

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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<http://oversight.house.gov>

March 13, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

On March 3, 2015, the Committee held a hearing entitled, “Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking.” During the hearing, several Members of the Committee expressed concerns regarding the Environmental Protection Agency’s and Army Corps of Engineers’ proposed “Waters of the United States” rule.¹ We are writing to request that you produce documents and information to address those concerns about the development of the proposed rule.

The designation of a proposed rule as “significant” or “major,” and certification that the rule will not have a “significant impact on a substantial number of small entities” under the Regulatory Flexibility Act (RFA)² (together, “classifications”) determines the way the proposed rule is handled at various stages of the regulatory process. Among other things, the classifications determine the type and level of analysis the rulemaking agency must undertake before promulgating the rule. The classification also triggers certain legal protections.

Significant or major rules are subject to a higher degree of scrutiny. The Congressional Review Act requires agencies to submit “major” rules to Congress and the Government Accountability Office (GAO), where they undergo a mandatory period of review before promulgation.³ Executive Order 12866 requires the Office of Information and Regulatory Affairs (OIRA) to review “significant” rules before they are promulgated.⁴ Additionally, the RFA requires agencies to analyze whether newly proposed regulations will significantly and

¹ Definition of Waters of the United States Under the Clean Water Act, 79 Fed. Reg. 22188 (Apr. 21, 2014).

² Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. 104-121, Title II, 100 Stat. 857 (1996) (codified in 5 U.S.C. § 601 et seq.) [hereinafter “small business impact”].

³ Congressional Review Act, 5 U.S.C. § 801.

⁴ Executive Order 12,866 § 6, “Regulatory Planning and Review” 58 Fed. Reg. 51,735 (Oct. 4, 1993).

adversely impact a substantial number of small entities, and, if so, conduct additional analysis and outreach before the proposed rule is finalized.⁵

The U.S. Small Business Administration Office of Advocacy (Advocacy) and various industry groups have raised concerns regarding the designations and certifications of federal rules and the process by which those classifications are made. In identifying a number of issues related to the lack of transparency in the federal rulemaking process,⁶ GAO found that in a majority of cases, agencies did not explain why a rule was or was not designated “significant” under Executive Order 12866.⁷ Advocacy has repeatedly found that agencies improperly certify rules as not meeting the threshold small business impact under the RFA.⁸ Other reports show inconsistencies in agency designations of “major” rules, or those OIRA finds have “resulted in or [are] likely to result in an annual effect on the economy of \$100 million or more.”⁹

On October 1, 2014, Advocacy determined that the proposed rule’s RFA certification was inappropriate, as the rule provides “ample evidence of a potentially significant economic impact,” and found that the agencies’ own economic analysis indicated that “small businesses will see a cost increase as a result of the [rule].”¹⁰ Further, the EPA and Corps used a different baseline to analyze small business impacts under the RFA than was used in the regulatory impact analysis required under Executive Order 12866,¹¹ which calls the legitimacy of the RFA certification into question.¹² The EPA and Corps designated the proposed rule as “not economically significant” and “non-major,” despite the fact that the agencies themselves estimate the rule will impose costs between \$133 and \$231 million, annually.¹³

During the March 3, 2015, hearing, Members of the Committee raised concerns regarding the proposed rule’s classifications and asked OIRA Administrator Howard Shelanski for information relating to how the EPA and Corps came to their development. Administrator Shelanski testified that those decisions were made by the rulemaking agencies and that OIRA merely reviews such decisions.

⁵ *Supra* fn 2.

⁶ “Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations’ Significance Could Be More Transparent,” GAO-14-714 (Sep. 11, 2014).

⁷ *Supra* fn 4 at § 3(f).

⁸ U.S. Small Bus. Admin. Office of Advocacy, “Regulatory Flexibility Act Annual Reports,” available at <https://www.sba.gov/advocacy/regulatory-flexibility-act-annual-reports>.

