

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: HOWARD SHELANSKI

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16 Friday, May 13, 2016

17 Washington, D.C.

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22 The interview in the above matter was held at 6480

23 O'Neill House Office Building, commencing at 10:06 a.m.

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1 Appearances:

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5 For COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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18 CHARLES LUFTIG, GENERAL COUNSEL

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1 Mr. Skladany. This is a transcribed interview of
2 Howard Shelanski. Chairman Chafitz requested this interview
3 as part of the Committee's investigation into promulgation
4 of the Waters of the United States Rule.

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

7 Mr. Shelanski. Howard Shelanski.

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

11 My name is Jonathan Skladany. I'm with the
12 Committee's Majority Staff, and I'll now ask everyone else
13 from the Committee here at the table to please introduce
14 themselves as well.

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

17 Ms. Rother. Katy Rother with the Majority Staff.

18 Mr. Owens. Graham Owens with the Majority Staff.

19 Mr. Longani. Kapil Longani with the Minority
20 Staff.

21 Mr. Burns. Sean Burns, Majority Staff -- Minority
22 Staff.

23 [Laughter.]

24 Mr. Skladany. The Federal Rules of Civil
25 Procedure do not apply to any of the Committee's

1 investigative activities, including transcribed interviews,
2 but there are some guidelines that we follow, and I'll go
3 over those now.

4 Our questioning will proceed in rounds. The
5 Majority will ask questions first for one hour, and then the
6 Minority Staff will have an opportunity to ask questions for
7 an equal period of time if they choose, and we'll go back
8 and forth that way until there are no more questions.

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

13 As you can see, there's an official reporter
14 taking down everything we say to make a written record. So
15 we ask that you give verbal responses to all questions.

16 Do you understand that?

17 Mr. Shelanski. Yes, I do. Thank you.

18 Mr. Skladany. So the court reporter can take down
19 a clear record, we'll do our best to limit the number of
20 people directing questions at you during any given hour.
21 We'll try to go one at a time, and it's also important that
22 we don't talk over one another or interrupt each other to
23 the extent that we can

24 We encourage witnesses who appear before the
25 Committee to freely consult with counsel if they so choose,

1 and you are appearing here today with counsel.

2 Would counsel please state their name for the
3 record.

4 Mr. Luftig. Good morning. Charles Luftig, Deputy
5 General Counsel, Office of Management and Budget.

6 Ms. Brown. Crystal Brown. I'll be appearing as
7 note taker.

8 Mr. Skladany. Thank you.

9 We want you to answer our questions in the most
10 complete and truthful manner possible. So we'll take our
11 time. If you have any questions or if you do not understand
12 one of our questions, please let us know.

13 When you answer it's best not to guess. Please
14 just give us your best recollection, and it's okay to tell
15 us if you learned information from someone else. Just
16 indicate how you came to know the information.

17 If there are things you don't know or can't
18 remember, just say so and let us know who might be able to
19 provide a more complete answer.

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

24 Mr. Shelanski. Yes, I do.

25 Mr. Skladany. And this also applies to questions

1 from congressional staff in an interview. Do you understand
2 that?

3 Mr. Shelanski. Yes, I do.

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

8 Mr. Shelanski. Yes, I do.

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

11 Mr. Shelanski. No.

12 Mr. Skladany. Finally, I'd just note that the
13 content of what we discuss here today is confidential. So
14 we ask that you not speak about this interview to anyone
15 who's not present here today.

16 That's the end of my preamble. Is there anything
17 my colleagues would like to add?

18 [No response.]

19 Mr. Skladany. It is 10:10, and so we will get
20 started with the first hour of questions.

21 Mr. Luftig. And before the first question let me
22 just state for the record that, again, Mr. Shelanski is
23 appearing here voluntarily today and is prepared to answer
24 questions based on his personal knowledge.

25 Ms. Aizcorbe. Thank you.

1 Thank you, Mr. Shelanski, for joining us today.

2 EXAMINATION

3 BY MS. AIZCORBE:

4 Q Can you tell the Committee when you first became
5 involved with the development of the Waters of the United
6 States guidance or rule, which I'll hereinafter refer to as
7 WOTUS?

8 A The process that led to a proposed rule coming
9 into review at OIRA, I believe, was taking place sometime in
10 the summer of 2013, which is when I began as OIRA
11 Administrator.

12 Q And how did you become acquainted with OIRA's
13 review to that point?

14 A I don't know what review there had been to that
15 point. At a briefing sometime that summer -- it might have
16 been in August -- members of my staff told me that there had
17 been a guidance on the issue that became -- on the matters
18 that became subject to regulation, and that EPA was working
19 on either a guidance or a new rule, and at some point I was
20 informed that they had a new rule that they were working on
21 that would come into us for review.

22 Q And before the rule came into you for review, did
23 you meet or speak with anyone at the EPA, Army or Corps
24 about the rule?

25 A I have no recollection of meeting with anybody

1 other than OIRA staff prior to the rule coming in.

2 Q Would you characterize your involvement in the
3 WOTUS rulemaking throughout the rulemaking as different from
4 any other rules OIRA has reviewed during your time with
5 OIRA?

6 A I think it was in most respects quite typical.
7 There is no one size fits all for my involvement with rules,
8 but there was nothing particularly unusual or noteworthy,
9 although there were aspects of my involvement that don't
10 occur in every rule.

11 Q And would you be able to elaborate on those
12 aspects?

13 A Yes. There was at least at one point in this rule
14 that I was directly talking about text with the head of the
15 EPA, with Administrator McCarthy. While it is not super
16 rare or, you know, that wasn't a unique case, it's not a
17 common thing for me to actually talk about text, specific
18 text back and forth with the head of an agency, although it
19 is not rare for me to talk to the head of an agency about
20 various aspects of rulemaking.

21 Q Do you recall what the reasons were that gave rise
22 to the need to speak about actual text in this case?

23 A The Administrator contacted me to say that there
24 was an issue where staff could not reach agreement, that our
25 staff was asking for particular wording that her staff and

1 that she would not agree to and that I believe the Corps
2 would not agree to, and could I work with her to come up
3 with some compromise language so that we didn't have endless
4 rounds of back-and-forth at the staff level.

5 So we at that point worked together over the
6 period of a couple of days to come up with language that
7 achieved the goals that we had hoped to achieve while also
8 being acceptable to the promulgating agencies.

9 Q Do you recall whether you had discussions about
10 this text also with Assistant Secretary Darcy?

11 A I do not recall having any such discussions.

12 Q Was the text that you're referring to the "other
13 water" section of the rule?

14 A That is correct, at the proposed phase.

15 Q Did you have discussions with anyone within the
16 Executive Office of the President regarding the timeliness
17 of OIRA's review of the rule?

18 A I have no recollection of having any such
19 discussion at the proposed phase, and at the final stage, I
20 don't remember being asked about the timeliness. It's a
21 very common thing on many rules for me to be asked when OIRA
22 is likely to be done. But in this case I don't have any
23 recollection of a specific discussion on timing.

24 Q Do you recall having any specific discussion on
25 timing with the EPA or Army?

1 A I don't recall having any such discussion.
2 Again, it's common in rules that I'll get a call from
3 somebody senior at an agency saying, "How are you doing?
4 You know, we have other things we're working on. You know,
5 when do you see us getting to the end of this process?"

6 But I don't recall any specific discussion about a
7 date or a conclusion deadline with this rule.

8 Q Mr. Laity informed the Committee that there was a
9 lot of concern communicated from senior leadership of OIRA
10 regarding a time frame or deadline set for the rules
11 development or finalization.

12 Do you recall such discussions within OIRA?

13 A I very frequently push my staff to move things
14 along. We have a 90-day normative time under the Executive
15 Order, and that was a timeline that had been frequently not
16 met prior to my coming into office, and there was a lot of
17 concern about that ~~from~~ members of Congress, from the
18 committee of the Senate that I had to appear before for my
19 confirmation hearings.

20 So it has been a priority of mine to make sure
21 that to the extent possible we move our rulemakings along a
22 good timeline. It's better for the public. It's better
23 for stakeholders. So it is common for me to internally set
24 deadlines and to say, "Look. If we're not making progress
25 on something, please come up with a solution. Let me know

1 what we're not making progress on."

2 So I do know that in the spring of 2015, I was
3 particularly concerned about our work flow. It was very,
4 very heavy. So for purposes of what I'll call air traffic
5 control and being able to manage our internal workload, it
6 would have been a normal thing for me to have been pushing
7 staff not to any particular conclusion date, but to move
8 things along as efficiently as possible.

9 Q And do you recall who determined when the rule
10 would be released?

11 A My recollection is that once we got to a point
12 where we felt the review had gone as far as it needed to go
13 and that issues were resolved to the extent that they were
14 going to be resolved, we reached the conclusion at OIRA that
15 we were ready to conclude review. I don't have a
16 recollection of any other people being involved with that
17 decision.

18 Q We understand that the final rule is with OIRA for
19 six weeks. Is that a typical time frame in your estimation
20 for a rule of this size and complexity?

21 A It varies. We've had rules of this size and
22 complexity that have gone even faster. A lot depends on the
23 condition the rule is in when it reaches us, how it has
24 changed since the proposed phase and how much of a priority
25 it is for the promulgating agencies.

1 Because a lot of the time in a rule review is when
2 the rule is back with the agency and how fast they work to
3 address comments and pass the rule back. In this case,
4 things moved along quite well, and the rule came into us
5 changed from the proposed phase in a way that was mostly in
6 line with what we were expecting.

7 So I don't think six weeks was particularly
8 abnormal under those circumstances.

9 Q And when ~~you came~~ it came back to you as you were
10 expecting, did that also include the adjacency or distance
11 limits that were addressed or added to the rule at that
12 time?

13 A If what you mean by that are the flood plain and
14 the scope of the flood plain and how far that those
15 distances would be, there was a lot of discussion about that
16 at the final stage, and I think that the rule came to us
17 with the issues fairly defined so that we were able to focus
18 and work on those.

19 Q How were extensions to the public comment period
20 approved typically?

21 A They are in the hands of the agency typically.

22 Q And is that how they were approved in this case by
23 the EPA and the Corps?

24 A You would have to ask the agencies. I was not
25 involved with those decisions.

1 Q Does OIRA have any guidance on how much time to
2 give interagency reviewers to review the final rule?

3 A You know, we typically give interagency reviewers
4 ten days or two weeks. In almost I would say in many, many
5 rules it is a normal thing for agencies to ask for more
6 time. They always want more time, and it's not their rule.
7 It's another agency's rule. They have other things they're
8 working on.

9 We're usually pretty firm on those deadlines. So
10 my understanding was that the interagency comments worked on
11 a fairly normal schedule here.

12 Q The Committee was informed by Mr. Dorjets that he
13 shortened the time frame for interagency review from two
14 weeks to one and a half weeks. Do you recall what
15 precipitated that deadline shortening?

16 A I do not.

17 Q Mr. Dorjets informed the Committee that direction
18 to shorten the review period would have come from within
19 OIRA, but could not recall who he received such instruction
20 from. Are you aware of who may have given this instruction
21 to Mr. Dorjets?

22 A I am not, but it's also not uncommon when we want
23 to narrow the scope of review and move efficiently in the
24 first round of pass-back, you know, for me to say, you know,
25 "Ask agencies what they need. Let's try to put them on a

1 deadline." Because, as I say, we usually anticipate that
2 they will slip in their timing or ask for extra time.

3 So I don't know who specifically gave Mr. Dorjets
4 those instructions.

5 Q And you mentioned earlier that it's a typical time
6 frame, ten days to two weeks, to give agencies a final
7 interagency review, and that you're pretty firm on those
8 deadlines, but is that also the case when you hear from
9 agencies that that time will not provide them sufficient
10 time to conduct a full review or is that just as a matter of
11 general applicability?

12 A I mean, it depends. Staff from the agency will
13 often tell my staff that they need more time. Typically if
14 there's an issue that is really important to that agency
15 that affects their equities, I will get a call from somebody
16 high up in that agency asking for more time and explaining
17 why they need it.

18 I don't have a recollection of receiving any such
19 call on this rule.

20 Q And you don't have any recollection of receiving
21 such concerns from your own internal OIRA staff?

22 A No, although, you know, they'll frequently say to
23 me, "Agency X is asking for more time."

24 And my response is usually to say, "Well, ask them
25 why and is it really a critical issue?"

1 Q Do you recall doing so with respect to this rule?

2 A I don't have a specific recollection, no.

3 Q Mr. Dorjets informed the Committee also that the
4 review period for a rule can be constrained by factors, such
5 as a press release. Can you explain how this might
6 constrain OIRA's ability to provide more time in the case if
7 an affected agency says it needs more time?

8 Mr. Luftig. If you're referring to Mr. Dorjets'
9 interview with the question and answer, can you provide that
10 question and answer to the witness?

11 Ms. Aizcorbe. We can. I will be doing that quite
12 frequently. So we can certainly have you look up every page
13 that we reference, but I do have -- excuse me.

14 Can we go off the record?

15 [Discussion was held off the record.]

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

17 Mr. Shelanski. Could you please repeat the
18 question?

19 Ms. Aizcorbe. Yes.

20 Mr. Shelanski. Thank you.

21 EXAMINATION [Resumed]

22 BY MS. AIZCORBE:

23 Q Mr. Dorjets informed the Committee that review
24 period for a rule can be constrained by factors, such as a
25 press release. Can you explain how this factor might

1 constrain OIRA's ability to provide more time in the case of
2 an affected agency who says it needs more time to conduct a
3 full review?

4 A Okay. I'm just taking a moment to look --

5 Q Sure.

6 A -- and to see where there's mention of a press
7 release. I'm sorry.

8 Ms. Rother. His comments are on Lines 8 through
9 13.

10 Mr. Shelanski. I see. Yes, so I mean my quick
11 look at this is it seems that he's offering hypothetical
12 reasons, and I don't know. I have no recollection of either
13 of these issues arising in the context of this rule.

14 BY MS. AIZCORBE:

15 Q In the context of any rule though would it be the
16 case that OIRA would feel a press release would constrain
17 its ability to afford more time to an agency for review?

18 A It depends very much on the circumstances, the
19 press release by whom saying what. As a typical matter, it
20 is very important for us to make sure that all of the
21 significant issues in interagency review are heard and
22 addressed.

23 Q And to be clear, you don't recall that any sort of
24 press or press release or rollout of this rule constrained
25 OIRA's ability to afford appropriate time for review?

1 A I don't have any recollection of that, and I have
2 no recollection of anybody from one of the agencies that
3 wished to comment contacting me and saying, "Wait. We
4 really need time because there's an issue that's not being
5 addressed."

6 Typically where there's a significant issue I
7 would be so contacted.

8 Ms. Aizcorbe. Okay. We need Exhibit D that I
9 will enter into the record as Exhibit 1.

10 [Shelanski Exhibit 1 was marked for
11 identification.]

12 Ms. Aizcorbe. And I will be referring to just the
13 top email, the last sentence that Mr. Dorjets says to DOT.

14 Mr. Shelanski. Yes.

15 BY MS. AIZCORBE:

16 Q In a May 5th, 2015, email, while discussing the
17 shortened time frame for review, Mr. Dorjets tells Ms. Lew
18 of the Department of Transportation, "I can send the other
19 comments to EPA and the Corps and let them know that your
20 agency's comments will be provided later, but I can't
21 guarantee how that will go over, given the pressure to get
22 this rule out the door."

23 Can you explain what pressure Mr. Dorjets is
24 referring to?

25 A So I first note that I neither received nor was

1 the sender of this email. So I really don't know what he
2 was referring to at that time.

3 I will note from the date that this was reasonably
4 close to the time that we concluded review, and we would
5 typically know at this point that we were moving towards
6 conclusion. So this would be a typical kind of response as
7 we were moving towards conclusion to lead comments from the
8 interagency process.

9 Q Mr. Dorjets informed the Committee that as a
10 matter of practice he tells agencies that committees or
11 comments -- let me start over. Excuse me. I apologize.

12 Mr. Dorjets informed the Committee that as a
13 matter of practice he tells agencies their comments may not
14 be considered in an effort to get them to comply with the
15 review deadline and, in fact, did so in this case.

16 That is, if you would like to reference it, on
17 page 36 and 37.

18 Were you aware of this practice?

19 A I am not aware of the specific practice that
20 different staff use to enforce deadlines, but it is, as I
21 said, it is really the norm that agencies are always asking
22 for more time, and staff have to hold them to deadlines.
23 Otherwise reviews will just go on and on and on.

24 So I'm not aware of the specific practice.

25 Q Are you okay with it?

1 A Yeah. Whatever, you know, whatever they need to
2 do to make clear the deadlines are deadlines.

3 Q As Administrator of OIRA, who do you report to?

4 A I report in the first instance to the Director of
5 the Office of Management and Budget.

6 Q And after the Director of OMB?

7 A Well, I would usually, as I say, go through the
8 Director of OMB. There are other people who I would brief
9 or talk to, but my reporting relationship is to the Director
10 of the Office of Management and Budget.

11 Q Do you report on the status of specific rules to
12 OMB?

13 A We do. It is -- there are different ways that we
14 do that, but I have a weekly meeting with the Director of
15 OMB. At least that has been the practice since I've been in
16 office, and typically that meeting will go over a couple of,
17 you know, major -- any major issues that are arising, but
18 also has a list of what we are working on and what -- not
19 everything we're working on, but the things that are nearing
20 conclusion, and we would typically update the Director on
21 what rules we're nearing conclusion, but we don't report on
22 a weekly basis on all the rules we have under review.

23 Q Do you report on the status of specific rules
24 similarly to other offices within the Executive Office of
25 the President?

1 A There's only one -- there's only one place that we
2 would give a similar update, and that at least during my
3 tenure has been to the Deputy Chief of Staff, and so for a
4 while I had a weekly meeting with the Deputy Chief of Staff
5 where, again, it would just be an update on rules that were
6 coming near a conclusion, not everything we were working on,
7 and similarly that practice has resumed after a hiatus, and
8 we update again on just here's what we're working on. Here
9 are the top line items that are coming up just so that they
10 have visibility on what the office will soon be putting out
11 the door.

12 Q And what precipitated that weekly meeting with the
13 Deputy Chief of Staff?

14 A My understanding is it was something that was in
15 place when I arrived just so that they would have visibility
16 as to what the office was doing. So it was something that
17 was already on my calendar the first day I was in the job.

18 Q And was the WOTUS Rule a part of either one of
19 these briefings with OMB or the EOP?

20 A I can't say specifically on what day it was part
21 of the briefing, but it would be unusual for a rule as it
22 neared conclusion not to be on the list at a certain point.
23 So I would imagine it was discussed.

24 Q We understand that rules are circulated to offices
25 within the EOP that might have an interest in the rule. Who

1 in OIRA typically communicates with those offices during an
2 ongoing rulemaking? Is that handled on a staff level or on
3 your level?

4 A It's handled on the staff level. So the first
5 thing that happens when a rule comes into OIRA is that it
6 gets put into interagency circulation. Simultaneous with
7 the desk officer's own reading of the rule, the desk officer
8 circulates the rule to interested agencies around the
9 federal government, and that can include independent
10 agencies that would have an interest, but primarily it's
11 Executive Branch and the relevant EOP policy councils would
12 also see the rule, and it's the desk officer who would be in_
13 ~~the~~_first instance and sometimes in all instances in
14 communication with those agencies and policy councils and be
15 assimilating their comments to pass back to the agency.

16 Q And with respect to WOTUS, were you communicating
17 as well with other EOP offices regarding the rulemaking?

18 A At the proposed rule phase I have no recollection
19 of any such communication, and at the final rule stage I can
20 recall only one discussion that involved other offices
21 within the EOP that I was involved in.

22 Q To the extent that EOP offices have comments on a
23 rulemaking, are these comments shared with the agencies like
24 other comments?

25 A It depends on -- so in the normal case, yes. They

1 come to us as comments that are assimilated with all of the
2 other comments, and they're all sent over by the desk
3 officer, typically without identification from whom they
4 particularly come with. They're all funneled through the
5 desk officer.

6 There are some cases where an agency or a policy
7 council might have a general question that's not a
8 particular comment, and that might not go back to the
9 agency, but in the normal case, in the overwhelming case,
10 yes, they are passed back to the agency.

11 Q And are those comments treated any differently
12 than those received from the public as far as OIRA's
13 consideration?

14 A So comments received from the public go to the
15 agency. Oh, well, let me back up. The main area of public
16 comment is on a proposed rule, and those public comments go
17 to the agency during a period when OIRA doesn't have
18 anything to do with the rule.

19 OIRA gets public comments through the 12866
20 meeting process, and that is under the Executive Orders. We
21 are required to meet with anybody who requests a meeting on
22 a rule, and we have many such meetings, you know, hundreds
23 per year, and so we will hold that meetings.

24 Now, the agency is typically present at those
25 meetings. There may be times they don't show up, but that's

1 rare. So they hear firsthand what's coming in.

2 But OIRA will, you know, make sure that the agency
3 addresses those comments. I would add in most cases that we
4 have a 12866 meeting there is no additional written material
5 submitted. Sometimes there is, but I'd say in the normal
6 case it's just a discussion, and very often it is from
7 people who have also commented directly to the agency just
8 to reinforce their comments.

9 Q Do you recall whether CEQ, or the Council on
10 Environmental Quality, had any disagreements with the rule
11 at the final stage?

12 A My only recollection is that CEQ was involved with
13 some discussions. I don't specifically recall what their
14 positions were.

15 Q Do you recall whether they submitted comments at
16 the final rule stage?

17 We haven't seen any. So --

18 A Yeah, very often they might come to 12866 meetings
19 or might have, you know, verbal discussions. I don't know
20 if they submitted any comments or not.

21 Q We understand that late in the rulemaking, the
22 rule was changed so that waters beyond the 4,000 foot limit
23 but within the 100 year flood plain would potentially be
24 considered jurisdictional. Can you explain how this change
25 came about?

1 A I was not on the front line of that decision, but
2 I do recall the issue because it was a primary issue of
3 concern to OIRA as we got into the review. I don't remember
4 at what point we were talking about, you know, 1,000 feet
5 versus 4,000 feet or different distances or exactly what
6 they were.

7 I recall the following dynamic. OIRA was favoring
8 a narrower scope of jurisdiction. The Army Corps of
9 Engineers, to my recollection, was favoring a much broader
10 scope of jurisdiction.

11 In the back-and-forth with EPA, OIRA got some
12 traction. OIRA staff got some traction towards narrowing
13 the scope, but then in EPA's consultation with the Corps, it
14 got re-broadened, as you say. I don't recall specifically
15 when that happened, and I was not involved as I recall with
16 the specific discussions to propose that broadening. I was
17 informed that it had happened and that there were strong
18 reasons for the Corps to ask for that.

19 Q Mr. Laity informed the Committee that he staffed
20 you on a call with others within EOP, including CEQ, where
21 this decision to include the 100-year flood plain was made.
22 That's in Mr. Laity's transcript at 111 to 112.

23 Do you recall this call?

24 Mr. Luftig. I'm sorry. Can we go off the record
25 for a second?

1 Ms. Aizcorbe. Sure.

2 [Discussion was held off the record.]

3 Ms. Aizcorbe. We can go back on.

4 So let me begin again.

5 EXAMINATION [Resumed]

6 BY MS. AIZCORBE:

7 Q Mr. Laity informed the committee that he staffed
8 you on a call late in the rulemaking process with others
9 within the Executive Office of the President, including CEQ,
10 where the decision regarding the 100-year flood plain was
11 made.

12 And I asked you whether you recalled this call.

13 A I don't specifically recall the call, and as I
14 read Mr. Laity's transcript, he says shortly after the phone
15 call the decision was made to reach that change. So it's
16 very possible I was on a call where people discussed the
17 issue because we knew that there were people advocating a
18 broader flood plain. I wanted to hear the arguments because
19 this was the one issue that was really -- to which we had
20 narrowed down the focus of our review at this point.

