generally aware of it. From popular press.

18 Q Upon learning of their activities, were you
19 concerned at all that they were out of the ordinary for a
20 rulemaking agency?

21 A I don't think it would have been my place -- I'm
22 not a lawyer -- to know what's ordinary or not ordinary in
23 this case.

24 Q OIRA, does it involve itself in how an agency
25 promotes or advocates for its rules?

1 A No.

2 Q Okay. Did you ever discuss those activities with
3 the EPA or Army or Corps?

4 A No, I did not.

5 Q With anyone within OIRA or OMB?

6 A No, I did not.

7 Q When did you learn of the Committee's WOTUS
8 investigation?

9 A I'm trying to recall the exact date.

10 Q Do you have a ballpark idea of the time?

11 A It was several, several months ago.

12 Q Do you recall when you were notified that the
13 Committee asked for your interview?

14 A Several months ago.

15 Q Do you recall who informed you?

16 A Not currently.

17 Q Did you discuss this request with anybody within
18 OIRA?

19 A My supervisor, Jim Laity. And some other people
20 in my branch are aware in general that this is something
21 that I have to do, but not the specifics.

22 Q And what was your, the nature of your conversation
23 with Mr. Laity?

24 A Just informing him that I had, this was coming up.
25 And he asked me to tell him what day, so he would know I'd

1 be out of the office.

2 Q Have you been asked to produce documents or emails
3 related to the rulemaking?

4 A Yes, I have.

5 Q Do you recall when you received such a request?

6 A No, I do not.

7 Q Or can you ballpark?

8 A No, I don't.

9 Q The Committee issued its subpoena back on July
10 14th of 2015. Do you recall whether it was as long as a
11 year ago?

12 A I honestly don't remember when I was asked for
13 these documents.

14 Q Do you recall when you started searching for the
15 documents or when you conducted your search?

16 A No, I don't recall that either.

17 Q You're pretty busy at OIRA, right?

18 A Yes.

19 Q So you don't recall ever taking time out of your
20 day to run a search for emails?

21 A If I did, it would have taken a couple -- it would
22 have been a very quick search, and I would have continued
23 doing what I was doing before, and carried on my day. So
24 its just I don't recall when that was.

25 Q Okay. So you don't recall who you gave them to

1 when you produced them?

2 A No, I do not.

3 Q Okay. Do you recall whether you were given any
4 instruction on how to search for these documents?

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

6 BY MS. AIZCORBE:

7 Q I'll repeat the question again. Were you given
8 any instruction on how to search for these documents?

9 A Not that I recall.

10 Q You don't recall receiving any search terms or
11 locations of which you would search for documents?

12 A Not that I recall.

13 Q Did you receive any instruction, preparation for
14 today's interview?

15 A Just to tell the truth.

16 Q And who did you receive that instruction from?

17 A From Charles Luftig and Matt Carney.

18 Q Okay. Okay. I think we're done.

19 BY MR. LONGANI:

20 Q Okay. Mr. Dorjets, I've got a couple wrap up
21 questions for you. Mr. Dorjets, how would you describe your
22 role in shepherding through the economic analysis for the
23 Clean Water Rule?

24 A I was largely deferential to economist Amanda
25 Thomas, and tried to resolve any concerns that were raised

1 by other reviewers.

2 Q Okay. Do you have any problem with the EPA taking
3 the lead in the economic analysis?

4 A No, I didn't have a reason to think it was out of
5 the ordinary.

6 Q Okay. Can you take a look at Exhibit 3 again
7 please? And we've discussed this on a couple of occasions
8 now during this interview. In this email, this chain of
9 emails that's going at the top at least between Mr. Peck and
10 you and Mr. Schmauder. There's a discussion about
11 significant changes that were you expecting to the economic
12 analysis in response to interagency comment. Is that
13 correct?

14 A Yes.

15 [Dorjets Exhibit No. 25 was marked
16 for identification.]

17 Q Now I'm going to show you what I'm going to mark
18 as Exhibit Number 25. I want to ask you to take a look at
19 this briefly, and specifically I'm going to ask you to take
20 a look at page three. Page three, and I will tell you while
21 you're looking at it --

22 A I'm sorry, side three or the --

23 Q Labeled page three --

24 A I see.

25 Mr. Longani. For the record I'm showing this to Mr.

1 Dorjets and to my colleagues as well. And it is Bates
2 Number 005877.

3 BY MR. LONGANI:

4 Q Mr. Dorjets, do you recall receiving this email
5 from Benjamin Portis and the attached comments from the
6 Tennessee Valley Authority?