⁹ Congressional Review Act, 5 U.S.C. § 804(2). See also Sam Batkins, *Administration Compliance with the Congressional Review Act*, American Action Forum (Apr. 2, 2014) and Curtis W. Copeland, *Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress* (Jul. 15, 2014), commissioned by the Administrative Conference of the United States (ACUS).

¹⁰ Letter from Advocacy to the EPA and Army Corps, “Definition of ‘Waters of the United States’ Under the Clean Water Act,” (Oct. 1, 2014). See also “Waters Advocacy Coalition (WAC) Letter on Definition of Waters of the U.S.,” U.S. Chamber of Commerce (June 10, 2014) and Ryan Yonk, Ken Sim, Josh DeFriez, “Definition of ‘Waters of the United States’ Under the Clean Water Act,” Mercatus Center (Oct. 31, 2014).

¹¹ 3 C.F.R. 628 (1993), reprinted in 58 Fed. Reg. 51,735 (Oct. 4, 1993).

¹² *Id.* fn 4. See also U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, “Economic Analysis of Proposed Revised Definition of Waters of the United States” (2014) at 2. [hereinafter Economic Analysis]

¹³ *Id.* See also Economic Analysis at 33.

In light of Administrator Shelanski's testimony, we are requesting documents and information from the EPA that will help the Committee understand the development of the proposed rule. Please provide the following documents and information as soon as possible, but no later than 5:00 p.m. on March 23, 2015:

1. All documents and communications between and among EPA and Corps employees and the White House, the Office of Management and Budget (OMB), and OIRA, referring or relating to the proposed rule, including, but not limited to:
 - a. designation of the proposed rule as major or non-major, significant or non-significant, economically significant or not economically significant, or other;
 - b. certification that there will be no significant adverse impact on the small business community under the RFA, including, but not limited to, documents and communications referring or relating to the factual basis underlying such certification; and
 - c. recommendations, advice, views, directions, suggestions, or preferences, sent or received by any EPA, Corps, White House, OMB, and/or OIRA employee, about such designations or certification.
2. All documents prepared pursuant to EPA policies on RFA compliance in the course of the proposed rule's development, including, but not limited to, internal documents relating to EPA's evaluation of potential businesses that may be affected by the rule and the economic burdens that the rule will impose on those businesses.
3. All documents prepared pursuant to Corps policies on RFA compliance in the course of the proposed rule's development, including, but not limited to, internal documents relating to Corps' evaluation of potential businesses that may be affected by the rule and the economic burdens that the rule will impose on those businesses.
4. All documents, including, but not limited to, internal guidance, referring or relating to the EPA's or Corps' process for making "significance" designations under E.O. 12866, making "major" designations under the CRA, or certifying a rule's small business impact under the RFA.

These requests should be interpreted to also include, but not be limited to, relevant information before the proposed rule's submission to OIRA for review and publication in the Federal Register. An attachment to this letter provides additional information about responding to the Committee's request. When producing documents to the Committee, please deliver production sets to the Majority staff in Room 2157 of the Rayburn House Office Building and the Minority staff in Room 2471 of the Rayburn House Office Building.

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The Committee on Oversight and Government Reform is the principal investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, the Committee has authority to investigate "any matter" at "any time."

Thank you for your cooperation in this matter. If you have any questions regarding this request, please contact Christina Aizcorbe of the Committee staff at (202) 225-5074.

Sincerely,



Jason Chaffetz
Chairman



Mark Meadows
Chairman
Subcommittee on Government
Operations



Jim Jordan
Chairman
Subcommittee on Health Care
Benefits and Administrative Rules



Cynthia M. Lummis
Chairman
Subcommittee on the Interior

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Gerald E. Connolly, Ranking Minority Member
Subcommittee on Government Operations

The Honorable Matt Cartwright, Ranking Minority Member
Subcommittee on Health Care, Benefits and Administrative Rules

The Honorable Brenda L. Lawrence, Ranking Minority Member
Subcommittee on the Interior

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.