21 So I may well have been on a call. I don't
22 specifically recall it. I have many, many phone calls on
23 many reviews on many different rules in a typical week, and
24 I don't recall them all specifically, but I don't recall
25 being involved with the decision, and as Mr. Laity said, the

1 decision was, in fact, made after that call.

2 Q And you mentioned earlier when we were speaking
3 that you only recall one instance in which you had a meeting
4 with the Executive Office of the President to discuss this
5 rule specifically. Correct me if I'm wrong. Is that your
6 recollection?

7 A At the final stage I remember one specific
8 meeting, and I don't specifically recall any, you know,
9 other calls or briefings that may have occurred.

10 Q And so with respect to the addition of the 100-
11 year flood plain to the descents limits, you do not recall
12 who made that decision or who approved it?

13 A My recollection is that I was told it emerged from
14 discussions between EPA and the Corps. I can't speculate as
15 to who else might have been involved with those decisions.
16 The one meeting, actual face-to-face meeting, that I recall
17 involved this issue after the decision was made to discuss
18 it so that we could air our concerns and other people could
19 discuss the rule and see where the consensus was.

20 Ms. Aizcorbe. I'll go ahead and provide this as
21 Exhibit 2, and this is an addendum to the transcribed
22 interview of Jim Laity.

23 [Shelanski Exhibit 2 was marked for
24 identification.]

25 Mr. Shelanski. Would you like me to read this?

1 Ms. Aizcorbe. Yes, if you could just read the
2 paragraph that is included on the second page.

3 Mr. Shelanski. [Examining document.] Yes, I have
4 read the paragraph.

5 BY MS. AIZCORBE:

6 Q Does this reflect your recollection -- refresh
7 your recollection of what was discussed in that call?

8 A This is what I recall being part of the face-to-
9 face discussion that I referenced that happened. Again, I
10 don't recall the call. So it doesn't refresh my
11 recollection of the call, but this was one of the issues
12 that arose in the face-to-face meeting that I recall as the
13 one meeting we held in the EOP.

14 Q And do you recall who was in that face-to-face
15 meeting besides yourself?

16 A I don't recall everybody who was there. The
17 meeting was hosted by Brian Deese, and the people I recall
18 being there were Avi Garbow, I believe, the General Counsel
19 of EPA. I think I quite clearly recall his being there,
20 although I may be confusing it with another meeting.

21 I believe Administrator McCarthy was there. I
22 know people were there from the call -- from the Corps. I
23 don't specifically recall who was there from the Corps, and
24 I don't know who else might have been there from the EOP.
25 My mental image of the meeting is that there were more

1 people in the room, but I can't put faces to who they were.

2 Q And when you say "the Corps," do you recall
3 whether that was from the Corps or from the Army
4 specifically?

5 A My recollection, and again, this is just my
6 recollection, ~~is just recollection~~, is the Corps, but I'm
7 not sure I would have made that distinction.

8 Q And as we just looked at, Mr. Laity's revision to
9 his transcript, he said towards the bottom, "I now recall,
10 however, that one of the points in favor of making this
11 modification was that the Corps believed it would be more
12 consistent with their FONSI. The final rule did include
13 this modification consistent with the Corps' FONSI."

14 Do you recall discussing the FONSI in ~~theour~~ face-
15 to-face meeting?

16 A So until I read Mr. Laity's addendum right here
17 now during this interview, I actually didn't recall the term
18 "FONSI," but this is very consistent with my recollection of
19 what the issue was, that the Corps had made prior
20 determinations that would be inconsistent with the narrower
21 scope of jurisdiction, and there was concern that that would
22 create a number of problems, and that was the basis for the
23 Corps pushing back on our and, if I recall correctly, EPA's
24 desire for a narrower scope of jurisdiction, and so this is
25 very consistent with my recollection of the discussion that

1 went on in Mr. Deese's office.

2 Q When you said that -- excuse me -- the Corps had
3 made some inconsistent findings and that's why they were
4 favorable toward making this modification, do you recall at
5 all discussing the Corps going back and redoing its
6 analysis?

7 A So let me make clear. I didn't say the Corps made
8 inconsistent findings. They had findings that were from the
9 past that a narrower jurisdiction, had one been adopted in
10 the rule, might have been in tension with. So I recall the
11 rule being harmonized with the Corps' determinations. I do
12 not know and have no knowledge of what the Corps did in
13 terms of those determinations subsequently.

14 Q Are you aware of whether the agencies conducted
15 additional analysis or considered additional alternatives to
16 support this change to include the 100-year flood plain?

17 A I don't recall what the entire scope of reasoning
18 was. I remember that the Corps' previous determinations
19 that their precedent and their findings, which they stood
20 by, were the main driver behind including this additional
21 scope of jurisdiction.

22 What other analytic issues or what other evidence
23 might have been brought to bear on that, I have no
24 specifically recollection of.

25 Q Did you or anyone else express reservation about

1 making substantive changes to the rule at this stage in the
2 rulemaking process?

3 A There's always a question when changes are made in
4 a rule about how closely those changes are or whether those
5 changes have logical outgrowth from the proposed rule and
6 the scope of comment on the proposed rule. It's a kind of
7 question I often ask when we reach final policy decisions in
8 a rule.

9 I don't have any specific recollection of asking
10 that question here, but it would have been a natural kind of
11 thing for us to ask as we reach these final kinds of
12 determinations.

13 Q And you don't recall asking the question, but do
14 you recall the agencies discussing it at all?

15 A I recall a logical outgrowth being a topic of
16 conversation, to make sure that the -- which is a matter of
17 general administrative law. So, you know, I recall there
18 being experts in the room talking about whether or not the
19 additional jurisdiction was -- satisfied logical outgrowth
20 requirements. I do recall that being a topic of discussion,
21 but I have no recollection of the specifics that went into
22 that discussion.

23 Q And do you recall whether anyone in those
24 conversations disagreed that it would be a logical
25 outgrowth?

1 A I do not have any recollection of that.

2 Q Was this change made before or after the rule was
3 sent to agencies for final interagency review?

4 A Rules typically go out for interagency review~~room~~
5 on multiple rounds. Often there is a judgment call to be
6 made when there is a late change -- I'm speaking generally,
7 not about this specific rule -- whether to recirculate or to
8 specifically have a discussion with the affected agency for
9 any change.

10 I don't recall what happened here procedurally,
11 whether there was a recirculation or not or what kinds of
12 discussions might have happened.

13 Q So you don't recall whether recirculation was
14 discussed?

15 A I do not recall that, no.

16 Q Do you recall receiving any indication or
17 information from your staff that agencies wanted the rule to
18 be recirculated?

19 A I do not specifically recall that in the case of
20 this rule.

21 Q Would it be within OIRA's discretion to either
22 reopen the rule for public comment or recirculate for
23 interagency review if a change is made?

24 A It is not typically within OIRA's discretion to
25 reopen for public comment. That actually requires a major

1 change in the regulatory process that we typically cannot
2 order an agency to do absent fairly drastic measures.

3 It typically is within OIRA's discretion whether
4 to recirculate a rule for interagency review or to use some
5 alternative means of discussing an issue with an agency.

6 Q Do you recall whether any alternative means that
7 you're referencing were done so in this case?

8 A I do not recall what was done in this case.

9 Q Has OIRA in your experience ever given agencies
10 the opportunity to view or comment on changes made during or
11 after the final interagency review?

12 A Oh, yes, on many cases. It's actually fairly
13 typical if I get a call saying, "Hey, we're interested in
14 this," or more importantly, if I think there's something
15 that particularly implicates an agency's equities, I will
16 call that agency. I won't always recirculate.

17 As a general matter, because we're speaking
18 generally right now, there tends to be a problem every time
19 when you go on many, many re-circulations. Often personnel
20 change. Different people will look at a rule. Issues that
21 were litigated get opened up again, and again, our ability
22 to stay on a reasonable time frame can really break down.

23 So there is a judgment call about how broadly and
24 whether to circulate a rule again and again, but when there
25 is a significant issue, it is the typical practice to have

1 either somebody from OIRA or in some cases somebody from the
2 agency, the promulgating agency, work with another agency
3 that might be affected to hear their comments and to see
4 what they can do about it.

5 I will add just one final thing. Sometimes there
6 are things that other agencies don't like, but that they
7 cannot have. They cannot have them because they're illegal.
8 They cannot have them because, frankly, the consensus of the
9 interagency process is against them.

10 So agencies often, you know, late in the game say,
11 "But we didn't get the change we want." That's not because
12 they weren't heard, and I'm speaking generally, not about
13 this rule. It's not because they weren't heard. It's
14 because their suggestion was seriously considered and not
15 accepted, and we agreed with that decision not to accept it.

16 But, again, going back to the specific case of the
17 Clean Water Rule -- because you had asked me generally,
18 that's my general answer -- I don't have any recollection of
19 what happened after this meeting or after this decision to
20 broaden the jurisdiction was reached.

21 Q Or whether anybody within OIRA specifically
22 decided not to recirculate or use any of these alternative
23 means to work out additional review of changes?

24 A I do not have personal knowledge of what happened
25 after that point.

1 Ms. Aizcorbe. I'll be referring to the last
2 sentence on page 15.

3 Mr. Shelanski. Okay. Yes.

4 BY MS. AIZCORBE:

5 Q Are you comfortable to move forward?

6 A It depends what the question is, I guess.

7 Q I'll start.

8 A Okay.

9 Q You testified at the Committee's April 19th
10 document production hearing that OIRA works with OMB's
11 Office of Legislative Affairs, Office of the General Counsel
12 and other offices within OMB to respond to congressional
13 requests for information, briefings and documents relating
14 to issues under OIRA's purview.

15 Can you explain exactly what role each of these
16 offices plays in responding to requests from the Committee?

17 A Yes, I will do that to the best of my ability and
18 my personal knowledge.

19 So the Office of Legislative Affairs just in the
20 first instance is the office that has the direct contact
21 with Congress. So they would be the people who you would be
22 interacting with, I would imagine, for scheduling of hearing
23 or for communication of document requests. And I think
24 that's just a normal kind of process throughout the
25 government, and that's what our Office of Legislative

1 Affairs do.

2 They typically tell me when there is a request
3 from Congress of any kind, for a phone call, for a meeting,
4 for a hearing, for documents.

5 The Office of General Counsel is involved with
6 making sure that we understand our obligations when we
7 receive an oversight request. We certainly take oversight
8 extremely seriously at OIRA. It's not something we have a
9 vast amount of experience with in terms of document
10 productions, but we think it is absolutely vital that
11 Congress get the information it needs.

12 And I think it very important that we work
13 cooperatively with Congress, and the Office of General
14 Counsel is very helpful in making clear what we are supposed
15 to do and, importantly, how to communicate with Congress.
16 | We're a regulatory review body and it's just not something
17 we're experienced with.

18 The other thing I would note is when it comes to
19 production of documents, there are multiple ways that
20 documents get identified, and we, the people being asked for
21 documents, certainly do our own searches, but I also
22 understand that there are other practices that could be more
23 comprehensive or at least ensure that documents are not
24 inadvertently omitted or not found, and those would be
25 electronic searches that we don't know how to run. We

1 probably don't even know they're being run.

2 And my understanding is that those are handled by
3 our Office of General Counsel, and so that would be their
4 role. They also play the important role of reviewing the
5 documents for production.

6 Q And when you say that you do your own searches,
7 you're referring to "you" as OIRA?

8 A Yes.

9 Q Okay.

10 A So when I receive a document request, the first
11 thing I do is look and see, you know, on my computer in my
12 files what do I have that is possibly responsive. I
13 assemble that and I turn it over to our Legislative Affairs
14 and General Counsel's Office.

15 Q And in the case of our WOTUS request from the
16 Committee, are you aware of whether both OIRA searched on
17 its own for those records as well as the Office of General
18 Counsel conducting its electronic search for those records,
19 or was it one or the other?

20 A My understanding is that it is both. I have
21 direct personal knowledge that I and -- that I searched my
22 documents and that I directed my staff to always comply and
23 comprehensively search and turn over any of their documents.

24 I have been informed that our General Counsel's
25 Office in consultation with you, the Committee staff, as to

1 | search terms, ran electronic searches as well.

2 Q Are there any other offices within the Executive
3 Office of the President that review document productions and
4 responses to congressional requests from OIRA?

5 A My only interactions and the only thing I have
6 personal knowledge of are the Offices listed here, the
7 Office of Legislative Affairs and our General Counsel's
8 Office.

9 Q You mentioned in your statement that other offices
10 with OMB respond. Is that within what you were just
11 | explaining with OLA and OGCE, or are there other OMB offices
12 that you were referring to in your statement?

13 A I don't actual -- I have to be very honest. I
14 think the other offices was an effort to be comprehensive.
15 Like we might consult with the Office of the Director to
16 see, but my own -- I think of this as being mostly in
17 | conjunction with the Legislative Affairs Office and the
18 General Counsel.

19 I wouldn't exclude that another office might get
20 involved as needed.

21 Q Did anyone advise you on how to respond to the
22 Committee's requests?

23 A The only advice, when we first received the
24 Committee request, which was prior to the subpoena, in the
25 spring of 2015, I was asked to please as quickly as possible

1 do as comprehensive a search as I could do of my documents.

2 I also did immediately ask my staff at our weekly
3 staff meeting. I said, "Look. Sometimes we get these
4 requests. It is not up to you to decide what is relevant or
5 not. You should search broadly and turn everything over."

6 And I recall being told by our Legislative Affairs
7 staff, "You have this request," and I don't specifically
8 recall who asked me, "Like get your documents together now,"
9 but somebody did say, "So why don't you take this afternoon
10 to do that?" And I started to do that.

11 Q Does OIRA needs to first seek clearance from OMB
12 to speak with a Committee directly about any piece of
13 correspondence or request?

14 A There is a longstanding process by which requests
15 from Congress of any kind come through our Legislative
16 Affairs Office. So if I want to speak with a member of
17 Congress, I will usually tell our Legislative Affairs
18 Office. I have never been told no, but they are the
19 interface between OIRA and other OMB offices and the
20 Congress.

21 Q You mentioned earlier that you had these
22 conversations about the Committee's request after receiving
23 the Committee's request in spring.

24 A That's my recollection of the time frame, yes.

25 Q As you may recall, members asked you for documents

1 | relating to OIRA's review of the WOTUS rulemaking in the
2 Committee's March 3rd, 2015, OIRA oversight hearing.

3 A Yes.

4 Q After that hearing, do you recall discussing the
5 request with anyone at OIRA or OMB?

6 A I don't recall any specific conversations, but one
7 of the things that is always at issue when we get document
8 requests is what do we turn over as a matter of course; what
9 needs further discussion, and that involves longstanding
10 things that I was becoming familiar with as I was going
11 through my time as Administrator about what constitutes
12 deliberative process and what doesn't and all kinds of
13 questions like that.

14 | So it isn't normal for me. We haven't had many
15 document requests I should add. So this is a bit of a new
16 experience for me, but so I don't recall any specific
17 discussions that I would have had other than "hey, we have
18 this request. What do we do?"

19 Q So after the hearing, you do recall telling
20 anybody at OMB that you had been asked by member of Congress
21 for those records, or did you wait until the Committee
22 submitted its letter to initiate that contact?

23 A My understanding is that we received a letter from
24 the Committee, and that's what triggered the discussion on
25 the response.

1 Q And you don't recall why you didn't initiate a
2 search sooner after the March 3rd hearing?

3 A I do not recall why. I think I was told to, you
4 know -- typically I was told letters make these requests
5 because they spell out the requests a little more clearly,
6 but I don't have any specific recollection of a discussion
7 after the hearing.

8 My recollection is after we received I guess it
9 was a letter or something, Leg. Affairs came to me and said,
10 "Okay. You need to get your documents together."

11 Q Were you informed that after the March 3rd hearing
12 the Committee staff was in contact with the Office of
13 Legislative Affairs about its request?

14 A I mean I know that there was contact because
15 eventually Leg. Affairs came to me, but I know nothing about
16 the timing or content or number of such contacts.

17 Q Do you recall when the Office of Legislative
18 Affairs came to you?

19 A I do not. I would note that that hearing was
20 prior to our even receiving the final rule for review. So I
21 was probably very focused on, you know -- because I recall
22 calling Chairman Meadows of the Subcommittee to tell him
23 that the rule had come in for review because I had told him
24 I would let him know, and I recall that being shortly after
25 the hearing.

1 Q Did you discuss with anyone in Legislative Affairs
2 or the Office of General Counsel how to respond to the
3 Committee?

4 A I remember being told, and again, as I said
5 before, I don't remember specifically by whom, that I was
6 supposed to search all of my documents, everything, email,
7 everything on my computer, everything on my desk, and turn
8 it over.

9 Q But to be clear, you don't remember when you
10 received that instruction, correct?

11 A I do not. To me the time frame between the
12 hearing and, you know, the weeks and couple of months after,
13 I can't differentiate within that.

14 Q And when you communicated to your staff at the
15 staff meeting that you referred to earlier to initiate a
16 search, did you also communicate this by email or any other
17 method or was it just in person?

18 A I recall -- we have a weekly meeting -- saying,
19 "You will be asked. You will receive specific requests for
20 documents related to the waters rule, and you obviously" --
21 you know, I even recall saying something like, "Many of you
22 have much more experience with this than I do probably, but
23 obviously you are to be fully cooperative with this
24 request."

25 Q So your instruction, just to be clear, to your

1 staff at OIRA was not to initiate any sort of search. It
2 was to wait to be contacted or --

3 A No. I was told they were going to be contacted,
4 and I took my own initiative to jump the gun on that and
5 tell them, "You are going to be specifically asked. You
6 should be fully cooperative."

7 Q And do you recall having any conversations with
8 either the Office of General Counsel or the Office of
9 Legislative Affairs of who might need to conduct a search?
10 Mr. Luftig. Before you answer, can we go off the
11 record for a second?

12 Ms. Aizcorbe. Off the record.

13 [Discussion was held off the record.]

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

15 BY MS. AIZCORBE:

16 Q Do you recall having conversations with the Office
17 of Management and Budget regarding who would be a potential
18 custodian or do you know how the custodians who were
19 identified were identified?

20 A I do not know specifically how the custodians were
21 identified. I do know that I said generally to staff,
22 "Anybody who" -- I tried to give a very general message --
23 "anybody who is involved, anybody who might have been
24 involved, please search. You know, please cooperate fully."

25 Beyond that, I really don't have a recollection of

1 a specific conversation about that issue or about the
2 mechanics. I remember thinking this was a very serious
3 thing. You know, this is a real request. We have to
4 cooperate with this and thinking that my job, the core part
5 of my job was making sure that, first, I got all of my
6 documents together and, second, that I communicated to my
7 staff that they were to be fully cooperative.

8 Q And you didn't provide any input as to which OIRA
9 staffer might have responsive documents?

10 A I don't recall whether I had any such discussions
11 or not at the time.

12 Q How did you become aware of the Committee's July
13 14th, 2015, subpoena?

14 A I became aware because somebody -- and I, again,
15 am not specifically clear who, but I believe it was somebody
16 from the Legislative Affairs Office, came to tell me because
17 we had been preparing a document production because, you
18 know, we felt like we really needed to come forward with a
19 good set of documents and start being responsive.

20 And I was told, you know -- boy, it was sort of
21 framed to me in a very disappointed way, just as we're
22 getting this together we got the subpoena to which I said,
23 "Well, let's get on it."

24 Q What did you understand your role would be in
25 responding to the subpoena?

1 A I understood that my role was to work with, you
2 know, as I said in my opening testimony at the last hearing,
3 to work with the Office of Legislative Affairs and the
4 Office of General Counsel to make sure that they got the
5 documents and that they were in a position to start our
6 response to the subpoena.

7 And I did, as I think I mentioned to you, the
8 steps that I took. I reiterated to staff that now we have a
9 subpoena. We really must be very cooperative, and at that
10 point for the day-to-day mechanics of that because, you
11 know, how one responds, how one transmits the documents, how
12 one does all the technical things that are specified in the
13 subpoena were not things I knew how to do. So I was at that
14 point quite reliant on our Office of Legislative Affairs or
15 our Office of General Counsel in taking the day-to-day
16 matters from there, and I was then just in the position of
17 inquiring to make sure that we were, that things were moving
18 along.

19 Q Did you inquire with your staff as to whether they
20 were producing in any sort of timely manner?

21 A I don't recall specific discussions other than
22 reminders that they were to be cooperative because other
23 offices had a role, and whether as a result of specific
24 conversations or what, I can't quite remember, but was told
25 there was an ongoing, active role interacting with my staff

1 on this. I felt that my job was just to, as head of the
2 office, to keep emphasizing the need to be cooperative.

3 Q So at any point were you informed or aware which
4 OIRA staffers were asked to produce records?

5 A I don't recall being so informed.

6 Q The Committee did not receive any document
7 productions in the four and a half month period after
8 service of the subpoena between July 22nd and December 10th,
9 2015. Are you aware of why there was that lapse in time?

10 A I'm not specifically aware of why not. I do know
11 that we had some very significant personnel changes going on
12 at that time. I remember being extremely upset when it came
13 to my attention that we had had a long gap.

14 Q And personnel changes within OIRA or other
15 offices?

16 A I believe within other offices, but I'm just
17 recalling without, you know, being able to be terribly
18 specific about the timing.

19 We did have a change in General Counsel and we did
20 have a change in Deputy General Counsel, and because we had
21 people leaving. How the timing lines up I can't remember,
22 but I seem to recall feeling like I hadn't heard anything
23 for a while and then being, as I said, quite upset when I
24 discovered that there had not been ongoing responses.

25 Q The Committee issued two letters, one on October

1 28th, 2015, and one on March 16th, 2016, that both dealt
2 with the custodians that had been identified to date. Were
3 you aware of either one of these letters?

4 Mr. Skladany. Make this the last question.

5 A I was certainly aware of the 2016 letter. I don't
6 specifically recall the October letter, but I recall
7 something happening in the fall that triggered my
8 realization that productions had not been ongoing through
9 the fall, and I cannot recall whether it was that letter or
10 something else.

11 Ms. Aizcorbe. Okay. Thank you.

12 Yeah, we can go off.

13 [A brief recess was taken.]

14 Mr. Longani. Back on record.

15 Good morning, Administrator Shelanski.

16 Mr. Shelanski. Good morning.

17 EXAMINATION [Resumed]

18 BY MR. LONGANI:

19 Q Administrator, for the last hour my colleagues
20 talked to you a bit about your background. I want to get a
21 little bit more into that before moving forward.

22 When did you arrive at OIRA?

23 A I was confirmed in late June 2013 and sworn in on
24 July 10th, 2013.

25 Q Okay. And you talked briefly about who you report

1 to. Who directly reports to you?

2 Q Everybody within OIRA reports to me. There's a
3 bit of a hierarchy. I have a Deputy Administrator and
4 Associate Administrator and a Counsel who directly report to
5 me. The Branch Chiefs typically report to me as well. Desk
6 officers typically report to their Branch Chiefs.

7 Q And ~~onafter~~ the Clean Water Rule, would you say
8 that you receive reports from Vlad Dorjets, Jim Laity and
9 Dominic Mancini?

10 A At the proposed phase of the rule or the final
11 phase of the rule?

12 Q Let's start with the proposed phase.

13 A At the proposed phase of the rule, I received -- I
14 had regular discussions with Mr. Laity and Mr. Mancini.

15 Q And at the final stage?

16 A By the final stage, Mr. Dorjets had joined OIRA,
17 and he was the desk officer working closely with Mr. Laity
18 on the final rule. So he was involved with those
19 discussions at the final stage.

20 Q And during the final stage, did the vast majority
21 of your information come from the biweekly meetings that you
22 would have at OIRA?

23 A A lot of information would come through the
24 biweekly meetings, but I also as needed would have
25 discussions, phone calls, meetings with my staff on

1 particular rules outside of those meetings. So I can't say
2 whether it was the majority or not, but a lot of information
3 came through those meetings.

4 Q So you would receive information ~~in~~by the biweekly
5 meetings in addition to other meetings or phone calls that
6 would take place throughout the process as necessary?