7 A Roughly, yes.

8 Q And on the page that I just referred to, which is
9 OMB 5877, page three of the attachment, the TVA states in
10 part that portions of the economic analysis lack technical
11 rigor and calls into the question the benefits of the
12 proposed rule change, generally.

13 Do you agree that that's the gist of what they're
14 saying in portions of that this response?

15 A Yeah, that seems reasonably, yeah.

16 Q And, again, I refer you to Exhibit 3 in which you
17 talk about changes that might take place in the economic
18 analysis. Are these the type of comments that you were
19 referencing when talking with Mr. Peck about comments that
20 you were expecting that might influence the economic
21 analysis?

22 A Yes, exactly.

23 Q Okay, and did you further these comments for
24 review to the promulgating agencies?

25 A I have no reason to think I wouldn't have.

1 Q Okay. In terms of how you would provide -- how
2 you would convey the interagency comments to the
3 promulgating agencies in the Clean Water Rule process? Were
4 there multiple ways in which you might do that? For
5 example, could it be via email or via phone call, for
6 example?

7 A It could, yes.

8 Q So there are multiple ways in which you would
9 convey interagency comments to the promulgating agencies, is
10 that correct?

11 A Yes, but most more often by email than phone
12 because some of these issues are very complex so I wouldn't
13 want to mischaracterize them on the phone.

14 Q Okay, so generally by email, but also by phone.
15 Is that fair?

16 A That's fair.

17 [Dorjets Exhibit No. 26 was marked
18 for identification.]

19 Q I'm going to introduce Exhibit 26. And yes, you
20 have -- we've already introduced -- my colleagues introduced
21 a portion of this email. This is the complete email chain.
22 And I'm going to ask you to focus on the last page, which is
23 OMB 5901. And, again, this is an email, at the bottom, from
24 Kenneth Kumor to you, Mr. Dorjets.

25 A Mm-hmm.

1 Q Now Mr. Dorjets, are you familiar, and if you need
2 a moment to read let me know, but are you familiar with OMB
3 5900 and 5901, second and third page of Exhibit 26?

4 A Generally.

5 Q Okay, and this was an email that you received from
6 NASA with its economic analysis of the Clean Water Rule. Is
7 that correct?

8 A With their comments on the economic analysis.

9 Q Yes, excuse me if I mis -- yes, comments on the
10 economic analysis. Is that correct?

11 A Yes.

12 Q And in summary they have several criticism of the
13 economic analysis. Is that correct?

14 A Yes.

15 Q And based on what we see here, this email chain
16 you forwarded those comments to Mr. Peck and Mr. Schmauder.
17 Is that correct?

18 A Yes.

19 Q And as you've just described in the context of the
20 comments received from the Tennessee Valley Authority, would
21 this be your general modus operandus in terms of getting
22 comments over to the promulgating agencies?

23 A Yes, I'd either forward them directly as is or
24 sometimes I will consolidate them into a single document, to
25 the extent that's feasible. In this case you saw I sent the

1 emails from TVA separately and NASA separately. Sometimes
2 I'll consolidate them.

3 Q And in light of the comments and criticisms in
4 NASA's response to the economic analysis, again, are these
5 the type of comments that you expect the promulgating
6 agencies to take into consideration when making any changes
7 or amendments to the economic analysis?

8 A Yes.

9 Q And when you were talking, again, about these
10 significant changes in your May 8, 2015 email, was it
11 because, or account of, agency comments that were coming in
12 such as NASA's comments?

13 A Yes.

14 Q And Mr. Dorjets, were in there, in fact, changes
15 to the economic analysis in response to the interagency
16 comment process, and specifically comments from various
17 agencies like NASA, the Tennessee Valley Authority, et
18 cetera?

19 A Yes, there were.

20 Mr. Longani. Just a brief indulgence, Mr. Dorjets, I
21 believe we're done. Thank you, Mr. Dorjets.

22 [Whereupon, the interview was concluded at 3:49 p.m.]

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CERTIFICATE OF INTERVIEWEE

I have read the foregoing 181 pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Vlad Dorjets