7 A As necessary, yes.

8 Q And is that commonplace for the rulemaking process
9 generally in your administration?

10 A Yes, that's typically how it works.

11 Q Anything unusual about the communication process
12 that took place during the Clean Water Rule time period?

13 A No, not at all.

14 Q How would you describe your responsibilities as
15 Administrator of OIRA?

16 A My responsibilities as Administrator are to
17 oversee all of the work of the office, which goes far beyond
18 regulatory review. We certainly have our regulatory review
19 process, but we also have a whole information policy side of
20 OIRA. So we set privacy and statistical directives for
21 within the federal government.

22 We also have to -- we are the office responsible
23 under the Paperwork Reduction Act for managing clearances of
24 information collection requests, of which we have at least
25 3,000 a year, just throwing a number out there. I mean, it

1 runs into the thousands.

2 So my responsibilities are to make sure all of
3 that work gets done, all of it gets managed, and that we
4 have the capacity to meet demand as it is arising for
5 reviews of all manner of things.

6 Q Do you oversee international regulatory
7 cooperation?

8 A We do. Under Executive Order 13609, the President
9 has directed OIRA to play a role, a leading role in
10 international regulatory cooperation. So as Administrator
11 of OIRA, I am co-chair of our two regulatory cooperation
12 councils, one with Canada and one with Mexico.

13 Q So your responsibilities go far beyond managing
14 rules that come into OIRA. Is that fair?

15 A Yes, they do.

16 Q Now, in the last hour you talked a little bit
17 about some of your priorities. Can you discuss when you
18 came in as OIRA Administration, could you expand upon what
19 your priorities were?

20 A My priorities were, first and foremost, to make
21 sure that we got the regulatory review process back onto a
22 reasonable track for being timely. There has been a lot of
23 public criticism for rules that had been languishing at OIRA
24 and for moving above our normative time on a lot of rules,
25 and we had what was being commonly called the backlog. So

1 one of my high priorities was to clean up the backlog.

2 Another one of my priorities was to try to make
3 more serious and institutionalized the process of
4 retrospective review of regulations by the agencies.

5 I also had as a high priority making sure that our
6 reporting to the public, for example, the posting of the
7 regulatory plans and agenda which in the years previous,
8 prior had not been quite as regular or timely as it should
9 have been; that those were done on a timely and regular
10 basis.

11 So those were among my priorities; I had many
12 other priorities related to strengthening and making
13 progress on our international regulatory cooperation and
14 moving forward with a number of our initiatives on the
15 statistical side of the docket.

16 Q Why was it important to you that OIRA aspired to
17 meet the normative deadline as set out in the relevant
18 Executive Orders?

19 A Are you talking about the timing deadline?

20 Q Yes.

21 A It is not a good thing for the public to know that
22 a rule is coming and have to sit and wait, particularly on a
23 final rule, to see how their comments have been taken into
24 account. Stakeholders need some degree of certainty. They
25 need the ability to plan and to move forward.

1 Also on proposed rules, it's important to get
2 those rules out for public comment because that's where a
3 lot of the most valuable input can come, and so just as part
4 of the good and predictable process that would benefit all
5 stakeholders, I felt that it was very important for us to
6 make sure that we at OIRA were viewed as an effective and
7 reliable agency in doing our job in reviewing rules and all
8 of the other kinds of matters like information collections
9 that we review.

10 Q I want to come back to the deadlines and
11 specifically the 90 days that's in Executive Order 12866. A
12 couple more questions for you in terms of your actual role.

13 In your current role, do you have final decision
14 making authority to conclude the review of all rules passing
15 through OIRA's review process?

16 A I ultimately have the final decision on whether or
17 not to conclude review. Very often I am not involved with
18 that decision. I am simply notified that a rule is ready to
19 conclude, and the desk officer actually concludes its
20 review. That is probably on most of our rules where there's
21 not some significant issue that I need to be involved with
22 resolving.

23 At the end, I'm usually informed that the review
24 | process is over, and I get ~~a~~ notice of that, and I can ask
25 any final questions I have, but I don't always. I'm not in

1 the normal course the person who actually concludes.

2 Q Okay. How about for the Clean Water Rule?

3 A For the Clean Water Rule, I remember being
4 involved with discussions towards as we were nearing what
5 ended up being the conclusion date, on resolving the final,
6 what to me was the final big issue to be resolved. So at
7 that point, once that issue was resolved and I felt that it
8 had reached a final resolution, I asked my staff to please
9 move forward with wrapping up any last details so that we
10 could conclude.

11 Mr. Longani. Okay.

12 BY MS. BERROYA:

13 Q How many rules, in general, is OIRA considering at
14 any one time?

15 A Our ongoing stock of rules would be in the
16 neighborhood of 100. There are times they're in the 80s.
17 There are times they're in the 120s, but a good rule of
18 thumb is that at any given time we have about 100 rules
19 under review and, you know, probably a multiple of that many
20 information collection requests or other things that have
21 come into the office.

22 BY MR. LONGANI:

23 Q Is it fair to say that your desk officers are
24 reviewing multiple rules at the same time?

25 A Typically desk officers have a docket of several

1 rules simultaneously, yes.

2 BY MS. BERROYA:

3 Q And you are getting updates about a multitude of
4 those 80 to 100 rules that OIRA is considering?

5 A Oh, yes. At any given time I have, you know,
6 many, many things on my radar screen, and I'm receiving
7 input, updates, questions about dozens of rules, and a rule
8 review can go extremely smoothly where everything gets
9 resolved very nicely and nothing elevates. Other times
10 there are thorny issues where I actually need to get quite
11 involved. There's no one size fits all.

12 But the one thing that is certain is that in any
13 given week I am getting input on a large number of rules.

14 Q But, again, regulatory review is just one part of
15 your total portfolio?

16 A It is one part of our portfolio, is probably the
17 largest single part, but it is only one part.

18 BY MR. LONGANI:

19 Q You previously testified in 2015 alone, OIRA
20 reviewed over 400 rulemakings and over 2,800 information
21 collections; is that correct?

22 A That's correct. I mean, in a typical year, we're,
23 you know, in the neighborhood of, you know, close to 500
24 rules. It can be a little bit either side, and information
25 collections, you know, that sounds like an accurate number.

1 It actually sounds even potentially a bit low.

2 Q And in addition to that, OIRA, as you briefly
3 stated in the last hour, holds hundreds of meetings with
4 stakeholders; is that correct?

5 A Yes. We do not have discretion to decline
6 meetings. Sometimes when we're getting effectively the same
7 stakeholder asking for multiple meetings, we'll consolidate
8 them. So the regional offices of one organization, each
9 requesting individual meetings, but we have hundreds of
10 meetings.

11 And I actually did a count from March 2014 to
12 March 2016, and we were over 850 meetings in that two-year
13 period. So it's safe to say on average we're holding
14 multiple meetings per day.

15 Q Do you know how many meetings OIRA held during the
16 Clean Water Rule process, both the proposed and final rule
17 stage?

18 A I do not know what the number is.

19 Q Getting back to the 90-day deadline that is in
20 the Executives Order, in Executive Order 12866, is it
21 unusual for OIRA to take more than 90 days to review a rule
22 at either the proposed or final stage?

23 A No, it is not unusual. The 90 days are a
24 normative deadline. They are not a hard and fast deadline.
25 There's no default. In fact, there's a provision in the

1 Executive Order for the agencies to request more time, and
2 that frequently happens.

3 It is my goal to make sure that that only happens
4 when absolutely necessary, but it is not at all uncommon.
5 At any given time we will have a number of rules that are
6 over 90 days.

7 Q And what are some reasons why the rule may take
8 longer than 90 days?

9 A There are many reasons. Sometimes there is a very
10 significant interagency issue that can take a long time for
11 the concerned agencies to resolve.

12 Sometimes the agency itself receives a pass-back
13 | but has prioritized d other work and takes a long period of
14 time to get back to us.

15 Sometimes we are extremely busy and don't get back
16 to the agency quite as fast as we would like to, although
17 typically we're pretty fast getting back to them.

18 There could be lots of reasons why a rule would
19 take over 90 days.

20 Q And on the other side of that coin, is it unusual
21 for OIRA to take less than 90 days to review a rule at
22 either the proposed or final stage?

23 A No, it's not unusual. In fact, our average is
24 under 90 days, which suggests that it's not only not
25 unusual, it's fairly common for us to go below 90 days.

1 And, again, there's no one size fits all for why
2 that might happen. Sometimes a very complex rule comes in
3 in very good shape with the issues already pretty well
4 vetted in the proposed rule stage or even through previous
5 interagency discussions that the agency itself engaged in,
6 and we might get fairly little comment and find fairly few
7 issues that really need resolution.

8 So, again, there's no one size fits all for the
9 normative time, and it's not uncommon for rules to take less
10 time.

11 Q As you know, the Clean Water Rule was cleared in
12 about six weeks at the final stage.

13 A Right.

14 Q At the final rule stage. Did that concern you at
15 all?

16 A It did not concern me because what concerns me is
17 when, for example, when we have a court deadline and we
18 absolutely have to conclude, and we actually have a
19 designation for, you know, concluded consistent with court
20 order. Those can be very difficult because we don't have
21 time to actually work through the issues that need to be
22 worked through.

23 I have no recollection of anybody elevating to me
24 a concern that there was some big issue that was not
25 properly worked through in this rule. So I did not have a

1 concern with the timeline. In fact, I was pleased that
2 people were very, very active at the agencies and very
3 responsive and that we were able to move through this rule
4 in good timing because we had lots of big rules that I knew
5 were coming into the same branch.

6 Did you receive any pressure from anybody within
7 the government to push this rule out within the six-week
8 period?

9 A I don't recall any pressure to conclude this on a
10 particular time line.

11 Q Were you satisfied that the rule had been fully
12 vetted?

13 A Yes, I was.

14 Q Administrator, how do you view your role in OIRA's
15 formal rule review process?

16 A My role is, first of all, just to keep up with my
17 staff in knowing what rules are in. With 100 rules I don't
18 always track all of them, but to make sure that there's a
19 very open channel for any difficult issues that are
20 emerging.

21 So if we're starting to have significant
22 disagreements with an agency, it is one of my primary roles
23 in review to understand what the nature of that disagreement
24 is, to understand where I support my staff and where I might
25 think the agency has the better ~~of the~~ argument so that I

1 can manage internally first what issues we're going to --
2 where there's disagreement, what disagreements we're really
3 going to push and which ones I don't think are actually
4 worth pursuing or ones where I think we might be wrong at
5 the staff level.

6 So I make a lot of those internal judgments, and
7 then as issues elevate, you know, it becomes increasingly my
8 job as things elevate within the agency, in particular, to
9 be available to work on resolving those issues.

10 And it is also my job to make sure that the office
11 work flow works in a way that my staff is able, you know, in
12 the time that they have to do a good job and are not getting
13 ground into dust.

14 Q Administrator, you've mentioned a couple of times
15 now the agenda that OIRA deals with. Are you specifically
16 referring to the Unified Regulatory Agenda and Plan?

17 A The Unified Regulatory Agenda and Plan that we are
18 required to publish each fall and each spring, yes.

19 Q And what is that?

20 A That is a document that contains two things. It
21 contains, first, the plan for the rules that the agencies
22 intend to release in the coming year, and then it contains
23 also the broader agenda, things that might be longer term
24 items so that the public can be aware of what regulatory
25 actions are moving through the federal government.

1 Q And who prepares the Unified Regulatory Agenda and
2 Plan?

3 A OIRA issues a data call to agencies, all agencies,
4 Executive Branch agencies and independent agencies, with a
5 deadline for them to submit their plan and agenda.

6 We then review those to make sure that they're
7 consistent with other information we might have to see what
8 changes might be being made.

9 We then go back and forth with the agencies a
10 little bit. We typically have a staff member who is tasked
11 with each cycle with managing that process internally, and
12 we then move towards publication of that plan and agenda.

13 Q How did the agenda and plan relate to deadlines
14 set by OIRA for rule review?

15 A Typically, typically the plan and agenda do not
16 necessarily establish the OIRA deadline. In the ideal
17 world, the agency submits its rule on the date it says it's
18 going to submit the rule ~~on~~ the plan and agenda, but
19 look. You know, things slip all the time.

20 So I can't have an agency come to me and say, "It
21 says in our plan and agenda that we're going to have our
22 final rule published on Date X. We know we only got it to
23 you two weeks ago."

24 So the plan and agenda do not -- the deadlines in
25 OIRA are really determined in the first instance by when a

1 rule is submitted and the normative time in the Executive
2 Order, and then my views on, you know, how much time we
3 really need.

4 What is the work flow that we're facing? Are
5 there, you know, factors like a court order or something
6 else involved?

7 BY MS. BERROYA:

8 Q Does the unified agenda help OIRA prioritize and
9 estimate work flow for the upcoming year?

10 A It does help, but we also, you know, have ongoing
11 discussions with agencies of where they are and, you know,
12 | just what can we expect from you when, this is ~~those~~ what I
13 call air traffic control.

14 So I may -- and usually it's the agency that
15 contacts OIRA and says, "We are nearing readiness to submit
16 a certain number of rules. You know, how would you like to
17 receive them?" or, you know, "when do you think you will
18 have capacity to deal with them?"

19 That's a common kind of thing. So the agenda
20 gives us an idea of what's coming, sort of how big and how
21 dark is the cloud. The specific time of the rainfall comes
22 through, you know, ongoing back-and-forth with the agencies.

23 BY MR. LONGANI:

24 Q And how often is the agenda and plan put out on
25 your -- is it placed on your Web site?

1 emergencies that arrive or there are unforeseen things.
2 There are statutes. There are things that drive an agency
3 to do rules that are not in the plan and agenda. So there's
4 no prohibition on doing rules outside the plan and agenda.

5 But it is my personal view and it is the purpose
6 of the plan and agenda that most rulemaking activity of the
7 federal government should be something that the public has
8 some warning and visibility into.

9 Q Do you view it as part of your job to try and
10 ensure that the rules that you've told the public are coming
11 on the agenda actually do appear in some semblance of the
12 schedule?

13 A The schedule gets revised. So you will get rules
14 that travel from one plan to the next year's plan. We can't
15 control what agencies prioritize. We can't control their
16 work flow. We can ask them, "Hey, this is on the plan. Is
17 it coming in?"

18 But, you know, in the end if they say no, I'm not
19 the Ceabinet Secretary. You know, I don't run their agency.
20 So, you know, typically when an agency's actual work flow is
21 quite out of whack with what is on the plan and agenda,
22 there will be a substantial revision of that agency's plan
23 and agenda during the next cycle.

24 That's one of the reasons that we have it twice a
25 year, because agencies do have to update. They change their

1 plans and their priorities.

2 BY MR. LONGANI:

3 Q Administrator, is it common for OIRA to set
4 deadlines for the completion of rule review both at the
5 proposed and final stage?

6 A I set the deadlines internally because that's just
7 how you have to manage things, and I don't always say like,
8 "Oh, I want this, you know, done on some particular random
9 date in the future."

10 But once I've been briefed on a rule, I try to ask
11 staff what's a reasonable time line for resolving these
12 issues. What is your plan for moving forward and addressing
13 these issues? Don't do five rounds at the staff level. If
14 you're not going to reach agreement, let's move things up so
15 that we can keep the rule moving.

16 So I do a lot of that kind of thing, and also like
17 is five weeks reasonable? Do you need three weeks? Do you
18 think next week we can get resolution of this?

19 That's just part of my management and keeping the
20 work flow going. So in terms of setting deadlines, I don't
21 when a rule comes in set a deadline for its completion.
22 What I try to do is set interim deadlines on difficult rules
23 to make sure that we actually have a process that's moving
24 forward because I don't want rules to get stuck.

25 Q Okay. And what would happen to the rulemaking

1 process generally if OIRA set deadlines that it did not
2 keep?

3 And specifically I'm referring to deadlines that
4 it gives agencies, for example, to return comments.

5 A I see. So the deadlines that we set for
6 interagency review are very important because other agencies
7 may have an important comment that they want to make, but
8 they also want as much time as possible because these
9 agencies are busy. The particular people who might be
10 experts and be the right people to make the interagency
11 comment are probably working on things of their own?

12 So when they get something circulated for
13 interagency comment, they may view it as important, but not
14 their top priority, and so we have to make sure that the
15 agencies respond because, to answer your question, if they
16 don't we have two problems. One is we get long delays in
17 responses from agencies, and the other thing is we get very
18 uncoordinated responses. We'll get themy coming at very
19 different times, and that can lead to lots of confusion.

20 We may not want to wait to do a pass-back until
21 we've heard from every agency because it's not fair to the
22 promulgating agency, but then they're revising one draft and
23 then they get another set of comments to build into the
24 draft that they're revising. It just gets very complicated
25 for them.

1 So to the extent possible we try quite firmly to
2 set firm but reasonable deadlines for interagency and to
3 hold to them so that we can do a unified pass-back.

4 Q So it is common for OIRA to hold firm on its
5 deadlines that it provides --

6 A Yes.

7 Q -- to agencies for their comments, for a specific
8 rule.

9 A Yes. It is typical for us to hold firm on those
10 deadlines making exceptions where necessary.

11 Q Anything unusual about OIRA setting an internal
12 deadline for the completion of the Clean Water Rule's final
13 review?

14 A No. Again, when I set internal deadlines, it's to
15 keep staff moving forward. I think the term I used earlier
16 was air traffic control. I know we've got a lot of stuff
17 coming in. If we've got big rules that are blocking up the
18 desk, I would never ask for a deadline that cut off review.

19 At the same time, to get the effort that is
20 necessary to get a rule, you know, done in a timely manner,
21 that is something I will ask for.

22 Q During the interagency review process, is it
23 unusual for agencies to submit comments about the rule in
24 question after the OIRA imposed deadline?

25 A Unfortunately it is not unusual. So sometimes we

1 get one set of comments from an agency and follow-on
2 comments later.

3 Q Would it be unusual for an agency comment not to
4 get considered because the comment was submitted after the
5 deadline?

6 A There are comments that will come in on issues
7 that have been very widely litigated where a judgment can be
8 made. Listen. You're a little late to the party. This has
9 been fully discussed at very high levels, and often
10 theywe'll be told, "So unless the head of your agency really
11 wants to take this to the head of the other agency," and
12 typically those comments don't get pursued.

13 But we don't arbitrarily cut off valid comments.
14 If it's a new comment, if it's a new issue, if it's
15 something that hadn't been foreseeable, we do not
16 arbitrarily cut it off.

17 Q Even when an agency comment is submitted after the
18 deadline, would OIRA still attempt to get the comments to
19 the promulgating agencies if it would not disrupt the entire
20 process and the comments are new and had not heretofore been
21 addressed?

22 A Well, even if it would disrupt the entire process,
23 if it's a significant comment, we send it back.

24 Q Now, after the Clean Water Rule --

25 A Now, let me clarify. When I say "send it back," I

1 mean we sent it on to the promulgating agency, not send it
2 back to the commenting agency. If it's an important
3 comment, it should be heard.

4 Q And is that what your instructions are to your
5 staff?

6 A You know, it's just the typical practice at OIRA.

7 Q To your knowledge during the Clean Water Rule
8 review, start first at the proposed stage. Did any
9 substantive comments from an agency during the interagency
10 review process not get addressed?

11 A I just want to clarify one thing in your question.
12 So there's a difference between not being accepted and not
13 being heard and dealt with. To my knowledge, there was no
14 issue that was raised by an agency that was not heard and
15 dealt with.

16 Q Okay. And I'll ask you the same question for the
17 final rule stage. Was there any agency comment that was not
18 addressed and dealt with to your knowledge during the final
19 rule stage?

20 A I do not recall any such comment.

21 Q Administrator, you had discussed during the last
22 hour and you referred to it during my questions this hour if
23 during the interagency review process an agency is truly
24 upset about an issue, for example, a deadline set by OIRA
25 for receipt of their comments, a response or lack of

1 response that it is getting to its suggestions, et cetera,
2 what do agencies normally do in those type of situations?

3 A There are discussions that go on at the staff
4 level. Often things are resolved at that level. If there's
5 a disagreement or they can't be resolved, the typical
6 process in a rule is that the agency will decide whether it
7 wants to elevate that request. In other words, how
8 important to the agency is it?

9 | It may be something—a staff would like to have but
10 isn't really essential to the agency, and in cases where the
11 agency believes its comment to be essential or the extra
12 time to be essential or the something essential is not being
13 addressed, in those circumstances, there's elevation, you
14 know, to the Branch Chief, to the Deputy Administrator and
15 in some cases to me.

16 Q During your review of the Clean Water Rule, did
17 any agency call you to complain about the deadline imposed
18 by OIRA for receiving comments?

19 A I do not recall receiving such a call.

20 Q During the review of the Clean Water Rule, did any
21 agency during the interagency process call you to complain
22 about lack of attention to its suggestions that it had sent
23 over to OIRA?

24 A I don't remember receiving a call personally. I
25 remember staff telling me that there had been one agency

1 that was concerned about something, but it had gotten
2 resolved.

3 Q Is one and a half to two weeks a usual amount of
4 time that agencies are given to review the final economic
5 analysis for a rule?

6 A Yes, it's typical.

7 Q Administrator, I'm going to ask you to pull out
8 Exhibit 1.

9 A Sure.

10 Q If you have it on you.

11 A Thank you very much.

12 Q Administrator if you could again read the top
13 | email, and that's ~~from~~ Mr. Dorjets to Shoshana Lew. The
14 email is dated May 5th, 2015, at 6:30 p.m. If you don't
15 mind reading those three sentence, and if you'll look back
16 up at me when you're done, I'll ask my question.

17 A [Examining document.] Yes.

18 Q Okay. And specifically, Administrator, looking at
19 | the last sentence, it states~~s~~, Mr. Dorjets states, "If needed
20 I can send the other comments to EPA and the Corps and let
21 them know that their agencies' comments will be provided
22 later, but I can't guarantee how that will go over given the
23 pressure to get this rule out the door."

24 Administrator, have you ever instructed any
25 employee to disregard comments that come in after the OIRA

1 deadline?

2 A To my knowledge, I have never instructed somebody
3 to disregard such comments.

4 Q And is it unusual for agencies to ask for more
5 time and/or negotiate for more time using various tactics?

6 A It's very common. It's standard.

7 Q And what would happen to the rulemaking process if
8 OIRA granted agencies their request for more time, granted
9 every request for more time to review the rule in question?

10 A It would extend the process quite a long time.
11 Agencies will litigate for, you know, for a very long time
12 when it's not their rule that's at stake.

13 Q And when you say "litigate," what do you mean?

14 A I'm sorry. That's an internal jargon that we use.
15 It means argue over aspects of the rule.

16 Q If Mr. Dorjets felt that an agency truly needed
17 additional time for review and asked you for that extension,
18 would you have any issue giving an agency more time if Mr.
19 Dorjets had explained that there was a need for that
20 additional time?

21 A Yes, if I agreed with his determination, I
22 absolutely would give them more time or find another way to
23 resolve the issue through a direct conversation with the
24 agency.

25 Q Did anyone at EOP tell you that the deadline for

1 completing review of the Clean Water Rule could not be
2 moved?

3 A I recall no such instruction or discussion.

4 Q Getting back to the 90 days and the fact -- the
5 90-day normative deadline and the fact that it took OIRA
6 approximately six weeks to review the final rule, Jim Laity
7 told the Committee that there was nothing atypical about the
8 fact that the Clean Water rule took six weeks to review. Do
9 you agree with Jim?

10 A As I've stated before, there's no one size fits
11 all, and there's nothing particularly atypical about -- you
12 know, it depends on the circumstances of the rule. There's
13 nothing concerning or atypical about this.

14 Q Would you have concluded review of this rule if
15 there were any significant concerns relating to any aspect
16 of the rule review process that had not been addressed?

17 A I recall no such concerns being raised to me.

18 Q And had there been any such concerns, would you
19 have concluded the rule?

20 A No, I would have asked that we address the
21 significant concerns.

22 [Counsel conferred.]

23 Mr. Longani. This is Exhibit 4 for the record.

24 [Shelanski Exhibit 4 was marked for
25 identification.]

1 Mr. Longani. Administrator, I will hand you a
2 copy, an official copy. There you are.

3 Mr. Shelanski. Thank you.

4 BY MR. LONGANI:

5 Q Administrator, I'm going to ask you to take a look
6 at that email, and for the record, I will describe it as the
7 Administrator is reviewing it.

8 It's an email from Administrator Shelanski to
9 Administrator McCarthy, dated Monday, March 24th, 2014, 2:11
10 p.m.

11 A Yes.

12 Q And the email for the record reads, "Great, and
13 just to clarify, we were planning formally to conclude
14 tomorrow morning. I can try to push that if you wish. Will
15 the calls you wanted to make today trigger public awareness
16 or is the public portion tomorrow? Thanks."

17 Is there anything unusual, Administrator
18 Shelanski, about OIRA coordinating conclusion of a rule with
19 the promulgating agency?

20 And for the record, this is the proposed rule
21 stage.

22 A Yes, this is the proposed rule.

23 No, it's very common that as we are getting to the
24 day of conclusion, that the agency will want to announce or
25 roll out its rule in a particular way. The issue is when we

1 conclude review in our system, it will become public when
2 the system updates that we have concluded review.

3 And so agencies often want to make sure that it
4 becomes public simultaneously with their own announcement or
5 roll-out plans, if any, for the rule. So it is very common
6 as we near the end to have the discussions with the agency
7 about the day on which they wish us to conclude.

8 Those discussions typically happen when we have
9 told the agency we're getting close. We think we can
10 conclude in a very short -- you know, in a very foreseeable
11 future.

12 Mr. Longani. I can get J?

13 And this will be Exhibit 5.

14 [Shelanski Exhibit 5 was marked for
15 identification.]

16 Mr. Longani. And again, Administrator, I'm going
17 to ask you to take a look at this please.

18 Mr. Shelanski. Sure. Yes.

19 BY MR. LONGANI:

20 Q Administrator, looking at Exhibit 5, and this is
21 actually Administrator McCarthy's response to the email that
22 I just read in Exhibit -- to your email that I just put into
23 the record and is now in the record as Exhibit 4, and I will
24 read her response.

25 Quote, "they are heads-up calls agreed to by WH,

1 | et cetera, and commsCOMS material. No public release until
2 | noon tomorrow. WeER did not want to conclude clearance
3 | until the morning. Thanks."

4 | Administrator, is there anything unusual about
5 | Administrator McCarthy's response to your response?

6 | A No, not at all. We do not like agencies to go
7 | public with a rule until we are done because the review
8 | process isn't over till it's over, and so this was simply me
9 | making sure that there was not going to be a public release
10 | until we had concluded.

11 | Q And is there anything unusual about the agency or
12 | the promulgating agency coordinating the release date for
13 | the rule with White House Communications Department?

14 | A I'm typically not involved with those things, but
15 | I think that's very common.

16 | Q Administrator, on March 18th, 2015, Ken Kopocis,
17 | the Deputy Assistant Administrator for EPA's Office of
18 | Water, testified at the hearing of the Water Resources and
19 | Environment Subcommittee. During that hearing he stated in
20 | part, quote, "Quite candidly, I will tell you that there's
21 | not a lot of new in the way of issues that are being raised.
22 | Many of the issues that are being raised are the same ones
23 | that have been raised for several years."

24 | Would you agree with Mr. Kopocis that because of
25 | the six-year process of review that the Clean Water Rule had

1 been through that all the significant issues related to the
2 rule had been raised by relevant agencies on several
3 occasions?

4 A I'm not in a position to know specifically the
5 scope of issues that Mr. Kopocis was testifying to. I'm not
6 familiar with his testimony or the context in which he made
7 that statement.

8 My understanding is that there were no significant
9 outstanding issues. There were no outstanding issues that
10 anybody wished to pursue when we concluded review. That's
11 all I can testify to from my personal knowledge.

12 Q What was Katie Johnson's role in the Clean Water
13 review?

14 A So Katie Johnson would have come on board after
15 the proposed rule. So Katie is one of my front office
16 staff, and she is a manager. Often she is a manager of a
17 number of rules, and she would have been involved in just
18 making sure that the process for the rule was moving
19 forward.

20 I don't recall Katie being very involved with the
21 substance or the back-and-forth of the review. She would
22 make sure that appropriate meetings were happening, and if
23 somebody in an agency outside of OIRA or an office outside
24 of OIRA had an issue they wished to elevate, they would
25 have, you know, eventually brought it to Katie.

1 Katie would try to run a process to resolve it and
2 figure out what really needed to be referred to me. So she
3 tends to be a manager on a large portfolio of rules at any
4 given time.

5 Q How would you describe Jim Laity's role in the
6 Clean Water Rule review process?

7 A I would describe Jim Laity as having had the most
8 important role of anybody in OIRA in the Clean Water Rule.
9 At the proposed stage, Jim was not yet Branch Chief. He was
10 the Acting Branch Chief, which meant he was still also a
11 desk officer. So this was Jim's role at the proposed stage.

12 And at the final stage, the rule was assigned to
13 Mr. Dorjets as the desk officer, but I viewed Mr. Laity
14 because of his experience with the proposed rule and,
15 indeed, his very long and deep experience with water rules
16 generally to have been an equal partner and in some sense
17 the leader throughout the review of the rule.

18 Q Would you agree that you worked closely with Jim
19 Laity during OIRA's review of the Clean Water rule?

20 A I worked the way I would typically work with
21 whoever was most in charge of the rule during a review
22 process.

23 Q The experience that you described of Mr. Laity's,
24 would you rely on that deep experience in resolving
25 difficult issues during the final review stage for the Clean

1 Water rule?

2 A Yes, I would. With the large number of rules and
3 other matters that we have at OIRA, I need to not
4 micromanage every decision, and in particular, my branches
5 are organized by areas of expertise, expertise I do not
6 personally have.

7 So I do have to rely on my subject matter experts
8 and make judgments in listening to them, but I have to rely
9 on them, and Mr. Laity in particular is ~~an~~ particularly
10 expert and a particularly experienced person in OIRA.

11 So, yes, I would have relied on him quite
12 substantially during the review of this rule.

13 Q Administrator, you briefly the last hour talked
14 about a call at a meeting that took place regarding the
15 4,000 foot limit for determining waters to be
16 jurisdictional. Do you recall that?

17 A I recall the exchange that I had with Majority
18 Counsel. To clarify, I didn't specifically recall the
19 telephone call. I do recall the in-person meeting.

20 Q Well, would it have been unusual for Mr. Laity to
21 have been invited to a call such as the one he describes in
22 Exhibit 2?

23 A No, it would not be unusual. Perhaps the more
24 unusual thing is I was on the call.

25 Q And why is that?

1 A Just because there are many, many such calls and,
2 | you know, ~~I~~ with my schedule it's not always the case that
3 my staff thinks I should be on the call. In this particular
4 case, I think Mr. Laity had -- well, I don't particularly
5 know, but I can say for sure that Mr. Laity would normally
6 be on such a call.

7 Q And I believe you testified, but I want to be
8 clear on this. Mr. Laity had told the Committee that one of
9 the reasons for making this change, and again referring to
10 the 4,000 foot limit change, is that the Corps believed it
11 would be more consistent with its FONSI.

12 Does that match your recollection?

13 A Yes. It matches my recollection. To clarify, I
14 did not recall the term FONSI until in the last hour I
15 reviewed Mr. Laity's addendum, but that did refresh my
16 memory as to what the key issue was surrounding the scope of
17 the flood plain.

18 Q And do you believe all relevant agencies or
19 stakeholders who had been affected by this specific change
20 were involved in the process of making this change or at
21 least were notified of this change?

22 A I have no knowledge of anybody who was not
23 notified or any stakeholder who would have had an interest
24 who did not participate.

25 Q Administrator, in the last hour, you also briefly

1 discussed how OIRA responds to document requests; is that
2 correct?

3 A I did answer questions about our response to the
4 document requests, yes.

5 Q How important is it to you to promptly respond to
6 congressional document requests?

7 A It's very important to me that we cooperate with
8 congressional requests. Congressional, the Congress has a
9 vital oversight function, and it is our duty and I think
10 very important for the American public that we cooperate
11 with that.

12 Q Since the last document hearing on April 19th,
13 2016, OIRA has turned over an additional over 4,000 pages;
14 is that correct?

15 A That is my understanding, yes.

16 Q And now in total OIRA since this process commenced
17 has turned over over 10,000 pages; is that correct?

18 A Yes, we have. We have done ten document
19 productions to date, two since my last hearing, and the
20 total number of pages is over 10,000.

21 BY MS. BERROYA:

22 Q You mentioned your last hearing. That was your
23 last hearing before this Committee, correct?

24 A That was my last hearing before this Committee,
25 yes.

1 Q And that was just over a month ago, correct?

2 A It feels like it was sometime in that time frame,
3 yes. I don't recall the specific date.

4 Q I believe it was April 19th.

5 A Okay.

6 Q Correct? That you were before this Committee?

7 A That sounds right, yes.

8 Q And on April 19th, before this Committee, you
9 answered questions from members concerning OIRA's document
10 responses concerning the Clean Water investigation, correct?

11 A That is correct.

12 Q And were you also testifying before this Committee
13 I believe it was March 15th, sometime mid-March?

14 A Yes, I was.

15 Q And during that testimony were you asked questions
16 from members of this Committee concerning OIRA's production
17 of documents?

18 A Yes, I was.

19 Q And so that makes three times that you've appeared
20 before this Committee, counting today, to answer questions
21 concerning OIRA's responses?

22 A That is correct.

23 I would note that in the March hearing the subject
24 matter of the hearing that had been noticed was actually
25 different from the document production. So that was a

1 hearing that was not originally noticed as dealing with the
2 document production, but I was asked questions about the
3 document production.

4 Q Are you aware of anyone ein OIRA intentionally
5 withholding responsive documents?

6 A No.

7 BY MR. LONGANI:

8 Q And, in fact, I believe you testified in the prior
9 that you actually jumped the gun even before you received
10 specific instruction from anyone at OMB and convened a
11 meeting amongst your staff members telling them that they
12 needed to go ahead and pull documents and cooperate in terms
13 of any request that they may receive with respect to the
14 Clean Water Rule and turning over documents.

15 A I used the opportunity of a regularly scheduled
16 staff meeting that was taking place just after I had learned
17 of the document request to issue that statement to my staff.

18 Q And moving forward, do you expect to continue to
19 cooperate with Congress and continue to respond as the
20 review continues, continue to respond to the document
21 request?

22 A I cannot think of a higher priority for my office.

23 Q Just a couple of clean-up questions. I'm going to
24 jump around for that.

25 A Sure.

1 Q In the last hour we talked about -- and again, I'm
2 going back to this 4,000 foot limit -- that the rule was
3 harmonized to the Corps' conclusion; is that correct?

4 A I recall that it was the rule, the scope of
5 jurisdiction was -- a scope of jurisdiction was decided on
6 that the Corps viewed as consistent with its prior
7 determinations and its prior work.

8 Q And you considered this change -- and I don't want
9 to put words in your mouth -- but was it a logical outgrowth
10 of the rule?

11 A What I said in the last round of questioning is
12 the question of whether it was a logical outgrowth was
13 discussed. I don't recall the details of the discussion,
14 but I do recall the conclusion being reached that, yes, this
15 was a logical outgrowth and valid as a matter of
16 administrative law.

17 Q Okay. Did you agree with that conclusion?

18 A I had no basis for disagreeing with that
19 conclusion.

20 [Counsel conferred.]

21 BY MR. LONGANI:

22 Q Administrator, prior to you coming to OIRA, at
23 some point did you have a clerkship?

24 A I had three.

25 Q Who did you clerk for?

1 everyone in OIRA had searched their documents. So I don't -
2 - I don't recall what my particular reaction was to that.

3 Q Are you aware of how OMB identified a list of
4 names of potentially responsive custodians?

5 A I'm not specifically familiar with how the other
6 offices identified custodians.

7 Q At any point did you identify or recognize that
8 several desk officers responsible for the WOTUS review had
9 not been included or identified by OMB?

10 A At no time did I have reason to believe that any
11 desk officers or people with ~~in-an~~ OIRA had not searched
12 their documents.

13 Q Are you aware that the Committee was provided the
14 names of only four of the nine current custodians when it
15 asked for a list of possible custodians of potentially
16 responsive materials?

17 A I was not aware.

18 Q Were you told in any way or aware that Committee
19 staff identified Stuart Levenbach as a potential custodian?

20 A I don't know what the source of information was,
21 but at one point I was told that Mr. Levenbach had been
22 identified or there were questions about Mr. Levenbach's
23 role.

24 Q Do you recall when you became aware?

25 A I do not specifically recall.

1 Q The Committee staff had a call with OMB on July
2 7th, 2015, where we raised Mr. Levenbach's name as a
3 potential custodian, but he was not confirmed as a custodian
4 or included in OMB's initial search.

5 Were you aware of any of that dialogue with OMB?

6 A I was not aware of any of that dialogue.

7 Q And can you explain Mr. Levenbach's involvement in
8 reviewing the rule?

9 A I have to be honest. I never considered Mr.
10 Levenbach to be involved in reviewing the rule.

11 Q Mr. Laity informed the Committee that he
12 coordinated the review and assisted Mr. Dorjets in the final
13 review stage. Is that not your understanding?

14 A When I think back to the final review stage, I
15 recall mostly having discussions with Mr. Laity and Mr.
16 Dorjets. I do not recall Mr. or was not aware of the
17 details of Mr. Levenbach's role.

18 Q Were you aware of Ms. Higgins' involvement in
19 reviewing the rule?

20 A I recall that Ms. Higgins assisted Mr. Laity
21 during the proposed phase, but I do not recall the scope or
22 nature of her role.

23 Q And what was her role with OIRA?

24 A Ms. Higgins is a desk officer at OIRA. She is,
25 yes, she's a desk officer.

1 Q Were you aware of Ms. Thomas' involved in
2 reviewing the rule?

3 A I had not recalled until actually my last hearing
4 that Ms. Thomas, who's an economist at OIRA, did attend a
5 couple of the meetings that we had internally, but don't
6 specifically recall the nature of her role.

7 Q Is it typical with respect to rules undergoing
8 OIRA review that one of your economists would review the
9 economic analysis?

10 A Yes. Where there is an economic analysis, it's
11 typical that an economist would be involved with reviewing
12 the economic analysis.

13 Q In the April 7th, 2016, production to the
14 Committee, the Office of Legislative Affairs expressly
15 identified communications involving Katie Johnson. I know
16 our colleagues previously spoke about her in the last hour.
17 This is the first time the Committee had heard of Ms.
18 Johnson's involvement in the rule.

19 Can you explain why we did not receive her name
20 before this time?

21 A Well, Ms. Johnson didn't join OIRA until after the
22 proposed phase. She manages a very big portfolio of rules,
23 typically is most involved in process, to make sure that
24 meetings get scheduled that need to be scheduled, that the
25 right communications are getting made. I have no -- no

1 understanding of when or why or her name would have come up
2 at any particular time.

3 Q You mentioned she joined after the proposed rule
4 stage. Do you recall approximately when that would have
5 been?

6 A I believe that she joined OIRA in September of --
7 I've got to get the year right -- I'd have to go back and
8 check, but September of 2014 sounds right to me.

9 Q Are you aware of any other OIRA staff who would
10 likely have responsive information regarding the WOTUS rule
11 that have not already been named, which would include you,
12 Mr. Mancini, Mr. Greenawalt, Mr. Laity, Mr. Dorjets, Mr.
13 Levenbach, Ms. Higgins, Ms. Thomas, and Ms. Johnson?

14 A No, I am not.

15 Ms. Aizcorbe. Okay. I have an email I'd like to
16 enter into the record as Exhibit 6.

17 [Shelanski Exhibit 6 was marked for
18 identification.]

19 Mr. Shelanski. Yes.

20 BY MS. AIZCORBE:

21 Q Mr. Shelanski, in this chain of emails beginning
22 on Wednesday, October 23rd, 2013, you have a back-and-forth
23 with a Deputy Administrator Bob, but his title or office
24 information are otherwise redacted. In these emails Bob was
25 seeking an update on WOTUS.

1 Can you explain who this person is?

2 A This person was Bob Perciasepe, then Deputy
3 Administrator of the EPA.

4 Q And can you explain Mr. Perciasepe's role in the
5 rulemaking?

6 A Typically I would receive a call from Mr.
7 Perciasepe, as I do on many rules from, you know, many
8 Deputy Secretaries just to sort of find out where the review
9 process is and to get an update of my view of how things
10 were going. But I cannot speculate as to what the
11 particular subject matter was of this exchange.

12 Q In the same email chain on October 30th, Bob says
13 his inquiry is about SCC. Can you explain this reference
14 and your discussion?

15 A Yes. SCC, which would not have anything to do
16 with the rule we are discussion, is the social cost of
17 carbon.

18 Q And you said that social cost of carbon has
19 nothing to do with WOTUS, although the originating email on
20 this chain says, "Howard, can we do a quick update before
21 10:00 a.m.? WOTUS. Thanks."

22 Your response on October 30th was, "Bob, have
23 sometime to talk this morning after 11. Thanks. About
24 SCC."

25 So can you just -- I'm just trying to clarify what

1 the differences there. He's seeking an update on WOTUS and
2 you mention social cost of carbon.

3 A These may be completely disconnected. Sometimes
4 if I don't have somebody in my address book yet, I'll just
5 look to the last email I got from them and use that as the
6 way to contact them. So I -- but I don't specifically
7 recall why this chain would have moved in that particular
8 way.

9 Ms. Aizcorbe. I have another set of emails we'd
10 like to introduce into the record as Exhibit 7.

11 [Shelanski Exhibit 7 was marked for
12 identification.]

13 Ms. Aizcorbe. And I'll give you some context here
14 because it is a longer email chain, but this is an email
15 chain between Committee staff and Allie Neil+ and Jessica
16 Menter of OMB regarding the document productions.

17 Mr. Shelanski. Yes.

18 Ms. Aizcorbe. And I will begin questioning first
19 with the email beginning on page 5, dated Wednesday, July
20 1st, 2015, at the bottom of the page. If you'd read that
21 and familiarize yourself.

22 Mr. Longani. Sorry. Which one, Christina, are
23 you referring to?

24 Ms. Aizcorbe. Bottom of page 5, July 1st email.

25 Mr. Longani. Thank you.

1 Mr. Shelanski. Yes.

2 BY MS. AIZCORBE:

3 Q This email is discussing a phone call that was
4 held with OMB on June 30th, 2015. As documented under Item
5 5 on page 6, Committee staff asked to speak directly with
6 OIRA staff responsible for the search and review process
7 after we had minimal, if any, luck receiving answers on that
8 call.

9 Did you receive such a request from OMB to make
10 OIRA staff available to speak with the Committee?

11 A I do -- so let me start by saying this is the
12 first time I've seen this email exchange. I was not
13 included in any part of it. So I'm completely unfamiliar
14 with the context or what might have been said here.

15 In answer to your specific question, I don't
16 recall.

17 Q Were you aware that OMB made a commitment to the
18 Committee to check to see whether such a meeting could take
19 place, as is referenced right before Section 6 where they
20 say OMB committed to checking on whether or not we could
21 have such a discussion with the staff conducting the search?

22 A I have no knowledge of such a commitment and no
23 recollection of having heard about it.

24 Q Okay. I'm going to direct you to the email from
25 July 6th, 2015. It would be on page 3.

1 A Yes.

2 Q Towards the middle of that email, Committee staff
3 provide a series of questions relating to OIRA search and
4 review process in anticipation of another call on July 7th.

5 A I'm sorry. I'm not -- I'm just having trouble
6 seeing --

7 Q Okay. The bottom of page 3.

8 A Bottom of page 3.

9 Q There's a numbered list.

10 A Okay. I see.

11 Q So this is an email from the Committee staff to
12 OMB regarding an upcoming call with OMB's Office of General
13 Counsel, and I'm just pointing this out to show you that
14 Committee staff had submitted a list of questions regarding
15 the search and review process.

16 A Yes, I see the list of questions.

17 Q At any point were you aware that the Committee had
18 provided such questions to OMB for information relating to
19 its search and review process?

20 A I have no recollection of being made aware of this
21 list of questions or of this entire set of communications.

22 Q At any point were you aware or informed that OMB
23 had produced answers to any questions relating to search and
24 review process that had been undertaken to that point?

25 A At various points I have been told that OMB staff,

1 Legislative Affairs staff, General Counsel staff, were in
2 consultation with the Committee. I don't have any
3 recollection of anything in any particular time frame that
4 would match this discussion.

5 Q Were you at all given the impression that answers
6 had been sufficiently provided to the Committee regarding
7 the search and review process?

8 A Again, I had no awareness of this whole set of
9 communications. So I had no recollection of being aware of
10 anything regarding any answers.

11 Q As a general matter, were you aware that the
12 Committee was conducting or having communications with OMB
13 regarding the search and review process in response to its
14 requests?

15 A I knew there was some kind of communication going
16 on because I was asking what was happening with production
17 of documents and was told at some point during that summer -
18 - and it's impossible for me at this point to recall
19 specific dates -- that we were preparing a significant
20 production to send over.

21 Q You were never given any indication that OMB was
22 unable to provide answers to the Committee's questions?

23 A Again, I have no recollection of being informed of
24 or being aware of the Committee's questions. So know
25 nothing about the answers or the discussion.

1 Q Which offices conducted the review of responsive
2 documents to date?

3 I apologize if that's a duplicate, but just to
4 clarify.

5 A My understanding is that the review of documents
6 was led by our Office of General Counsel.

7 Q Okay. In March 15 we've spoken of a hearing where
8 you testified before this Committee. You stated that you've
9 turned over 100 percent of your documents to the General
10 Counsel.

11 Do you recall this statement?

12 A Yes, I recall thinking 100 percent of what I could
13 find.

14 Q And to be clear, does that mean 100 percent of
15 your responsive documents for the entirety of the rulemaking
16 or for a more limited time frame?

17 A I searched my documents after we had concluded a
18 review of the final rule because I think that's around when
19 I got the request. I certainly know I searched my documents
20 after the final rule. So what I meant was everything that I
21 found I had turned over.

22 Q And the reason I ask is because OMB informed the
23 Committee that it was in the process of conducting a search
24 for records covering only six months as a preliminary
25 matter, from September 17th, 2013 to March 24th, 2014, which

1 is, I believe, when the proposed rule was under review at
2 OIRA. So --

3 A So I think it's important to distinguish here
4 between the person searches that I and others at OIRA might
5 have undertaken and the electronic searches that I
6 referenced previously that I was informed were being
7 undertaken. I have no knowledge of when or with what scope
8 or even what specific search terms those searches were
9 undertaken. So I can't address that.

10 I can only address what I did personally and what
11 I asked my staff to do.

12 Q And you're not aware then of the productions that
13 have been provided to the Committee whether those are from
14 your personal searches or from any electronic search that
15 may have taken place?

16 A I do not know what specific documents, you know,
17 what search they came through. I would -- and so, no, I
18 don't have any specific knowledge of that.

19 Q Getting back to the documents that you provided to
20 the Office of General Counsel, approximately how many
21 documents or pages did you personally turn over?

22 A I recall having -- I mean, I did it by identifying
23 documents and putting them in a file, in an electronic file,
24 and I recall somewhere between 80 and 100.

25 Q Are you aware of whether OMB has completed it

1 review and production for the documents identified in its
2 initial search of that six month period?

3 A My understanding is --

4 Mr. Luftig. I'm sorry. You keep saying "search
5 of the six month period." I don't think this witness has
6 testified to a search of a six month period to date. So can
7 you clarify what it is that you're asking him?

8 Ms. Aizcorbe. The Committee has had ongoing
9 conversations with OMB regarding its search and review and
10 production of responsive records to the Committee's
11 requests. In those conversations, many of which came from
12 negotiations with OMB regarding coming up to Congress to
13 testify regarding the status of the production because it's
14 been over a year since the Committee first made its request,
15 we have been told that conversations would be productive,
16 and so we've had several briefings with OMB staff, including
17 the Office of General Counsel, one of which where they
18 identified that their search was only for initially a six
19 month period where the proposed rule was under review at
20 OIRA.

21 Ms. Berroya. That's not my recollection of those
22 conversations.

23 Ms. Aizcorbe. It's documented in emails, and we
24 can provide them.

25 Ms. Berroya. The fact that you have written that

1 that's your understanding does not mean that that is an
2 accurate -- it doesn't mean -- I'm not saying it's
3 inaccurate, but that's not my recollection of what took
4 place.

5 Ms. Aizcorbe. Counsel can address that in your
6 own hour. I will try to rephrase.

7 Ms. Berroya. My understanding is that a six year
8 period that the subpoena covers and the Committee agreed to
9 prioritize --

10 Ms. Aizcorbe. Can we go off the record please?

11 Ms. Berroya. Nope, on the record. I'd like to
12 stay on the record.

13 -- that the Committee agreed to prioritize a six
14 month period first.

15 Ms. Aizcorbe. We have email documentation that
16 shows that the Committee explicitly said we did not agree to
17 prioritize the production in any manner, but we agreed that
18 the six month period would be an appropriate initial start
19 for OMB to use to start producing documents to the
20 Committee. That was the agreement that we had a
21 conversation with OMB General Counsel.

22 Ms. Berroya. I'm not sure what the distinction is
23 between six months being an appropriate initial period and
24 start in prioritizing, but I agree that the Committee said
25 six months would be an appropriate initial period to start

1 and it wasn't OMB's determination --

2 Ms. Aizcorbe. And my question --

3 Ms. Berroya. -- but the Committee determined
4 that.

5 Ms. Aizcorbe. And my question to Mr. Shelanski
6 was getting towards whether they had completed this initial
7 search of the six month period within the six year period or
8 however long it is determined that the subpoena covers;
9 whether that initial search and production has been
10 completed, to Mr. Shelanski's knowledge.

11 I don't know whether he would be able to answer
12 it.

13 Mr. Luftig. I think there's some confusion
14 because the six month period that was prioritized doesn't
15 mean that there was only a six month search performed. So
16 maybe the way to do this is if you could ask the witness if
17 he has any knowledge about what the searches that occurred
18 were, and then we can have a conversation offline if you
19 want about that.

20 But I think the question is sort of based on a
21 misunderstanding perhaps.

22 BY MS. AIZCORBE:

23 Q Mr. Shelanski, what is your knowledge of what has
24 been produced to the Committee so far?

25 A My knowledge of what has been produced to the

1 Committee so far are over 10,000 pages of documents that
2 span -- that involve communications between the OIRA staff
3 and leadership and the agencies over a period encompassing
4 both the proposed and final rules.

5 Q And when you say the period encompassing both the
6 final and proposed rules, you're saying that the documents
7 that have been produced to the Committee encompass both of
8 those periods?

9 A My understanding is that the 10,000-plus pages
10 that OIRA and OMB have produced to the Committee contain
11 documents related to both the proposed and final rules.

12 Q Are you aware of whether those documents relating
13 to the final rule were produced before the Committee
14 identified custodians who only managed the final rule
15 review?

16 A I have no personal knowledge of the timing of the
17 production.

18 Q Have you seen what has been produced to the
19 Committee?

20 A I have seen the letters that accompanied the
21 productions. I have not personally gone through the, you
22 know, thousands of pages that have accompanied those
23 letters, but so I've gotten a general understanding of what
24 was being included in each of the productions.

25 Q And when you say you have a general understanding

1 of what was included, would you say that you mean that you
2 know the content of what was produced or what kind of
3 understanding did you have --

4 A I -- I --

5 Q -- if you didn't look at the documents?

6 A I know whose documents were being produced and
7 what the nature of those documents were. So for each cover
8 letter I read who the custodians were whose documents were
9 being produced and read that those were documents between
10 those custodians and the agencies, communications between
11 those custodians and the agencies.

12 Q Custodians weren't identified in each cover
13 letter. So I'm just curious as to your representation that
14 you had an understanding of what has been produced.

15 A So the cover letters I saw spelled out names of
16 people whose documents were being produced to the Committee.

17 Q Are you aware of whether the Office of General
18 Counsel has completed its review of all of the documents
19 that have been produced to it?

20 A My understanding is that the review is ongoing.

21 Q Are you aware of whether all OIRA staff, of
22 potentially responsive information, have turned over 100
23 percent of their documents for the entirety of the
24 rulemaking to the Office of General Counsel?

25 A To the best of my personal knowledge the answer is

1 yes.

2 Q Are OIRA staff or custodians required to certify
3 or otherwise inform you or OMB when they complete their
4 search in full?

5 A I do not know what the requirements are.

6 Q You have not received any such certification?

7 A I have just asked my staff, "Have you done what is
8 required?" and it's not a certification. It's -- it's a
9 question and answer, and I've been told yes.

10 Q Do you have an estimate of how many documents have
11 been turned over to the Office of General Counsel or any
12 other office within the OMB by OIRA staff?

13 A No, I do not.

14 Q Are you aware that the Committee has previously
15 asked OMB and you for this figure?

16 A Yes, and it's not -- it's not a -- it's not a
17 number I -- I -- I know.

18 Q Is there a reason that you are unable to produce
19 that number?

20 A I think that as we go through the review, you
21 know, understanding what the universe of documents is, is
22 sort of an emerging figure, and so it's hard to know,
23 especially given what the scope of the review is. So I
24 don't even know what all of the documents are going back,
25 for example, that might or might not have been searched yet.

1 Q I guess my question is if you know that OIRA staff
2 have turned over 100 percent of their documents, why you are
3 unable to have an estimate of what those documents are as
4 far as page number or document number.

5 A I haven't asked people how many documents they've
6 turned over, and as I mentioned, there's the electronic
7 searches as well, and I don't know what those have turned
8 up. I don't know what the process is for figuring out, you
9 know, how many of those might be nonresponsive or
10 overlapping. So I just don't know. I think until the
11 review process is completed understanding what the universe
12 of responsive documents is is not a number that I'm able to
13 know.

14 Q We've been using this number 10,000 pages of
15 production that have been produced to the Committee. Are
16 you aware of how many of those pages are duplicates of
17 previously produced information?

18 A I am not aware.

19 BY MS. ROTHER:

20 Q You said that you had conversations with your
21 staff about whether or not they have produced their
22 documents. Who specifically has said that they've produced
23 all of their documents?

24 A I mean I have asked generally at, you know, a
25 staff meeting, "Has everybody gotten back to Leg. Affairs

1 and General Counsel about this?" and, you know, received --
2 you know, again, these are -- this is not a formal
3 interrogation or formal process. I used staff meetings to
4 remind people of their obligations.

5 Because let me make clear. I have signaled
6 multiple times to my staff how critical our cooperation with
7 this investigation is, how in general critical it is for us
8 to cooperate with Congress. That is why we hold meetings
9 with Congress any time we're asked. It's why we're
10 cooperative with, you know, transcribed interviews.

11 I have asked their full cooperation because I
12 believe this is an extremely important function that you are
13 carrying out, and that it is our duty to comply with. So I
14 have tried to send that message through these meetings.

15 And in terms of what constitutes a day-to-day
16 determination or a determination of whether somebody's
17 review is completed, because there are also the electronic
18 searches that, again, I'm not specifically familiar with,
19 don't even know how to undertake, you know, I can't talk
20 about what the -- what the process is for determining that
21 that process is complete.

22 Ms. Aizcorbe. This is an excerpt from the
23 Committee's March 3rd, 2015, oversight hearing. I'll give
24 you the first page and then I'll show you where to look
25 since we don't have line numbers.

1 Mr. Shelanski. Sure.

2 Mr. Luftig. Are you marking this?

3 Ms. Aizcorbe. Yes. I apologize. We'll enter
4 into the record as Exhibit 8, and here's a complete copy of
5 the --

6 Mr. Shelanski. Okay. Thank you
7 [Shelanski Exhibit 8 was marked for
8 identification.]

9 Ms. Aizcorbe. So we are looking --

10 Mr. Luftig. Can you hold on until we get copies?

11 Ms. Aizcorbe. I was just going to show him since
12 he has to read it in full.

13 Mr. Shelanski. Thank you.

14 Ms. Aizcorbe. And he already has it.

15 The third paragraph of your response to
16 Congressman DesJarlais.

17 Mr. Shelanski. Yeah.

18 Ms. Aizcorbe. Is what I'll be referring to.

19 Mr. Shelanski. Okay. Which -- I'm sorry -- which
20 paragraph?

21 Ms. Aizcorbe. The third paragraph of your
22 response to Congressman DesJarlais.

23 Mr. Shelanski. Okay.

24 Ms. Aizcorbe. It's about the one, two, three, the
25 fourth paragraph down.

1 Mr. Shelanski. Okay. Yes.

2 BY MS. AIZCORBE:

3 Q When asked about WOTUS during the Committee's
4 March 3rd, 2015, oversight hearing, you testified that part
5 of what OIRA does when it reviews final rules is to look to
6 see how the agency has reacted to and addressed important
7 public commentary. "So we look forward to doing so when the
8 rule comes back to us for final review."

9 A Yes.

10 Q Is this a fair characterization of OIRA's
11 activities?

12 A Part of what we do when we review a final rule is
13 look to see how public comment has been addressed.

14 Q Did OIRA ensure that the EPA and Army Corps
15 responded to public comments with respect to the WOTUS Rule?

16 A I think the -- I'm not familiar with what the day-
17 to-day specific actions that staff took to review that, but,
18 yes, in my discussions with staff, I knew that they were
19 looking to make sure that the agency met its obligations.

20 Q Mr. Laity informed the Committee that OIRA does
21 not ensure the agencies appropriately respond to public
22 comments because that is a responsibility under the APA.
23 Can you may be explain or elaborate on Mr. Laity's comments
24 in light of your statement that OIRA does, in fact, look at
25 these comments and how they're addressed?

1 A I don't have the context for what Mr. Laity said
2 or, you know, what his specific statement was, but let me
3 just say something about OIRA's role and the APA role.

4 It is an obligation under the APA for agencies to
5 address public comment and make sure that they have a record
6 that will survive judicial review. Many of you here are
7 probably much more expert in that than I am.

8 What OIRA does is to make sure that when an agency
9 is making changes to a rule between final and proposed, that
10 in making those changes, it is properly taking account of
11 public comment.

12 Q And would you explain it or -- excuse me -- would
13 you say that your expectation that agencies complete review
14 of substantive public comments before sending their draft
15 final rule to OIRA for final review?

16 A I think that agencies sometimes amend rules while
17 they are under review, and I imagine that could have
18 happened to a public comment that came in.

19 Ms. Aizcorbe. Can we go off the record for a
20 second?

21 [Discussion was held off the record.]

22 Ms. Aizcorbe. Now we can go back on.

23 I'm sorry. If you could start over.

24 Mr. Shelanski. If you could repeat the question.

25 I'm sorry.

1 Ms. Aizcorbe. Absolutely. No, it's okay.

2 BY MS. AIZCORBE:

3 Q I believe you were discussing the APA and the
4 agency's responsibilities to respond to public comment. We
5 had been addressing Mr. Laity's comments that OIRA does not
6 ensure the agencies have appropriately responded to public
7 comments because that's a responsibility under the APA. And
8 I was just looking for some clarification about how and when
9 agencies review substantive public comments before the draft
10 final rule is submitted to OIRA for review.

11 A I'd say in most cases my assumption is that
12 agencies have addressed the public comments, but there, you
13 know, may very well be cases where they are still addressing
14 them because they're duplicative or a comment comes in late
15 that the agency wants to address. I think those are
16 possibilities, but I don't have any specific recollection of
17 that being an issue with this rule.

18 Q And you were just speaking to the addressing part.
19 Would it be your expectation that agencies have at least
20 reviewed the substantive public comments received before
21 they finalize their draft final rule and submit to OIRA?

22 A Again, it's not -- it's not OIRA's obligation to
23 sort of certify or play any kind of formal oversight role
24 there. Our concern is with the substance of the rule, and
25 to make sure that in making its substantive decisions, its

1 | policy decisions that are imbedded in the rule, the agency
2 is taking account of the public comment that has come in.

3 Q And so without knowledge of whether the agency has
4 completed its review of substantive public comments, how are
5 you as OIRA able to evaluate whether they've done so?

6 A So sometimes we get from the agency something
7 called a response to comment document that's very typical
8 that we get from the agency so we can look to see how
9 they've addressed comments.

10 We also have our 12866 meetings where people come
11 in and tell us, "Look specifically at our comment. We want
12 to make our point here to you to make sure our comment is
13 being addressed," and the 12866 meetings are a good way for
14 us to make sure that a particular comment has been -- has
15 been addressed.

16 Q And I know you mentioned that you didn't recall
17 this being an issue with respect to this rulemaking, but at
18 any point did you discuss the status of the agency's review
19 of substantive public comments?

20 A I have no recollection of having such a
21 discussion.

22 Q At any point did you become aware that the EPA or
23 Army may not have completed their review of substantive
24 public comments before the draft final rule was submitted to
25 OIRA?

1 A I do not recall ever being made aware of that.

2 Q Mr. Laity stated that OIRA assumes a review is
3 completed before a draft rule is finalized, but typically
4 does not inquire with the agency about status, and I know
5 that sort of tracks with what you just said.

6 Is there a reason OIRA does not at least inquire
7 about the status of an agency's review?

8 A I think that, you know, we view this as, first and
9 foremost, the agency's responsibility when they submit their
10 rule, we assume they have -- they have a lot of incentive to
11 have done that. So it's only in the case where somebody
12 brings to the attention a comment that we don't see
13 addressed that we would then ask the agency, you know,
14 what's going on here.

15 Q Can you explain what kind of interaction OIRA has
16 with agencies about specific rules before they are submitted
17 for formal review in the proposed rule stage?

18 A Sure. As a general matter, after we conclude
19 review on a rule, on a proposed rule, it's with the agency.
20 They put the rule out for public comment. They do whatever
21 they do. They hold hearings. They have stakeholder
22 meetings, whatever it is they want to do, and then they
23 develop their final rule.

24 In the normal case, the interaction we would have
25 with the agency would be two things. Very brief sort of

1 heads up about their timing, nothing about the substance,
2 but we think we're going to have a final rule ready in the
3 month of X, and I may get a couple of phone calls as it's
4 getting closer to that month from an agency head or a Deputy
5 Secretary saying, "Just want to let you know we're still
6 tracking towards," and then maybe would get, you know,
7 another such phone call as it's really approaching the date.

8 So simple air traffic control kinds of things are
9 one form of communication we would have. The other form of
10 communication which is reasonably common is shortly before a
11 rule comes in for review the agency will come and give a
12 briefing, not just to OIRA, but sort of an EOP-wide
13 briefing, anyone who wants to come.

14 It's typically at the staff level, has a way of
15 giving people a sense of what the scope of this rule is
16 going to be, you know. How big of a rule is it going to be?
17 What's it generally going to involve?

18 As a general matter, those are very high level, by
19 what I mean, you know, very general briefings. Here's what
20 the rule is going to cover. In general, we're moving in
21 this direction or that direction, and we intend to submit on
22 the following day.

23 Q Do you recall at that briefing whether the
24 agencies informed the audience or participants that distance
25 limits were going to be included in the rule?

1 A I was not present at the briefing and only became
2 aware of it sometime after the fact.

3 Q And my original question was about communications
4 between OIRA and agencies before a proposed rule is
5 submitted.

6 A Oh, before a proposed rule.

7 Q That was also going to be my next question. So I
8 just let you speak.

9 A Okay. So --

10 Q But with respect to a proposed rule, what are the
11 communications between OIRA and an agency?

12 A Almost identical. You know, here's -- here's what
13 we're working on. Here's our timing. Here's when we think
14 we're going to want to come in with a rule, and then -- and
15 then a briefing.

16 Q Does OIRA have any policies on how staff should
17 document communications with those agencies before a formal
18 submission?

19 A No, we do not. I mean, they're most often phone
20 calls or in-person briefings, but we don't have any -- we
21 don't have any, you know, specific policies about
22 documenting those.

23 Q Do you recall the engagement that OIRA had on the
24 WOTUS rulemaking before the proposed rule was submitted?

25 A Before the proposed rule? There was -- that

1 process was ongoing or launching or, you know, every much at
2 the beginning of my tenure. So I arrived in July, and
3 sometime in the summer, and I don't recall when, but
4 sometime in the couple of months after this started, Jim
5 Laity and Dom Mancini came to talk to me about this, and
6 there was some discussion about the evolution from guidance
7 to a rule and discussions between OIRA and the agencies
8 about the evolution of a guidance from a rule.

9 I was not involved with those discussions. I'm
10 not aware of the content of those discussions, and I'm not
11 aware of when they started.

12 Q Does the determination of a rule's significance
13 involved any discussion with rulemaking agency?

14 A We often have a discussion with the agency about a
15 significance determination, especially when there's a
16 question about it or a difference of opinion. Sometimes
17 it's very straightforward and an agency will submit a rule,
18 and we just agree with their designation and there's no
19 further discussion.

20 Other times OIRA staff will have a difference of
21 opinion with agencies, and there will be a -- there will be
22 a discussion. So I guess if I may go back to your last
23 question, it is true that there is some discussion prior to
24 a rule's formal submission about its significance because
25 it's not significant if it's not -- if it doesn't come into

1 OIRA.

2 But that is often done, you know, through a
3 discussion and some brief outline of what the rule does.

4 Q When a rule comes in, Mr. Laity explained it
5 usually contains three parts: a regulatory text, a rules
6 preamble, and the economic analysis. If a rule is sent to
7 OIRA without one of these three components, does OIRA
8 proceed with its review?

9 A As a typical matter, we ask for a complete rule
10 package. Often when an agency -- well, this doesn't happen
11 a lot, but sometimes an agency submits a rule that it does
12 not believe is significant, economically significant and,
13 therefore, there is no economic analysis.

14 So they have the preamble. They have the text,
15 but they don't have the economic analysis, and so we will
16 then say to the agency, "We think the rule is economically
17 significant." Sometimes there's an argument about that.
18 When we determine it is significant, we say, "Look. We'll
19 start review, but you've got to get to work on the RIA."

20 So in those -- in those circumstances, we will
21 start review. Sometimes we'll tell the agency to take it
22 all back if we think that they're not in a position to get
23 the RIA to us reasonably soon. Other times they will trail
24 the rule with the RIA, and that has happened on a number of
25 occasions.

1 Q Are you aware of whether all three parts were
2 submitted with respect to WOTUS?

3 A At the proposed or final stage?

4 Q Both.

5 A So I cannot recall when EPA prepared its economic
6 analysis. It wasn't an RIA. It was something a little
7 different. It was an economic analysis because EPA believed
8 the rule to be nonsignificant, and I don't remember at what
9 point there was some question and discussion about that that
10 led them to generate the economic analysis, whether it was
11 before the proposed d or before the final.

12 Q But you felt it was appropriate to move forward
13 with the review despite the fact that the agency needed some
14 more time?

15 A I felt that there were good -- there were good
16 reasons to think that the rule might actually not be
17 economically significant early on and, therefore, we were
18 very comfortable with moving forward while the agency
19 completed work and the various sensitivity analyses that it
20 did.

21 Very often an RIA will evolve during review
22 because with economists and analysts and people with good
23 ideas for how to make the RIA stronger, but I don't recall
24 the particular time line here.

25 Q Do you recall what the specific reasons that led

1 you to believe that it might not be economically significant
2 were?

3 A I do recall what the general nature of the
4 argument was, and the general nature of the argument was
5 that the rule was going to codify what had been the past
6 practice and pattern of case-by-case jurisdictional
7 determinations in absence of a rule and, therefore, because
8 there was this longstanding preexisting practice and a
9 preexisting guidance, I guess, that had affected this
10 practice, we felt that that preexisting practice was the
11 right baseline.

12 And at least as initially through initial
13 significance discussions, the argument was that this rule
14 would not change that baseline, in fact, might even reduce
15 from the baseline by a small amount and, therefore, was not
16 economically significant.

17 Q So as far as moving forward with the review when
18 you don't have a complete package, does the same sort of
19 hold for other key parts of a rule, such as a regulatory
20 flexibility analysis or a NEPA analysis or any of these
21 other parts that may accompany a rule?

22 A It -- again, it's a case-by-case determination.
23 If there are questions about what other parts might or might
24 not be required and those are open to discussion, we would
25 rather have the rule under review so that we can be informed

1 remember this conversation?"

2 Are you aware of what OP stands for in this
3 context?

4 A I believe it's an office within EPA.

5 Q And can you explain the concerns that they're
6 referencing regarding the designation of significant or
7 economically significant?

8 A I can't. I cannot. I don't have personal
9 knowledge on what their particular concerns were here.

10 Q Did you discuss significance when you first joined
11 OIRA and were getting briefings about this particular
12 rulemaking?

13 A I don't recall when the significance issue arose.
14 We tend to be conservative, which is to say we tend to opt
15 in favor of significance determinations when there is an
16 open question, but I don't specifically recall when I first
17 had these discussions with staff.

18 Q Do you recall discussing efforts to produce a
19 cost-benefit analysis that maximizes benefits of the rule?

20 A I do not specifically recall that in this context.

21 Q Did you engage in any discussions about whether or
22 how indirect costs would be factored into the agency's cost-
23 benefit analysis?

24 A I don't have a specific recollection in this case.
25 That's a common kind of discussion I would have though

1 related to an economic analysis.

2 Ms. Aizcorbe. Enter this next email into the
3 record as Exhibit 10.

4 [Shelanski Exhibit 10 was marked
5 for
6 identification.]

7 Ms. Aizcorbe. And I will be referencing the
8 latest email from Emma Roach to Jim Laity on October 25th.

9 Mr. Shelanski. Yes.

10 BY MS. AIZCORBE:

11 Q In an October 25th, 2013, email from Emma Roach of
12 OMB, Ms. Roach states, "The portion of the economic analysis
13 on the Corps' administrative cost seems to indicate that the
14 rule only increased costs. Are there any ways in which the
15 rule would decrease particular administrative costs due to
16 the greater certainty in terms of what Section 404 covers?"

17 Are such comments from OMB seeking to reduce an
18 agency's estimation of costs common?

19 A I have no personal knowledge of how common or not
20 they are. This looks to me like just a -- very standard
21 kinds of questions about whether the costs and benefit
22 analysis has been thorough and whether it has missed
23 categories of costs or benefits, and it is common for people
24 to ask questions about that, like whether -- are there
25 particular categories of costs or benefits that have been

1 addressed or not.

2 Q Are you aware of whether OIRA asked the agencies
3 to evaluate whether they could decrease costs after their
4 economic analysis was submitted?

5 A No, I have no knowledge of that.

6 Q If stakeholders report different cost estimates
7 than those used to support a proposed rule, does OIRA make a
8 recommendation for agencies to reevaluate their analysis?

9 A It is very common for stakeholders to submit very
10 different cost estimates, and we always pass those on. We
11 will also look at them ourselves to try to understand what
12 the differences are, but -- and they can be subject to a
13 discussion. So they would form part of a discussion in the
14 typical case surrounding an economic analysis if we think we
15 have gotten a credible analysis of a stakeholder.

16 But I have no knowledge of whether any such thing
17 occurred in this specific rule.

18 Ms. Aizcorbe. We'll enter into the record this
19 next email as Exhibit 11.

20 [Shelanski Exhibit 11 was marked
21 for
22 identification.]

23 Ms. Aizcorbe. I'll just be referring to the first
24 and second sections.

25 Mr. Shelanski. Yes.

1 BY MS. AIZCORBE:

2 Q In a December 12th, 2013, email under Subsection
3 2, Mr. Laity tells the EPA and Army that a lot of
4 stakeholders are complaining that the rules read like
5 substantive decisions have already been made and includes no
6 alternatives as required by Executive Order 12866. This is
7 a fair concern.

8 You were not a part of this email chain, but do
9 you recall Mr. Laity or any other OIRA staff bringing these
10 concerns to your attention?

11 A I don't recall a specific discussion, but this is
12 a normal kind of concern that would come up that staff would
13 brief to me.

14 Q Are agencies required to evaluate alternatives
15 before submitting their proposed rule to OIRA for review?

16 A We don't -- we often don't know what is in a
17 proposed rule ~~until~~ we have it. So we will often
18 discover that there are things we ~~w~~eould like to see in a
19 rule during review. So there isn't specifically a
20 requirement that all of those be addressed before they're
21 submitted.

22 There was a requirement that they address our
23 request if we see a need for them to change the rule that
24 they have submitted.

25 Q Specifically, do agencies have to consider

1 alternatives in their rulemaking?

2 A As a general matter under the Executive Orders,
3 they don't have to consider alternatives when none are
4 feasible or possible, but where there are relevant or
5 reasonable alternatives, we typically ask agencies to find
6 ways to address them or to seek comment that might raise
7 alternatives to what they're proposing.

8 Q And are you aware whether that was done so on EPA
9 and Army Corps' behalf?

10 A I do know that we had a discussion. I do know
11 that OIRA staff worked with the promulgating agencies at the
12 proposed rule phase to take questions, to take comments,
13 specifically request comment on a number of issues.

14 Q Is it common for a proposed rule to be submitted
15 to OIRA without a discussion of alternatives and then
16 develop alternatives while they're working with OIRA during
17 the formal review process?

18 A It happens. You know, I don't know the extent to
19 which, you know, the proportion of cases in which that
20 happens, but that certainly happens. It's not uncommon.

21 Q What does OIRA do if an agency has not considered
22 or included a sufficient discussion of alternatives in its
23 draft proposed rule? Do you ever return it to the agencies
24 or do you do what you previously said and work with them?

25 A We don't simply abruptly return it. Returning a

1 rule is a very drastic step. I find it's much better to
2 work with the agencies to improve the rule, and so the
3 typical process that I have engaged in and asked my staff to
4 engage in is work with the agencies. Make your case for
5 what they need to examine, what the alternative analysis is.

6 So the typical thing is a discussion where we get
7 the agencies to add to their rule the things that we think
8 it should have.

9 Q And at no stage in the WOTUS rulemaking did you
10 discuss potentially asking the agencies to withdraw their
11 rule for further consideration or work?

12 A At no point was I informed that an impasse had
13 been reached that would require that request.

14 Q Mr. Laity informed the committee that during his
15 review he raised the issue that the rule's connectivity
16 report was not finalized when the agencies pursued the
17 rulemaking. Did Mr. Laity or Mr. Mancini discuss these
18 concerns with you?

19 A The connectivity report and the particular
20 procedural place where it was raised in a couple of
21 staff discussions that we had, but at a certain point I was
22 told that the issue had been resolved to the satisfaction of
23 my staff and the agencies, and I did not hear any more about
24 it.

25 Q Did you share Mr. Laity's concern that the EPA

1 undertook efforts to pursue the rule while its scientific
2 basis was in the process of being developed?

3 A I remember at that time just asking what was
4 normal, what was required, at what stage this should be. I
5 remember the issue really had to do not so much with the
6 connectivity report, but whether a separate body had
7 specifically opined on the connectivity report, and I recall
8 being told by my staff that they were satisfied that there
9 was no such requirement to wait for that.

10 Q Do you recall discussing the staff's concerns with
11 anybody else at the Executive office of the President?

12 A I do not recall having any such discussion.

13 Q With the EPA or Army?

14 A Again, I don't specifically recall any such
15 discussion.

16 Q In the December 12th email that we were just
17 referencing under Subsection 1, Mr. Laity discusses
18 complaints with Mr. Mancini, including those submitted by
19 Congress, that we are letting the rule get ahead of the
20 science and should not propose the rule until the SAB review
21 is complete. If we can show that the report already went
22 through a round of peer review, which was hopefully
23 favorable and was already revised once to address peer
24 review comments, this will help a lot to address this
25 concern.

1 Mr. Laity informed the committee that OIRA does
2 not review comments made during peer reviews as it is an
3 agency responsibility.

4 Is that your understanding?

5 A Yes.

6 Q So would it be your opinion that the existence of
7 a peer review process is sufficient to accept an agency
8 scientific assessment on its face?

9 A As a general matter we don't like to accept
10 science or data or analyses that have not been through a
11 peer review. Obviously in an RIA, there has to be some new
12 analysis pulling things together. We don't require an RIA
13 to be peer reviewed, but when an analysis underlying a rule,
14 whether it's economic analysis or a scientific analysis is
15 based on a study, we like to know that that study has met
16 applicable scientific standards in the typical way that we -
17 - the typical thing we look to is peer review.

18 Q And what happens if the peer review is
19 unfavorable?

20 A That would matter in our -- first of all, it would
21 depend how important the underlying study is to the rule.
22 Often there's a much broader context, and that study is one
23 of a variety of things driving the outcome, and so if there
24 are other things that support the rule, it would matter a
25 lot less that that study, you know, was, you know,

1 considered flawed in some way.

2 If the rule rested fundamentally on that study,
3 that would be a significant issue that we would discuss with
4 the agency.

5 Q Were you at all aware of the comments that came
6 out of the peer review or the SAB peer review of this
7 report?

8 A I do not have personal knowledge of those and do
9 not even -- do not recall ever having been specifically
10 briefed on those.

11 Q So if OIRA staff managing review of the rule are
12 saying that it was important that these peer reviews take
13 place and are hopefully favorable, but then subsequently do
14 not review the comments that come out of those peer reviews,
15 | how do the OIRA staff keep track of whether a peer review is
16 favorable or not?

17 A I think, you know, typically what we would look to
18 is we don't necessarily even on published studies look at
19 the peer reviews themselves. We look at the studies, and
20 then we see if there are other things criticizing those
21 studies, and if there's -- you know, if it's a published
22 study, we typically know it has gone through peer review.
23 It is peer reviewed. We assume it met the concerns.

24 | I don't have any personal knowledge of what
25 happened in this case with the peer review or the

1 connectivity study.

2 Q Right, because you had mentioned that you would
3 look to other criticisms that exist with respect to that
4 report, but if the report is being developed concurrently
5 with the rule itself, there's really no chance that there
6 would be an existence of existing criticism, correct?

7 A And whether that's important or not, as I said
8 before, that depends on really what role the study is
9 playing in the rule. If it's -- if it's one of a number of
10 things that support the rule, if it's not sort of a "but
11 for" requirement for a certain part of the rule, that would
12 matter a lot less, and I don't recall sitting here today
13 exactly how the connectivity report factored in.

14 Q How it factored into the rulemaking?

15 A Yes.

16 Q Do you recall whether the report was determined to
17 be influential or highly influential per OIRA's peer review
18 bulletin?

19 A I do not.

20 Q Under what circumstances does OIRA evaluate a peer
21 review of scientific assessments?

22 A This is not something that has come up terribly
23 often in my tenure. Typically when an agency is proposing a
24 rule that is based on a as yet unpublished scientific
25 assessment, we may not be in a position to assess the

1 science, but where there has been a peer review report or a
2 National Academy study, we will read that so we can
3 understand whether the rule is based on science, you know,
4 proper science.

5 So I'm speaking generally now about what we do.
6 So the typical case which we would review a peer review
7 report is where it is the fundamental basis for a regulatory
8 action, and there's nowhere else to look for other evidence
9 or other assessments of that study.

10 Q And you're saying OIRA did not do so in this case?

11 A I'm saying I have no personal knowledge of what
12 happened here with regard to the peer review report and the
13 connectivity study.

14 Ms. Aizcorbe. Okay. Thank you.

15 I think we are out of time. We can go off the
16 record.

17 [A luncheon recess was taken from 1:24 p.m. to
18 2:20 a.m.]

19

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22

23

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

25 Mr. Longani. All right. We're going to go back

1 on the record.

2 EXAMINATION [Resumed]

3 BY MS. BERROYA:

4 Q And, Mr. Shelanski, can you pull out Exhibit 7?

5 A Yes, I have Exhibit 7 in front of me.

6 Q Exhibit 7 is an email chain between Committee
7 staff and I believe OIRA Legislative Affairs staff; is that
8 correct?

9 A It appears to be, yes.

10 Q Are you copied on any of these emails?

11 A I am not.

12 Q Prior to today's transcribed interview, have you
13 seen any of these emails?

14 A No, I have not.

15 Q Are you aware of whether the summaries contained
16 on these emails of the communications that occurred are
17 accurate?

18 A No, I have no personal knowledge.

19 Q There was some discussion with my colleagues in
20 the Majority in the last hour of discussions concerning
21 document production, questions that the Committee has asked
22 OIRA. Do you recall that?

23 A I recall the discussion that went on in the last
24 hour, yes.

25 Q Are you aware of whether OIRA Leg. Affairs,

1 General Counsel personnel have come to meet with folks on
2 the Committee concerning those questions?

3 A I am aware from one of my hearings that there was
4 one in-person meeting I believe in January. I have no -- I
5 was not -- I did not attend that meeting. I have no
6 personal knowledge of what went on at that meeting. I have
7 no knowledge of whether or not there were other meetings.

8 Q In the last hour, you discussed personally
9 collecting documents that were potentially responsive to
10 first the letter request and then the subpoena.

11 A Yes.

12 Q When you were collecting potentially responsive
13 documents, were you collecting documents using a broad
14 construction of the request or were you trying to determine
15 whether each individual document would ultimately be
16 responsive?

17 A I didn't try to make any such determination. I
18 just tried to see if I had any documents. Again, this was
19 early on, and I don't recall receiving any specific
20 instruction about how to search or what to search. So I
21 just looked for everything that was on my computer that
22 could possibly have to do with the rule and transferred it
23 into a folder.

24 I don't know sitting here today how long that
25 process took me. I remember doing it a couple of times to

1 make sure, and I don't recall how many documents -- I now
2 realize I just don't recall how many documents went into
3 that folder, but that's how I did the search.

4 Q I believe in the last hour you provided a number,
5 something like 80 to 100 documents that you've collected as
6 potentially responsive. Are you not sure whether that's
7 accurate?

8 A I think that is guessing and being pure
9 speculation because as I think back on it, I never really
10 did a count. I just kept transferring things into a folder
11 and turning it over. So I don't know if the number is
12 actually substantially higher or lower than that number. I
13 think that was a guess.

14 Q Administrator, if Congress passed a bill
15 preventing agencies from making public statements promoting
16 a rule, could that result in restricting the flow of
17 important information to the public?

18 A Agencies during the time that they're developing a
19 rule before it is published for public comment or submitted
20 to ~~OIRA~~ OIRA for review often do a lot of stakeholder outreach.
21 If the law you're talking about would prevent agencies from
22 being public about what they were thinking about doing in a
23 rulemaking, I would think that would be something
24 stakeholders would not like, and it would be harmful to
25 public participation in the rule development process.

1 BY MR. LONGANI:

2 Q Another question you were asked in the last hour
3 relating to documents is when you turn over documents
4 whether you knew how many of those documents were
5 duplicates. Do you remember that question?

6 A I do recall the question.

7 Q Do you think it's a good use of your time as an
8 administrator of OIRA to go through document productions to
9 determine how many of them are duplicates?

10 A Given all of the work that I have to do, I think I
11 have more productive uses of my time.

12 Q In the last hour you were also asked about the
13 role of Stuart Levenbach.

14 A Yes.

15 Mr. Longani. Do you remember that? Okay.

16 [Counsel conferred.]

17 Mr. Longani. I'm now showing you a copy of the
18 transcript of Vlad Dorjets, which I will just mark for
19 identification purposes only as Exhibit -- what are we up
20 to? -- 12. Just mark it.

21 [Shelanski Exhibit 12 was marked
22 for
23 identification.]

24 BY MR. LONGANI:

25 Q Now, and this is only should you need to refer to

1 the exact language --

2 A Sure.

3 Q -- but and for my Majority counterparts, I'm going
4 to be reading from ten and 11.

5 In response to one of my colleagues' questions
6 about the role of Mr. Levenbach, well, let me start with Jim
7 Laity. Excuse me. Let me start with Jim Laity first.

8 Jim Laity, in response to Mr. Levenbach and the
9 role that Mr. Levenbach and Mr. Dorjets, said, the lead
10 person was named -- the lead person on the Clean Water Rule
11 was Vlad Dorjets. Would you agree with that?

12 A At the final stage, the desk officer to whom the
13 rule was assigned was Vlad Dorjets.

14 Q Okay. So would you agree with Jim that he was the
15 lead person?

16 A Yes.

17 Q The lead desk officer.

18 A Yes. I thought of Jim and Vlad as playing sort of
19 co-, you know, reviewer roles on the final rule.

20 Q Okay. Mr. Dorjets when asked that same question
21 about the role of Stuart Levenbach said, "It's possible" --
22 "it's possible," page 11, "I mean, it's possible he attended
23 some of the meetings early on, but to the best of my
24 recollection, that did not continue throughout the whole
25 review. Maybe in the first couple of meetings he attended,

1 but as far as the actual day-to-day, the review, the
2 resolution of issues, the normal process of desk officer
3 responsibility he was not involved, no."

4 Any reason to contradict Vlad Dorjets or Jim
5 Laity's testimony on that point as to the role of Stuart
6 Levenbach?

7 A I have no basis for contradicting it. As I stated
8 earlier, I did not recall Mr. Levenbach playing any kind of
9 fundamental role in the review.

10 Q So would you agree with the role? Do you have any
11 reason to disagree with the description of Stuart
12 Levenbach's role as described by Vlad Dorjets?

13 A I have no basis for disagreeing with his
14 assessment.

15 Q Okay. You were also asked a series of questions
16 relating to public comment and OIRA's role in reviewing
17 public comment --

18 A Yes.

19 Q -- in the last hour; is that correct?

20 A That's correct.

21 Q Would you agree from your personal knowledge do
22 you know how many comments the agency has received on this
23 rule?

24 A I do not. At some point I remember hearing a
25 | large number, but I don't recall the ~~order-of~~ magnitude.

1 Q Would it surprise you to know it was over a
2 million?

3 A No, it would not surprise me.

4 Q Okay. Again, I'm going to ask you -- refer you to
5 a couple of points if you want to look at the full
6 testimony, but I'm going to refer to a few things that Jim
7 Laity said in his testimony to the Committee, okay?

8 Let's start with page 36. Mr. Laity says in
9 response -- I'll let you catch up.

10 A Thank you.

11 Q And I will read it as I'm going along. I'm going
12 to show you and my Majority colleagues as well the section
13 I'm sure they're familiar with that I'll be reading from.

14 And you can take a moment to read page 36.

15 A Yes.

16 Q Okay. Mr. Laity in response to my Majority
17 colleagues' question, "Were you aware that the EPA was also
18 reviewing comments at this time?" says, "I don't remember if
19 that is true and if I was aware of that. The agency, when
20 an agency has a high visibility rulemaking in which they get
21 tens or hundreds of thousands of comments, which was the
22 case here, what usually happens is that they review sort of
23 all the substantive comments early in the process in order
24 to inform the development of the final rule, but then the
25 process of actually formally preparing all the documentation

1 | that's required under the Administrative Procedures Act~~s~~ to
2 show that you have, in fact, reviewed all the comments and
3 provided answers to them and so on. That's an ongoing
4 process, and my understanding was that the process was
5 ongoing during the review of the rule, but I had no reason
6 to think that the agencies had not substantively already
7 reviewed all of the major comments and, in fact, there was a
8 detailed discussion of comments in the preamble to the final
9 rule."

10 Do you disagree with anything that Jim said in
11 response to that question?

12 A I do not disagree and actually I firmly agree.
13 It's consistent with my answer earlier that agencies often
14 | may continue when there are their-duplicative comments or
15 comments that are not major comments, you know, for some
16 time to formally address those.

17 But what Mr. Laity says is something I both agree
18 with and that is consistent with my recollection.

19 Q As to this rule.

20 A Yes.

21 Q I'm going to ask you to turn to page 38 now, and
22 then I'm going to show my colleagues.

23 Ms. Aizcorbe. We can't see.

24 Ms. Rother. Holding it up is not an effective way
25 to show it.

1 Mr. Longani. Really? It's not --

2 Mr. Skladany. Say the page number.

3 Mr. Longani. Thirty-eight, the last half of the
4 page.

5 Ms. Aizcorbe. Thank you.

6 Mr. Longani. Yeah. No worries. And I think you
7 can see it a little closer, Administrator. I'll show you
8 the part that I want to get to.

9 Mr. Shelanski. Yes, I see what they're referring
10 to.

11 Mr. Longani. And for the record I just showed a
12 highlighted section of page 38, which is the bottom half of
13 the page.

14 BY MR. LONGANI:

15 Q Again, in response to another question that the
16 Committee asked, the question is, "Would you say that it is
17 your expectation that an agency's review of public comments
18 would be completed by the time it drafts its preamble?"

19 Answer: "No."

20 Question: "Why is that?"

21 "I explained that just by the way the rulemaking
22 process works, of course, the agency has to have a pretty
23 good idea of what's in the comments and what the substantive
24 comments are and have the rulemaking informed by that, and
25 we would expect that that would be the case, but the process

1 of actually going through and documenting and reviewing and
2 preparing the documentation that goes into the
3 administrative record frequently is going on during the
4 review of the rule."

5 Again, do you disagree with anything Jim said in
6 response to that question?

7 A No, I have no reason to disagree with anything he
8 has said.

9 Q And, in fact, would you agree with what Jim said
10 in response to that question?

11 A Yes. It's consistent with my understanding.

12 Q Okay. I'm going to ask you now to turn to page
13 39, and I'm going to ask you to go -- it's the third
14 question down from the top.

15 A Yes.

16 Q And again, my colleagues asked Mr. Laity if he
17 would expect that the agency's documentations of its prior
18 answers to public rules would be completed at any point
19 prior to the signing of the final rule.

20 His answer, "Not necessarily."

21 He then in response to the next question, which
22 is, "Are you aware that agencies typically finish at any
23 stage before the final rule is promulgated?" states, "As
24 I've said several times, I have very little knowledge of the
25 details of how agencies respond to public comments, but I

1 have been aware from time to time that preparing for these
2 very high comment volume rules, that preparing all this
3 documentation for the administrative record is a big job and
4 it can certainly be ongoing up until the very end of the
5 process."

6 Is that consistent with how the public comments
7 issue was handled by OIRA as it relates to the Clean Water
8 Rule?

9 A I don't have a specific recollection of the issues
10 raised in this question and how they were handled. I have
11 no basis for disagreeing with Mr. Laity's assessment here.

12 Q Any reason to disagree with his assessment that
13 for large rules that involve high volume of comments, the
14 response to those comments may be an ongoing process that
15 takes --

16 A Yeah.

17 Q -- takes until the end of the rule?

18 A Yes, I agree with his assessment. I have no
19 reason to disagree with that, and it's consistent with my
20 understanding of what has happened.

21 Q Okay. I'm now going to ask you to pull up Exhibit
22 11, and, Administrator, I'm going to ask you take a look at
23 that again, and specifically the penultimate sentence in
24 Paragraph 1 or that's labeled Paragraph 1 --

25 A Yes.

1 Q -- and the first sentence in Paragraph 2.

2 A Yes.

3 Q And in this I'm referring to Paragraph 11.

4 A Yes.

5 Q Now, I'm also going to ask you to pull up Mr.
6 Laity's transcript, page 65 and to page 66. I'm going to
7 ask you to read the last question and answer, the last
8 question on page 65 and his answer going on to page 66.

9 A Okay. [Examining document.] Yes.

10 Q Now, just to give you the context of the section
11 of the transcript for Mr. Laity that I'm referring to, this,
12 again, is in response to questions related to what has now
13 been marked as Exhibit 11, an email that was written by Mr.
14 Laity to Gregory Peck and Craig Schmauder on December 12th,
15 2013.

16 The question I just asked you to review states,
17 for the record, "And you would expect at the proposed rule
18 stage, like you said, per the Executive Order, that the
19 agencies to this point have assessed and considered
20 alternatives?"

21 Answer: "The Executive Order requires that the
22 proposed rule present a range of alternatives, and I do feel
23 I need to add that the proposed rule did, in fact, when it
24 went out include a number of substantive alternatives and a
25 fairly detailed discussion of them in order to request

1 informed public comment on these alternatives."

2 Now, my majority colleagues asked you a couple of
3 questions related to this email and specifically to the
4 first sentence in Paragraph 2, in which Jim stated that a
5 lot of stakeholders were complaining that the rules read
6 like substantive decisions and includes no alternatives.

7 Jim, in fact, told the Committee that when the
8 proposed rule went out, it included a number of substantive
9 alternatives and a fairly detailed discussion of them.

10 Do you have any reason to disagree with Jim's
11 memory of the proposed rule and the fact that it contains
12 several alternatives and a fairly detailed discussion of
13 them?

14 A No, I have no basis to disagree with his
15 assessment.

16 Q Anything unusual about that?

17 A No. As I answered, it is common for us to address
18 the question of alternatives with agencies during a proposed
19 rule review.

20 BY MS. BERROYA:

21 Q When you say it was common to address the question
22 of alternatives during a proposed rule review, does that
23 mean that OIRA ~~option~~ has to suggest additional alternatives
24 be added?

25 A It's not uncommon for us to suggest that

1 additional alternatives be added and to work with agencies
2 either to develop those into proposals or specific
3 suggestions or to take comment on whether additional
4 alternatives might be warranted.

5 Q Another issue that you addressed regarding this
6 email was the portion of this first sentence in the second
7 paragraph in Exhibit 11 which says -- in which Jim says, "A
8 lot of stakeholders are complaining that the rules read like
9 substantive decisions have already been made."

10 I'm going to ask you to look at page 66, the last
11 question on page 66 from Jim Laity's transcript. I'm going
12 to ask you to look at the question and the answer which goes
13 on to page 67.

14 Since you were not on this email, this is the
15 context that Mr. Laity provided the Committee.

16 Question: "Were you concerned at all with the
17 comment that it reads like substantive decisions had already
18 been made?"

19 Answer: "You know, sometimes when I'm writing
20 emails, we all know each other pretty well and I speak
21 colloquially or informally or carelessly, and so I think
22 that my intention in writing this email is to get the
23 attention of the agencies and convince them that it would be
24 appropriate to include some regulatory alternatives in the
25 proposed rule, which they agreed to do."

1 Does that now provide you some context for why Jim
2 said what he said in Paragraph 2, first sentence, of Exhibit
3 11?

4 A I have -- yes, it provides some context for that
5 statement.

6 Q And do you have any problem with the fact -- do
7 you have any problem with the language that Jim used in this
8 email?

9 A Nothing raises concern to me.

10 Q Okay. And, again, his intention, according to
11 him, was to get the attention of the agencies and convince
12 them that it would be appropriate to include regulatory
13 alternatives. Would you agree that that would be an
14 appropriate measure for Jim to have taken in order to assure
15 that the agencies did provide appropriate alternatives?

16 A Well, I have no personal knowledge of Mr. Laity's
17 state of mind or intention. It strikes me as a very
18 reasonable way for him to have interacted with the agency.

19 Q Now, staying with Exhibit 11, my colleagues also
20 asked you several questions relating to the connectivity
21 report. Do you remember that?

22 A Yes.

23 Q In fact, the connectivity report, there was a
24 released draft of the connectivity report that occurred in
25 September of 2013. Is that accurate?

1 A I don't specifically recall when it was released.

2 Q Would you agree that it occurred at some point in
3 the fall of 2013?

4 A At some point the connectivity report came to my
5 attention, and I believe I was told it had been released,
6 yes.

7 Q Would you also agree that the connectivity report
8 was finalized before the final rule was sent to OIRA?

9 A I do not specifically recall when the connectivity
10 report was finalized.

11 Q I'm going to point you in Exhibit 11 again to the
12 section that my Majority colleagues had pointed you out to,
13 the last part, again, the penultimate sentence of Paragraph
14 1.

15 A Okay. Okay. Are you referring to the sentence
16 that starts, "If we can show"?

17 Q Sure, yes.

18 A Okay. Thank you.

19 Q Just a brief indulgence.

20 I'm going to ask you to take a look at page 70,
21 the last paragraph on page 70 of Jim Laity's transcript.

22 A Yes.

23 Q And I'll give you a moment to read that, going on
24 to page 71.

25 A [Examining document.] Yes.

1 Q In that section that I just referred to, Jim Laity
2 in referring to that specific sentence says, "I just
3 described to you the conversation that we had about peer
4 review, and this sentence in this email that you're
5 highlighting, when they said to me, 'Well, you know, this
6 was already peer reviewed and we're going to do it again
7 because we want to be super careful, but we already did this
8 once and we feel that it's a good, solid, scientific basis
9 for our rulemaking,' I said to them, 'Well, it would be
10 great if you could make the results of that first peer
11 review available to the public as part of the record for the
12 proposed rule,' and I believe they agreed to do that, and
13 that was put in the record for the proposed rule."

14 Does that provide you context for that sentence
15 that you were questioned about in the last hour, again, the
16 penultimate sentence, Paragraph 1, Exhibit 11?

17 A It does appear to flesh out the sentence in the
18 email.

19 Q Okay. And Mr. Laity also told the Committee the
20 fact that this, that the science in this case underwent two
21 rounds of peer review, the initial peer review and then the
22 review by the SAB, really was a -- I think his words were "a
23 gold-plated process for getting good science."

24 Would you agree with Mr. Laity about that?

25 A I -- I have no basis to disagree with him. I

1 would agree with him that two rounds of peer review is more
2 than we can really look for.

3 Q Administrator Shelanski, are you familiar with the
4 Government Accountability Office?

5 A I am.

6 Q What's your understanding of their role as a
7 federal agency?

8 A They undertake independent studies, often at the
9 request of -- my understanding is perhaps at the request of
10 members of Congress regarding various government activities.

11 Q They were not a party to this rulemaking, correct?

12 A I do not recall them being a party to this
13 rulemaking, no.

14 Q Were you aware that following the completion of
15 the Clean Water rulemaking the Government Accountability
16 Office conducted a review of the agencies' compliance with
17 all relative administrative requirements, including the
18 economic analysis and the Administrative Procedures Act and
19 concluded that the agencies met every requirement?

20 A I am aware that they issued such a report.

21 Q The report includes an assessment of various
22 regulatory requirements that the GAO concluded the agencies
23 complied with. Would you agree with the GAO's conclusion
24 that the cost-benefit analysis complied with all
25 requirements, all regulatory compliance -- all regulatory

1 requirements?

2 A My assessment was that the cost-benefit analysis
3 met requirements.

4 Q And would you agree with their conclusion that the
5 regulatory flexibility analysis -- all regulatory
6 requirements were complied with as to the regulatory
7 flexibility analysis?

8 A Yes, I agree with that assessment.

9 Q And would you agree with the GAO's conclusion that
10 OIRA complied with Executive Orders 12866 and 13563?

11 A Yes, I agree with that assessment.

12 Q Do you have any basis to suggest that the GAO did
13 not conduct an independent analysis of the EPA and Army's
14 regulatory compliance in the Clean Water Rule rulemaking?

15 A No, I have no reason to believe that.

16 Q Would you agree that conducting a cost-benefit
17 analysis in this case, specifically the Clean Water Rule,
18 was not an easy task?

19 A I would agree, yes, that it was not an easy task.

20 Q Why not? Why was it not an easy task, if you
21 know?

22 A Cost-benefit analysis is often a very challenging
23 task. It can be very hard to fully assess and quantify
24 relevant costs and benefits, and it can be difficult to try
25 to determine how to deal with the unquantifiable costs and

1 benefits, and I think that those problems were particularly
2 salient in the case of this rule.

3 Q My colleagues asked you in the last hour about the
4 fact that sometimes you receive cost-benefit analysis from
5 stakeholders that differ. Remember that?

6 A Yes.

7 Q What do you do in response to stakeholders that
8 send OIRA different cost-benefit analysis than might be in
9 the proposed economic analysis, for example?

10 A Well, in the typical matter we look at those
11 because they're an interesting check, an important check.
12 You know, have we left something out?

13 I think as I mentioned, it's very common that
14 people will ask questions about particular categories of
15 costs or particular categories of benefits, to ask whether
16 they've been thought of or examined.

17 And so a stakeholder might have information about
18 additional categories of costs or benefits or about the
19 proper way to estimate the existing categories, and that's
20 valuable information. We tried to understand where the
21 differences arise, and we tried to talk to the agencies
22 about where the differences arise.

23 Q And is that what took place in analyzing the
24 different cost-benefit analyses submitted during the review
25 process of the Clean Water Rule?

1 A I don't specifically recall the nature of any
2 outside cost-benefit analyses that were submitted in the
3 context of this rule and was not party to any deliberations
4 on how one might reconcile what the agencies did with those
5 outside studies.

6 Q Do you have any basis to believe that politics
7 played a role in the time line for this rulemaking?

8 A I don't recall politics playing a role in the time
9 line for this rulemaking.

10 Q The rulemaking process itself took six years from
11 beginning to end. Would you consider that to be a rushed
12 process?

13 A I would not consider that to be a rushed process,
14 no.

15 Q Are you aware of the agencies being directed by
16 anyone at EOP to promulgate this rule with a disregard for
17 science?

18 A Absolutely not.

19 Q Are you aware of the agencies being directed by
20 anyone at EOP to promulgate this rule with a disregard for
21 economics?

22 A Absolutely not.

23 Q Are you aware of the agencies being directed by
24 anyone at EOP to reach a finding of no significant impact?

25 A No.

1 Q Are you aware of the agencies being directed by
2 anyone at EOP to promulgate this rule in violation of any
3 legal requirements or regulations?

4 A No.

5 Q Is one of the purposes of the Clean Water Rule to
6 ensure that our drinking water is safe?

7 A Yes, I think this is one of its purposes.

8 Q If implemented, would this rule have an impact on
9 the ability to ensure clean drinking water for people in the
10 United States?

11 A I am not an expert in all of the things that
12 affect clean drinking water, but this rule is certainly part
13 of the package of things that affect clean drinking water.

14 Q Part of what the rule does is to preserve
15 protection of navigable rivers for Clean Water Act
16 jurisdiction, correct?

17 A Correct.

18 Q But the rule goes well beyond those easily
19 identifiable navigable rivers and now covers other
20 waterways, correct?

21 A That is correct.

22 Q The reason the rule discusses ditches, wetlands,
23 prairie potholes and other water bodies is because prior to
24 the rule, it was not clear how these were related to
25 navigable water and, therefore, to our sources of drinking

1 water; is that correct?

2 A That is my understanding.

3 Q Would you have concluded a review on this rule if
4 you had any concerns about either the process through which
5 this rule was put through at OIRA or the underlying science?

6 A No. I would have continued the process to address
7 those concerns.

8 Q Is there any evidence to suggest any part of this
9 rule was forced upon the Army by the EPA?

10 A I have no reason to believe that.

11 Q You've previously described OIRA staff as follows:
12 "the OIRA staff are a bunch of super smart and very
13 dedicated folks who really are focused on the evidence
14 underlying a rule, on the rule's justifications, and in
15 carrying out the mandates of the Executive Orders. I think
16 that they are very good at focusing on the analytic issues.
17 They speak truth even when it is inconvenient, and I've
18 always found them to be people of the highest honesty and
19 integrity."

20 Do you believe that sitting here today?

21 A I absolutely do believe that, yes.

22 Q And do you believe the people who worked on the
23 Clean Water Rule, including Vlad Dorjets, Jim Laity, Dominic
24 Mancini and yourself, all evidenced the characteristics that
25 you just described --

1 A Yes.

2 Q -- for the OIRA staff?

3 A Yes.

4 Mr. Longani. Brief indulgence.

5 [Counsel conferred.]

6 Mr. Longani. I think we're almost done.

7 [A brief recess was taken.]

8 Ms. Aizcorbe. All right. We can go on the
9 record.

10 EXAMINATION [Resumed]

11 BY MS. AIZCORBE:

12 Q Mr. Shelanski, I'd just like to go back to a few
13 clean-up questions before moving forward from some of the
14 previous hours that my colleagues had with you. You
15 mentioned at one point when we were discussing interagency
16 review that you recalled one agency that had a concern, but
17 that it had been resolved.

18 Do you recall which agency?

19 A Yes, it was the Department of Transportation.

20 Q And do you recall what the concern was?

21 A It had something to do with ditches along the
22 railway lines.

23 Q You also mentioned that in the briefing where you
24 were sitting with ~~HO~~OIRA staff and informed them of the
25 Committee's request that they may need to search for

1 documents, you told our colleagues that in that briefing or
2 meeting with OIRA staff that you instructed them to pull
3 documents and ~~to~~ to cooperate.

4 But it was my understanding when we spoke earlier
5 about that that you were just telling them to cooperate
6 because the instruction would come from OMB, either the
7 Office of General Counsel or OLA, as to who actually was
8 covered by the subpoena; is that correct?

9 A I don't -- I remember it being sort of less
10 formal. I told them that we were going to have to produce
11 documents so that they should, you know, search their
12 documents and cooperate fully.

13 I seem to recall, you know, it being implicit that
14 there would be some additional guidance. I was just
15 delivering my emphasis that they should be cooperative and
16 that this should be a priority.

17 Q I just wanted to clarify that there was no
18 instruction to all OIRA staff to go back to their desks to
19 conduct a search at that time.

20 A I mean, I -- again, as I said, it was less formal
21 than that. It was you should search your documents. You
22 should cooperate. I might have implied there would be more
23 guidance. I actually don't specifically recall.

24 My job was to set a tone as head of the office
25 that we were to be absolutely forthcoming and that also that

1 this should be a priority.

2 Ms. Aizcorbe. Okay. I apologize. I forgot to
3 note the time earlier. I believe we -- 2:56? Thank you.

4 BY MS. AIZCORBE:

5 Q In the previous hour you stated to our colleagues
6 that you agreed with the GAO's analysis of the regulatory
7 flexibility analysis that was provided for the rule. Are
8 you, in fact, aware of whether a regulatory flexibility
9 analysis was provided in the rule?

10 A What I recall regarding regulatory flexibility was
11 the analysis of alternatives and without being able to
12 recall specifically of what was produced, I recall being
13 satisfied that the regulatory flexibility obligations had
14 been met.

15 Q Okay. I wanted to clarify because the EPA did
16 certify under the Regulatory Flexibility Act that the rule
17 did not rise to the threshold of having to produce a
18 regulatory flexibility analysis. So I just wanted to
19 clarify.

20 A I was -- I was referring to the kind of analysis
21 of alternatives that we considered to be the essence of
22 regulatory flexibility that Mr. Laity also testified ~~to that~~.

23 Q Okay. Thank you.

24 Mr. Laity and Mr. Dorjets informed the Committee
25 that OIRA does not review compliance with NEPA. Is that

1 your understanding?

2 A That is my understanding.

3 Q Can you explain why OIRA does not consider
4 reviewing NEPA compliance a part of its responsibilities?

5 A I am not an expert in this matter. My
6 understanding is that that is mostly the province of another
7 office, and that we rely on their determinations.

8 Q Does OIRA have a specific policy or guidance that
9 restricts the interpretation of the term "applicable law" in
10 Executive Order 12866 to specific laws that OIRA oversees
11 compliance with or is that just a general understanding of
12 which specific laws OIRA really gets involved with
13 evaluating compliance?

14 A I've always thought of it as a general term.

15 Q So do you interpret that to mean to the extent
16 that other offices within the Executive Office of the
17 President are not charged with oversight over a specific
18 compliance with the law, OIRA will take care of overseeing
19 compliance with everything else?

20 A Again, as legal issues are raised, our job is
21 through the interagency process to make sure that they're
22 resolved.

23 Q Did you discuss reviewing or otherwise instruct
24 OIRA staff to review the Army's NEPA analysis after changes
25 were made to the rule to conform with the FONSI?

1 A I have no recollection of discussing the NEPA
2 analysis with my staff in any specificity.

3 Q Do you recall discussing the NEPA analysis with
4 either the agencies or anyone in EOP besides the call and
5 follow-up meeting that we discussed earlier?

6 A No.

7 Q Does OIRA have the authority to question an
8 agency's NEPA analysis or conclusion?

9 A I know of nothing that prevents OIRA from asking
10 any questions it wants to raise.

11 Q Do you recall discussing the addition of distance
12 thresholds to the final rule with anybody within OIRA?

13 A I'm sorry. Could you repeat the question?

14 Q Yes. Did you discuss the addition of distance
15 thresholds to the final rule with anyone within OIRA?

16 A I want to make sure I understand what you mean by
17 "distance thresholds." If you could elaborate a little bit.

18 Q Adjacency limits or the foot limitations that were
19 ultimately added to the rule, the 4,000 foot limitation as
20 an example.

21 A Yes, I remember having staff discussions or being
22 briefed by staff on that issue.

23 Q Did you personally speak with anybody at the
24 agencies about those limits?

25 A I recall having, you know, a couple of discussions

1 that involved sort of the scope of the jurisdiction.
2 Whether those were in broad terms or specifically dealing
3 with particular thresholds I don't recall.

4 Q Mr. Laity informed the Committee that no
5 additional science indicated specific thresholds. Did
6 anyone at any point express concern to you that the agencies
7 did not conduct science to support those specific
8 thresholds?

9 A I don't recall anybody raising that specific
10 concern.

11 Q And just to be clear because I know we spoke a
12 little bit about recirculation earlier with respect to the
13 public comment period and to the 100 year flood plain
14 modification, after the limits were added to the rule, was
15 the rule recirculated to the public to obtain public
16 comments?

17 A Recirculated to the public?

18 Q Correct.

19 A I do not recall the rule being recirculated to the
20 public, but I don't have any specific knowledge of whether
21 it was or not.

22 Q Do you recall whether that was discussed within
23 OIRA?

24 A I do not recall any such discussion.

25 Q As I just mentioned earlier, the EPA certified

1 that the rule does not have a significant economic impact on
2 a substantial number of small entities under the Small
3 Business Regulatory Enforcement Fairness Act. When did you
4 become aware that the EPA was going to certify the rule?

5 A I know that I had a discussion with staff about
6 the small business issue. I don't specifically recall when
7 that took place.

8 Q Were you aware that the U.S. Small Business
9 Administration Office of Advocacy communicated to OIRA and
10 the agencies that EPA improperly certified the rule?

11 A I remember being informed that SBA had raised some
12 concerns.

13 Q And do you recall discussing those concerns with
14 anyone at OIRA?

15 A Yes, I remember having a discussion with staff
16 about the SBA's concerns, and I remember that we talked
17 about what the basis for the concern was. They then went
18 back, staff then went back, and the next report that I had
19 was that they were satisfied that EPA was correct.

20 Q Do you recall discussing the EPA's decision to use
21 existing regulation as a baseline for its certification
22 which showed a decrease in jurisdiction when it used current
23 practice per Circular A4 for its economic analysis showing
24 an increase in jurisdiction?

25 A I remember having some discussions about baseline.

1 I don't remember the details of those discussions.

2 Q You don't recall whether anyone at OIRA weighed in
3 on that ultimate decision to use the current practice as the
4 baseline for only certain parts of the rule?

5 A I remember there was a discussion about that, and
6 I remember, you know, that everybody was comfortable with
7 sort of what the alternative analyses were and the economic
8 analyses that were being conducted.

9 Q Mr. Laity informed the Committee that OIRA
10 leadership had internal discussions and ultimately accepted
11 the EPA's determination that it was appropriate to certify
12 based largely on the discussion of what is direct and
13 indirect effect and what is the appropriate baseline.

14 Were you aware of these discussions?

15 A That's the nature of the discussion I was having
16 with staff that when they explained to me what the concern
17 was and that they were ultimately comfortable with where the
18 EPA came out.

19 Q Mr. Laity informed the Committee that it was his
20 observation that the agency was not consistent in how the
21 agencies presented which baseline in different contexts and
22 then informed the Committee he did not have any further
23 comment on this issue.

24 Did you or anyone within EOP to your knowledge
25 advise or suggest that Mr. Laity should not speak about this

1 issue?

2 A No.

3 Q In your experience, is it common the agencies use
4 different baselines to evaluate cost and impact of the same
5 rulemaking?

6 A I don't know if it's common. It's something I've
7 seen before.

8 Ms. Aizcorbe. We have an email I'd like to
9 introduce into the record as Exhibit 13.

10 [Shelanski Exhibit 13 was marked
11 for
12 identification.]

13 Mr. Shelanski. Thank you.

14 Ms. Aizcorbe. And I will be referring to just for
15 your information when you're navigating this, on the second
16 page under the section on drafting.

17 Mr. Shelanski. Okay. Second page under drafting.
18 Okay. I see the paragraph you're referring to. Yes, I see
19 the comment.

20 BY MS. AIZCORBE:

21 Q Okay. This email exchange includes CEQ's Deputy
22 Associate Director for Regulatory Policy, her comments on
23 the proposed rule to Mr. Laity on November 4th, 2013. So
24 it's talking about the proposed rule at this stage.

25 In her email, Ms. Finken states that "one takeaway

1 that any reader should have is that the proposed rule is
2 narrower in scope than the agency's previous interpretation
3 under the Clean Water Act."

4 Can you explain this comment in light of Circular
5 A4's requirement to use current practices as a baseline,
6 which would show the opposite effect?

7 A I'm sorry. Could you show me where you're reading
8 from?

9 Q Yeah, under -- I apologize. I'm referring to her
10 comments on page 2 under the subsection "Drafting."

11 A Yes.

12 Q Oh, I just realized there are two subsections
13 entitled "Drafting."

14 A Oh, the second subsection "Drafting." Okay.

15 Q I didn't realize that until just now. I
16 apologize. So the second subsection.

17 Ms. Berroya. I'm sorry. What was the question
18 again?

19 Ms. Aizcorbe. I'm referring to the comments
20 provided under the second subsection named "Drafting" on
21 page 2.

22 Ms. Berroya. Thank you. And I'm sorry. What was
23 the question about?

24 Ms. Aizcorbe. I'm going to restate it.

25 Ms. Berroya. Thank you.

1 BY MS. AIZCORBE:

2 Q In this email, CEQ's Deputy Associate Director for
3 Regulatory Policy submitted comments on the proposed rule,
4 stating that "one takeaway that any reader should have is
5 that the proposed rule is narrower in scope than the
6 agency's previous interpretation under the Clean Water Act."

7 Can you explain this comment in light of Circular
8 A4's requirement to use current practices at baseline which
9 would show the opposite effect?

10 A No, I can -- I was neither on nor aware of this
11 email. It's the first time I've seen it, and I can't
12 speculate as to the context in which she's making that
13 statement.

14 Q Did you or anyone else to your knowledge or
15 recollection explain this to CEQ or otherwise response to
16 CEQ's comment?

17 A Again, I had until this moment no knowledge of
18 this comment, and I don't know what happened to it or what
19 its context was.

20 Q So you weren't aware of any other discussion about
21 trying to show whether the rule was increasing or decreasing
22 jurisdiction?

23 A There were discussions about whether it in fact
24 was, and that was related, for example, to the certification
25 issue that you raised a short while ago. I'm not familiar

1 with this particular exchange and, again, have no idea what
2 this person who wrote the email was trying to convey or what
3 the context was.

4 Q Can you explain how OIRA interprets Circular A4's
5 requirement that current practice be used as a baseline?

6 A Yes. So typically when -- if a rule is going to
7 change current practice, we want to identify the effects of
8 the rule. We're looking at the differential between what
9 the rule's predicted effects will be and what current
10 practice has been.

11 And so that is -- that is typically what we try to
12 drive the agencies to do, to identify what current practice,
13 in fact, is.

14 Q And do you try to identify an appropriate baseline
15 with any particular goal in mind?

16 A We do not, absolutely not. The sole goal is to
17 try to be transparent to the public about what the impacts
18 will be of the rule.

19 Q Did OIRA encourage the EPA to include indirect
20 impact in its analysis? And I'm specifically referring to
21 the analysis that the EPA uses, the justification for its
22 certification.

23 A I do not recall whether -- what the discussion on
24 indirect impacts was.

25 Q Mr. Laity informed the Committee that OIRA

1 generally focuses on adverse impacts. Can you explain why
2 OIRA does not focus on all impacts?

3 A We think it is very important for the people who
4 are going to comply with the rule to understand what the
5 costs of the rule will be. So when we talk about adverse
6 impact, our goal is something like a first do no harm so we
7 really do want the agencies to be very transparent about
8 what the costs or possible harmful consequences of a rule
9 could be.

10 Agencies want to promulgate their rules. They
11 will typically do a very good job of identifying the
12 benefits. So part of our review role is often to push
13 agencies to make sure they have been fully transparent or as
14 transparent as the data and evidence will allow about what
15 the costs of the rule will be.

16 Q Were you aware of the EPA's use of an informal
17 small business outreach meeting to obtain input from the
18 small business community?

19 A I am not specifically aware of any such meeting.

20 Q At your time at OIRA have you ever recommended
21 having an agency produce an informal SBREFA-like report in
22 lieu of conducting an SBAR panel or regulatory flexibility
23 analysis?

24 A I do not recall that I have ever personally
25 advocated such an approach.

1 Q Mr. Laity informed the committee that information
2 received from this informal small business outreach meeting
3 was considered before promulgating the final rule. Do you
4 know how any of this small business input was actually
5 considered when the EPA certification was already made?

6 Mr. Luftig. The Administrator just said he has no
7 knowledge of a small business meeting. So he can either
8 answer the question to the best of his ability or if you
9 want to ask it differently.

10 BY MS. AIZCORBE:

11 Q Can you explain how small business input was
12 considered when the certification had already been made by
13 EPA?

14 A I do not know how the EPA -- what the EPA did to
15 gather that input or how they used it. I recall the main
16 issue that I was involved with discussing with my staff was
17 whether or not there was any evidence to suggest that
18 compared to the pre-regulatory practice there would be an
19 additional negative consequence from the rule on small
20 businesses, and they were comfortable that the EPA had
21 reached a reasonable determination.

22 Q So it was your understanding that it was EPA's
23 determination, not that some instruction was given to EPA
24 about their certification from any other source?

25 A I have no knowledge of any such thing occurring.

1 | Q Were you or anyone else at OIRA told you had to
2 accept the certification?

3 A No. We actually had, you know, a serious staff
4 discussion about how we felt about it. I do not recall
5 anyone saying any such thing.

6 Q How did OIRA resolve the Office of Advocacy's
7 disagreement with the certification and the agencies'
8 characterization of direct costs?

9 A I don't recall specifically how that was
10 addressed. I just recall that at a certain point the Chief
11 Counsel of the Office of Advocacy did not follow up and did
12 not seek to push the issue any further.

13 Ms. Aizcorbe. I have an email I'd like to
14 introduce into the record as Exhibit 14.

15 [Shelanski Exhibit 14 was marked
16 for
17 Identification.]

18 Ms. Aizcorbe. And I will just be referring to Mr.
19 Dorjets' response at the top of the first page.

20 Mr. Shelanski. Yeah.

21 BY MS. AIZCORBE:

22 Q So here we're talking about the differences of
23 opinion between the agencies and the Office of Advocacy's
24 comments. In Mr. Dorjets' email on Friday, May 15th, 2015,
25 he says Craig -- Greg and Craig to EPA and Army, "passing

1 along SBA's response. Not sure I want to get in the middle
2 of this, but let me know what you think if you think that's
3 best. Vlad."

4 This appears to be the latest communication that
5 we've seen in the production regarding the advocacy issue.
6 Is it common that OIRA would at this point pass this along
7 to the agencies to resolve what the agency -- with the
8 Office of Advocacy on their own or does OIRA ensure that
9 there is appropriate resolution when advocacy disagrees with
10 the certification?

11 A I mean, we at OIRA need to know that the issue is
12 resolved. I think there are different ways. Sometimes it
13 can be worked out directly. Sometimes the parties prefer to
14 have us involved, but I can't speculate as to what was
15 happening here because this is the first time I'm seeing
16 this communication.

17 Q Mr. Laity informed the Committee that it's not
18 really OIRA's role to interpret or to second guess any
19 agency's certification under the Reg. Flex. Act. Can you
20 explain OIRA's role then with respect to providing
21 meaningful oversight of an agency's compliance with that
22 Act?

23 A I can talk to my personal knowledge of what I have
24 done. I will sometimes be contacted by the Chief Counsel
25 from the Office of Advocacy to relay their concerns, and I

1 do think that one of the very important things OIRA does is
2 to make sure that small business interests are addressed by
3 the agency. So I will sometimes act as a conduit, and I
4 want to understand the agency's reasoning for how it is
5 addressing the small business concerns.

6 I may not have legal authority to second guess
7 that certification, but I can play a very useful role in the
8 review process of trying to encourage the agencies to
9 address the small business concerns or at least explain why
10 they are -- better explain why they are not.

11 So that's the role I have personally played. How
12 this is -- how this has been addressed at the staff level
13 and how the staff discussions go on this issue are not
14 something I can personally attest to.

15 Q And did you do so with respect to this rule
16 insofar as contacting the Office of Advocacy or other of the
17 agencies?

18 A I think as I mentioned before, I don't recall the
19 Office of Advocacy following up with me, you know as they
20 have on occasion with other rules.

21 Q Is OIRA responsible for evaluating compliance with
22 other applicable authorities, such as Executive Orders on
23 tribal consultation or state and local consultation for
24 federalism?

25 A I don't recall what our specific legal role is in

1 terms of those consultations. I do know under the Executive
2 Orders that we are supposed to check that the agencies at
3 least have certified or have said that they have dealt with
4 those issues, and you know, certainly those are questions
5 that often come up in rules, and when those questions are
6 raised, we will ask the agencies.

7 Q And when questions are raised and you discuss this
8 with the agencies, would you say that OIRA gets involved in
9 reviewing the sufficiency of an agency's consultation
10 activities or the sufficiency of an agency's efforts to
11 comply with the Executive Orders?

12 A The Executive Orders apply to the agencies and not
13 necessarily to us. I think if we see something that raises
14 real concern, we will raise it with the agencies, but I
15 don't think we conduct a full independent review of what the
16 agencies have done. We more want to make sure that the
17 agency has an answer to whether it has addressed those
18 issues.

19 Q Mr. Laity informed that the Committee was aware
20 that some members of the Corps staff were unhappy with the
21 rulemaking process. Did he discuss this with you?

22 This is from Laity's transcript on page 96 if
23 you'd like to look at it.

24 A Sure. I mean I actually can answer that question
25 without looking at this.

1 I do not recall Mr. Laity discussing with me
2 unhappiness in the Corps staff. I do recall when we were
3 talking about the scope of jurisdiction his conveying to me
4 a difference of opinion between Corps staff and EPA staff,
5 but I don't recall hearing that anybody was unhappy.

6 Q Were you aware at any point during the rulemaking
7 that the Corps disagreed with any of the rules, conclusions
8 and use of scientific data?⁷

9 A -I do not recall being aware of that.

10 Q Are you aware of the so-called Peabody memoranda
11 detailing concerns raised by the Corps senior leadership
12 regarding scientific, legal and procedural deficiencies in
13 the rule?

14 A No, I'm not familiar with that document.

15 Q Was it your understanding that the EPA would be
16 the lead on any part of the rulemaking or speak on the
17 Corps' behalf to OIRA in this rulemaking?

18 A I know that as a matter of fact when I had inter -
19 - when I had agency interactions with the exception of the
20 one meeting in Mr. Deese's office, I believe that most of my
21 interactions were with the EPA, but I also recall being
22 informed at different points that the Corps was being
23 consulted, and I know that staff was regularly in contact
24 with people from both agencies.

25 Q And you would know that just based on their

1 regular updates on the rule?

2 A Their regular updates, but I also might add that a
3 number of the emails that you showed me for the first time
4 here confirmed that impression by showing that members,
5 people from the Corps staff were included in those emails.

6 Q Well, I was asking because we have a similar
7 amount of emails that only have EPA on them, which for the
8 sake of time I wasn't introducing today, but --

9 A No, staff regularly relayed to me what, you know,
10 the Corps disagrees or the Corps thinks differently or the
11 Corps -- and that was what really particularly during the
12 final rule. So I inferred from that that there was regular
13 participation of the Corps in this process.

14 Q Does OIRA have guidance or policies on how to
15 coordinate with agencies in joint rulemakings to ensure
16 equal representation in the rulemaking process?

17 A I do not know of any such specific guidance.

18 Ms. Aizcorbe. I'd like to introduce this email
19 into the record as Exhibit 15.

20 [Shelanski's Exhibit 15 was marked for
21 identification.]

22 Mr. Shelanski. Thank you, sir.

23 Ms. Aizcorbe. And feel free to review the entire
24 chain, but I'm referring to Mr. Laity's email at the bottom
25 of page 1 from November 27th.

1 Mr. Shelanski. Okay. And I'm sorry. The one at
2 the bottom you said?

3 Ms. Aizcorbe. Of page 1.

4 Mr. Shelanski. Okay.

5 Ms. Aizcorbe. But feel free to take a look at the
6 entirety of the chain if you need.

7 Mr. Shelanski. Yes. Okay.

8 BY MS. AIZCORBE:

9 Q In an email chain between Mr. Laity and Mr. Peck
10 of the EPA during the proposed rule stage, toward the bottom
11 of the page, Mr. Laity discusses setting up a meeting
12 between you and Administrator McCarthy to resolve five
13 policy level issues.

14 Mr. Peck responds that he tried to suggest that
15 they be resolved at the ~~South Level~~staff level, and I
16 apologize because I didn't refer you to that specific
17 language. So met e find it first.

18 Okay. So let me refer you to that second section
19 before I finish the question.

20 A Sure.

21 Q So above the November 27th email Mr. Laity
22 responds to Mr. Peck saying, "I believe Howard will suggest
23 the staff work these issues a bit first and tee up for
24 policy level discussions with specific options as normally
25 happens. However, not sure how he will respond if Gina

1 disagrees."

2 So let me restate the question, and I apologize.

3 In an email chain between Mr. Laity and Mr. Peck
4 during the proposed rule stage, Mr. Laity discusses setting
5 up a meeting between you and Administrator McCarthy to
6 resolve five policy level issues.

7 Do you recall these issues that they are referring
8 to?

9 A I do not specifically recall them sitting here
10 today.

11 Q Do you recall meeting with the Administrator
12 around this time?

13 A I mean, this email refers to setting up a call,
14 and it's not uncommon during review of a rule for me to have
15 a call with a senior official in an agency just to identify
16 what the process will be for moving forward with big issues
17 that have been identified by staff.

18 It looks like that kind of routine interaction.

19 Q We spoke a little bit earlier about the issuance
20 of return letters, and you mentioned I know in one of our
21 previous hearings about the fact that you liked to work with
22 the agencies in order to avoid moving forward with a return.
23 Is that accurate?

24 A Yes, I prefer if possible to improve the rule
25 rather than send it back.

1 Q And to be clear I asked you earlier about
2 discussions regarding withdrawal, but I didn't ask whether
3 you at any point recommended that the agencies take more
4 time to conduct more science, assess alternatives, fully
5 consider public comment, or for any other reason.

6 A No, I felt during the proposed phase, which was a
7 fairly long review, that the issues that you just raised
8 were well resolved.

9 Q Have you participated in the review of other joint
10 rulemaking?

11 A I would have to go back and check. Joint
12 rulemakings are not terribly common. I'm sure there's
13 another one in the, you know, couple thousand that have
14 happened since I've been there, but sitting here today I
15 can't recall one off the top of my head.

16 Q Have you experienced one rulemaking agency
17 disagreeing with the substance or conclusions of a rule at
18 the final stages of a joint rulemaking?

19 A Can I amend my last answer?

20 Q Un-huh.

21 A I do recall one. Obviously the CAFE standards are
22 jointly administered by the EPA and the DOT. So that would
23 be one big example.

24 Q Was this rulemaking any different to you in how
25 OIRA approached its review or --

1 A No, this felt from my vantage point like a very
2 normal and productive interaction between the joint agencies
3 that were promulgating the rule.

4 Q So have you ever experienced one rulemaking agency
5 to a joint rulemaking disagreeing with the substance or
6 conclusions of the rule at the final stages of the joint
7 rulemaking?

8 A At the final stages? I don't recall any such
9 situation.

10 Q How would OIRA normally handle such a situation?

11 A Well, that would -- there would be a significant -
12 - the way we resolve major differences between agencies is
13 we will call the principals together and we'll have a
14 discussion. We will try to reach a compromise solution. If
15 we can't reach a solution, again, there will be, you know, a
16 very significant principals meeting involving not just the
17 agencies but you know, senior White House officials to try
18 to come up with the best resolution.

19 Q Executive Order 12866 requires OIRA to consider
20 the priorities of the President in its review. How does
21 OIRA receive information about the President's priorities
22 and how does OIRA incorporate that information into the
23 review process?

24 A The place where the President's priorities come
25 most into play is in the significance determination. So a

1 rule that might otherwise be fairly simple if it relates to
2 an identified priority of the President, a major policy area
3 of the President, we would deem it significant so that there
4 could be interagency review and awareness of the rule.

5 Q At any point did you become aware of or receive
6 any instruction or suggestion that OIRA should stand down on
7 any concerns regarding the WOTUS rulemaking or otherwise
8 ensure successful passage through the review process?

9 A No, I did not.

10 Q Mr. Laity informed the Committee that OIRA
11 occasionally receives instructions to ensure the rule makes
12 it through the review process, including court ordered
13 deadlines or on occasion very high profile rules where the
14 administration has made a public commitment to get something
15 done by a particular time.

16 It's on page 165 of his transcript.

17 A [Examining document.] Okay.

18 Q Can you provide any examples of such high profile
19 rules that Mr. Laity might have been referring to?

20 A As I read Mr. Laity's testimony, which I'll just
21 note I'm seeing for the first time, he says, "There could
22 also be a very high profile rule where the administration
23 has made a public commitment and then we would also be aware
24 of that and do our very best to meet that deadline."

25 I think that that -- you know, that hypothetical

1 situation has actually occurred a couple of times, but as I
2 said, I agree with Mr. Laity. We do our very best to meet
3 that deadline. I don't recall actually being told, "You
4 have to meet, you know, a particular day."

5 But we've been given targets on a number of
6 things. There have been public commitments in a number of
7 statements, and we do our best to meet them.

8 Q Was WOTUS one of these rules?

9 A Not that I recall, no.

10 Q Mr. Laity also informed the Committee that it is
11 not uncommon to hear that there is a desire on the part of
12 the administration to get a rule done on a particular
13 schedule, and I think you just referenced that.

14 A Yes.

15 Q Did anyone else within OIRA receive or give such
16 direction with respect to any of the other administration's
17 environmental proposals, which we have been told were a part
18 of the WOTUS timing as far as when WOTUS was going to be
19 rolled out?

20 A I do not have a specific recollection of how the
21 roll-out was managed with respect to other rules. I'm not
22 aware of what instructions. I did not receive instructions
23 other than, you know, as we got down to the final day of,
24 you know, exactly, you know, when it would be good to
25 coordinate with the roll-out as per a discussion we had

1 earlier.

2 But in terms of coordination with other rules, I
3 have no specific recollection of that.

4 Q We were speaking a little bit earlier. I believe
5 my colleagues raise the fact that this has been a very long
6 rulemaking, and as you have said, it has gone through
7 several iterations, including a guidance, a proposed rule.
8 We understand there was an interpretive rule at one point,
9 and then the final rule.

10 In your opinion, when we were discussing deadlines
11 and the pressure to get the rule out the door, did it seem
12 at all odd to you that you should meet a one and a half or
13 two week deadline for interagency review for a rule that had
14 already taken so long?

15 A Once a rule gets to us, it's my responsibility.
16 What happened in the past before I got there or what
17 happened with guidances, I'm not even aware of some of the
18 other things you're referring to like the interpretive rule.
19 These are -- those are not things that were my
20 responsibility.

21 Once a rule gets to OIRA, it's our
22 | resp~~o~~nsibility, and so I treat each rule not in the
23 context of its history, but in the context of what I have
24 before me, and therefore especially knowing that there was a
25 lot of other stuff coming in from agencies that we were

1 going to have to deal with through the spring of '15 and
2 summer of '15.

3 It was my own desire just to be responsible and
4 efficient in our rulemaking that led to my setting -- you
5 know, asking staff to please adhere to deadlines.

6 Q OIRA did review the guidance; is that correct?

7 A I don't know what happened. I was not at OIRA
8 when the guidance process was occurring. So I don't have
9 personal knowledge of that.

10 Q Were you ever told in any way or feel pressure to
11 achieve a specific result with the WOTUS rulemaking?

12 A No.

13 Q Were you ever told that your communications
14 regarding this rule would have to be treated in any manner?

15 A No.

16 Q That they would first have to be run by OMB or
17 Executive Office of the President's staff?

18 A No.

19 Q Earlier when we were discussing logical outgrowth
20 and you had mentioned to my colleagues that a conclusion had
21 been reached that the rule and its changes were a logical
22 outgrowth of the proposed rule. Do you recall who that
23 conclusion was made by?

24 A I recall that conclusion either being ratified or
25 emerging from a meeting that I attended, the meeting in Mr.

1 Deese's office. I couldn't tell you who or, you know,
2 specifically what couple of people made that determination.
3 It was discussed in the group meeting and generally agreed
4 to. That's my recollection.

5 Q Just a few clean-up questions, and then we can --

6 A Sure.

7 Q When were you notified that the Committee asked
8 for your interview?

9 A I don't recall when I was notified. I feel like
10 it was sometime around my March hearing or maybe at that.
11 It's hard for -- you know, I've known for some time. I
12 obviously knew by time of the April hearing. How far back
13 or when that happened I don't recall.

14 Q Do you recall who informed you that the Committee
15 was seeking your interview?

16 A I do not.

17 Q Have you been asked to produce documents or emails
18 relating to the rulemaking that we have not already
19 discussed today?

20 A I'm sorry. I'm -- can -- can you repeat that
21 question?

22 Q Have you been asked to produce any information,
23 documents or emails related to the rulemaking that you have
24 not -- we have not discussed already today?

25 So in essence I'm asking is there anything else

1 that you have not already produced to the Office of General
2 Counsel.

3 A Oh, not that I'm aware of, no.

4 Ms. Aizcorbe. Okay.

5 Mr. Longani. Just to be clear, that relate to
6 this rulemaking?

7 Ms. Aizcorbe. Correct.

8 BY MS. AIZCORBE:

9 Q Did you receive any instruction in preparation for
10 today's interview?

11 A I was told -- I met with counsel who told me what
12 the format would be and just told me to tell the truth.

13 [Counsel conferred.]

14 Ms. Aizcorbe. Okay. Thank you.

15 Mr. Shelanski. Thank you.

16 Ms. Aizcorbe. We're finished. We can go off the
17 record.

18 [A brief recess was taken.]

19 Mr. Longani. Let's go back on the record.

20 Just a few wrap-up questions for you,

21 Administrator Shelanski, and then we'll let you go.

22 EXAMINATION [Resumed]

23 BY MR. LONGANI:

24 Q In the last hour you had a brief discussion with
25 my colleagues about NEPA and the responsibility of OIRA to

1 ensure compliance with NEPA. Do you remember that?

2 A Yes, sir. I remember that exchange.

3 Q When the Committee spoke to Vlad Dorjets, he
4 indicated that it was CEQ's responsibility statutorily to
5 ensure that all rules comply with NEPA. So OIRA would
6 generally defer to CEQ.

7 Do you have any reason to disagree with Mr.
8 Dorjets on that point?

9 A No, I have no reason to disagree with him, and his
10 response is consistent with my own.

11 Mr. Longani. Give me Exhibit 11.

12 Administrator, that is just our internal --

13 Mr. Shelanski. Oh, sorry.

14 Mr. Longani. And this will be for the record
15 Exhibit 16. Thank you.

16 BY MR. LONGANI:

17 Q Administrator, in the last hour you also talked a
18 little bit about compliance with the Regulatory Flexibility
19 Act; is that correct?

20 A Yes, I received some questions on that topic.

21 Q Mr. Laity informed the Committee that when you
22 came aboard he briefed you on OIRA's decision to accept the
23 previous Administrator Cass Sunstein's decision to
24 ultimately accept EPA's certification. Do you recall that
25 briefing?

1 A I do not specifically recall that briefing. But
2 now that you mention it, that's consistent with my
3 recollection that staff was comfortable with the
4 determination.

5 Q Did you agree with your predecessor's
6 determination to accept the certification?

7 A I had no basis to disagree with Mr. Sunstein's
8 acceptance of that.

9 Q Mr. Laity also indicated that you were comfortable
10 with the agreement reached between EPA and OIRA regarding
11 what amounted to an informal SBREFA process. Does that
12 also -- is that consistent with your memory?

13 A Yeah, I don't remember asking for any particular
14 process, but I remember being comfortable with the
15 resolution of the small business concerns.

16 Mr. Longani. I'm going to show you now what I am
17 marking as Exhibit 16.

18 [Shelanski Exhibit No. 16 was marked for
19 identification.]

20 Mr. Longani. And I'm not going to ask you to read
21 the entire document. I will point you to a specific portion
22 of it.

23 The document is a joint report titled "Final
24 Report of the Discretionary Small Entity Outreach for the
25 Clean Water Rule, Definition of Waters of the United States,

1 under the Clean Water Act Final Rule," and it's dated May
2 2015.

3 BY MR. LONGANI:

4 Q Administrator, I'm first going to ask you to turn
5 to page 19, and I'm going to ask you to read the last
6 paragraph on page 19 please, and when you're done if you
7 could look up at me, I'd appreciate it.

8 A [Examining document.]

9 Q In that last paragraph, the report states in part,
10 "Given the vital role small entities play in the
11 implementation of the CWA, the agency has decided to solicit
12 technical input through outreach."

13 And it's the second sentence of that paragraph.

14 Have you read that now, Administrator?

15 A Yes, I have.

16 Q Do you have any reason to disagree with that
17 sentence, any facts that would ~~contradict~~~~be contract to~~ that
18 statement?

19 A I have no basis to disagree with that statement.

20 Q Okay. Would you have agreed to conclude the Clean
21 Water Rule's review if you had significant unaddressed
22 concerns regarding the small business entity certification?

23 A No. I would have continued the process to address
24 those concerns.

25 Q I'm going to ask you now to turn to page 2 of the

1 exhibit.

2 A [Examining document.]

3 Q And specifically -- brief indulgence.

4 I'm going to ask you to read the last paragraph on
5 page 2 please.

6 A The last full paragraph or the one that continues?

7 Q The one that's partial.

8 A The one that's partial. [Examining document.]

9 Yes.

10 Q And it says in the last sentence on this page, "In
11 light of this interest" -- let me just read the whole
12 paragraph.

13 "Nevertheless, the scope of the term 'waters of
14 the United States' is a question that has continued to
15 generate substantial interest, particularly within the small
16 business community, because permits must be obtained from
17 any discharges of pollutants into those waters. In light of
18 this interest, EPA and Army determined to seek wide input
19 from representatives of small entities while formulating the
20 proposed and final definition of this term that reflects the
21 intent of Congress, consistent with the Supreme Court's
22 decisions."

23 Do you have any reason to disagree or do you have
24 any reason to contest the fact that the EPA and Army did,
25 indeed, seek wide output from representatives of small

1 entities while formulating the proposed and final rules?

2 A I have no basis to contest or disagree with that
3 assertion.

4 Q In fact, further down in that paragraph, it
5 states, "The agencies conducted outreach meetings in 2011
6 and 2014 designed to exchange information with small
7 entities interested in this action."

8 Again, first of all, was OIRA involved in any of
9 these meetings to your knowledge?

10 A To my personal knowledge I do not have any
11 personal knowledge of whether we were involved.

12 Q Any reason to think that those meetings didn't
13 take place?

14 A No.

15 Q On page 20 of this report, it says that these
16 comments, and I'll let you go ahead and read it. It's right
17 before the adjacency section.

18 A Yes.

19 Q There's the last sentence says, "These and other
20 comments received were considered in the development of the
21 final rule, and it's a summary of some of the major comments
22 that the agencies heard during meetings with stakeholders
23 and in public comments submitted to the agencies."

24 Do you have any basis to challenge that statement?

25 A I have no basis to challenge that statement.

1 Q Mr. Laity testified that part of the discussion
2 about whether the EPA would certify the rule or not included
3 a commitment by the EPA to conduct a SBREFA-like process and
4 to make it as much like the SBREFA process as possible, and
5 OIRA and the SBA Office of Advocacy participated in that
6 process to a certain extent.

7 Is that accurate to your memory?

8 A I have no reason to disagree with that. It's
9 generally consistent with my recollection, which I must
10 confess is not very specific at this point.

11 Q Okay. Mr. Laity also told the Committee that the
12 decision to accept EPA's determination to certify the rule
13 was largely a legal determination that turned on this
14 discussion of what is a direct and indirect effect and what
15 is the appropriate baseline.

16 Would you agree with that?

17 A Yes, that's consistent with my recollection.

18 Q And would you agree the decision to accept EPA's
19 determination was made at OIRA by a person at the
20 appropriate level, and in this case Mr. Sunstein?

21 A Yes.

22 Q Mr. Shelanski, did you have any role in conducting
23 the economic analysis for the Clean Water Rule?

24 A I had no personal role in conducting that
25 analysis.

1 Q Was that because you don't typically participate
2 in the creation and/or analysis of the economic analysis?

3 A Typically the agency prepares the economic
4 analysis or the RIA in the first instance, and it's
5 something that staff will review, and just as with any other
6 part of the rule package, there may be times that I get
7 involved with specific issues that might arise as they
8 elevate.

9 Q Okay. And at the conclusion of OIRA's review of
10 the economic analysis, did you have any reason to challenge
11 the EPA's methodology that was used -- that it used in the
12 economic analysis?

13 A No.

14 Q Have any reason to challenge the analysis and
15 conclusions that were reached in the economic analysis?

16 A No.

17 Q Would you have recommended concluding the review
18 of the rule as consistent if you had -- excuse me.

19 Would you have recommended concluding the rule if
20 you had significant unresolved concerns about the economic
21 analysis?

22 A No. When I have significant unresolved concerns,
23 I continue the process until we resolve those concerns.

24 Q Do you have any evidence to suggest that the
25 economic analysis was unduly influenced by either the EPA or

1 the Army?

2 A I do not.

3 Mr. Longani. And a brief indulgence for just a
4 moment.

5 [Counsel conferred.]

6 BY MR. LONGANI:

7 Q Did you have any concerns about how the EPA and
8 the Army were interacting during the rule review process?

9 A No, I had no specific familiarity with how they
10 were interacting, and from my vantage point, as I said
11 before, it looked like a normal and cooperative interaction.

12 Q During a rulemaking process, joint or otherwise,
13 is every staff member's recommendation adopted and
14 integrated into the final rule by the ultimate decision
15 maker?

16 A No, not at all. Many times these are inconsistent
17 or not well founded, and so it's a process of iteration and
18 discussion.

19 Mr. Longani. A brief indulgence.

20 [Counsel conferred.]

21 Mr. Longani. Thank you, Mr. Shelanski.

22 Mr. Shelanski. Thank you.

23 [Whereupon, the interview was concluded at 3:55
24 p.m.]

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CERTIFICATE OF DEPONENT/INTERVIEWEE

I have read the foregoing 186 pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Howard Shelanski