

## **BACKGROUND ON OVERSIGHT COMMITTEE INVESTIGATION OF CLEAN WATER RULE**

### **I. The New Clean Water Rule Will Help Protect Drinking Water for Millions of Americans**

Passed in 1972, the Clean Water Act gives the federal government jurisdiction to regulate inputs to certain navigable waters—known as waters of the United States—to safeguard their environmental quality. After years of confusion over the definition of navigable waters leading to uneven implementation of the Act, the Environmental Protection Agency (EPA) and the Army Corps of Engineers issued the Clean Water Rule in 2015 to provide clarity and protect access to safe, clean, and drinkable water for more than 117 million Americans.

Craig Schmauder, the Deputy General Counsel for the Army, explained during his interview with Committee staff that the Clean Water Rule was written to define “tributary” in order to clarify the Act’s scope, and he explained that the Clean Water Rule could have a positive impact on the water quality of the Flint River:

Q: So then the relevant question would be, the second- and third-order streams?

A: Feeding the Flint River, correct. And that’s probably where this pollutant, or these agricultural pollutants and industrial systems are feeding into. It is probably upstream, upstream streams or tribes.

Q: And did the definition of which of those second- and third-order streams are covered by the Waters of the United States rule could impact the cleanliness of the water in the Flint River itself, correct?

A: It certainly could, yes.<sup>1</sup>

Similarly, Jo-Ellen Darcy, the Assistant Secretary of the Army for Civil Works, explained that the Clean Water Rule could help protect clean drinking water for millions of Americans:

According to the USGS—US Geological Survey about 59 percent of the headwaters of—in this country are the source of drinking water for—and under the existing rule, the rule before this proposed rule, some of those headwaters were not included in—as being jurisdictional under the rule. So the extrapolation was that of the people who get their drinking—about 117 million people get their drinking water from the headwaters that were not protected under the earlier rule.<sup>2</sup>

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<sup>1</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Craig Schmauder (Feb. 17, 2016), at 188.

<sup>2</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Jo-Ellen Darcy (Mar. 29, 2016), at 96.

In addition, Nancy Stoner, the Acting Administrator for Water at the EPA, stated during her interview with Committee staff that the number of Americans protected could be even greater: “There are probably a lot more Americans because there are a lot more Americans now than there were then. So if it was from 2006 or 2007, so there probably—it understates the number of people.”<sup>3</sup>

Unfortunately, the Republican staff report disregards these positive benefits for the American people and focuses instead on alleged process fouls that have largely been debunked.

## **II. GAO Concluded That the EPA and Army Fully Complied With Statutory and Regulatory Requirements**

On July 16, 2015, the nonpartisan Government Accountability Office (GAO) issued a report concluding that the EPA and Army Corps fully complied with statutory and regulatory requirements in promulgating their new joint rule implementing the Clean Water Act. This report was issued pursuant to the Congressional Review Act, which requires GAO to “report to Congress on whether an agency, in promulgating a major rule, has complied with the regulatory process.”<sup>4</sup>

GAO examined their compliance with a variety of rulemaking procedures. For example, GAO reported that the agencies prepared an economic analysis and fulfilled the requirement for conducting a cost-benefit analysis, and they also met the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act. GAO also concluded that the agencies complied with the Administrative Procedure Act, as they “published a proposed rule and solicited comments for 200 days,” while also receiving “input through their public outreach effort, which included over 400 meetings nationwide.” GAO also reported that the agencies complied with Executive Order 13,132. Given these findings, GAO concluded: “Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.”<sup>5</sup>

Unfortunately, the Republican staff report disregards these findings and argues inaccurately that the “EPA routinely failed to follow the law.”<sup>6</sup>

Witnesses interviewed by the Committee supported GAO’s conclusions. For example, Ms. Stoner, the Acting Administrator for Water at the EPA, had this exchange during her interview with Committee staff:

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<sup>3</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Nancy Stoner (July 21, 2016), at 108.

<sup>4</sup> Government Accountability Office, *Congressional Review Act FAQs* (online at [www.gao.gov/legal/congressional-review-act/faq](http://www.gao.gov/legal/congressional-review-act/faq)).

<sup>5</sup> Government Accountability Office, *Department of Defense, Department of the Army, Corps of Engineers; Environmental Protection Agency: Clean Water Rule: Definition of “Waters of the United States”* (July 16, 2015) (online at [www.gao.gov/assets/680/671628.pdf](http://www.gao.gov/assets/680/671628.pdf)).

<sup>6</sup> *Politicization of the Waters of the United States Rulemaking*, Republican Staff, House Committee on Oversight and Government Reform (Oct. 25, 2016), at 180.

Q: As to the Regulatory Flexibility Analysis, again, the GAO made a finding of compliance. Do you have any reason to disagree with the GAO's finding of compliance as to the Regulatory Flexibility Analysis?

A: I don't.

Q: Any reason to disagree with the GAO's finding of compliance as to the Unfunded Mandates Reform Act of 1995?

A: I don't.

Q: Any reason to disagree with the GAO's finding of compliance as to the Administrative Procedure Act?

A: I don't.

Q: And any reason why you might disagree with the GAO's finding of compliance as to the Paperwork Reduction Act?

A: I don't.

Q: And finally, any reason to disagree with the GAO's finding of compliance as to Executive Orders 12866 and 13563?

A: I don't.<sup>7</sup>

Similarly, Mr. Schmauder, the Deputy General Counsel for the Army, had this exchange during his interview with Committee staff:

Q: Do you believe the rule as promulgated meets all of the regulatory requirements?

A: Yes, I do.<sup>8</sup>

### **III. Despite Isolated Complaints By Some Army Employees, The Top Army Official Signed Off on The Final Clean Water Rule**

Ms. Darcy, the Assistant Secretary of the Army for Civil Works, approved of the final joint rule after a thorough review of all views within the Army Corps.

During her interview with Committee staff, Assistant Secretary Darcy explained that she is the policymaker with final rulemaking authority on behalf of the Army and the Army Corps. She stated: "I considered all of the issues raised by the Corps."<sup>9</sup>

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<sup>7</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Nancy Stoner (July 21, 2016), at 103.

<sup>8</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Craig Schmauder (Feb. 17, 2016), at 204.

Assistant Secretary Darcy also explained that the collaborative work on the Clean Water Rule improved the working relationship between the Army and the EPA:

I would say that as—throughout the development of the rule the relationship improved over time. And I think it has been a result of the fact that we were collaborating for—for a shared goal which was to make the Clean Water Act more transparent, more predictable for the stakeholders who rely on it. And I think because of that we improved the relationship between the two agencies dramatically.<sup>10</sup>

Other witnesses interviewed by the Committee described an inclusive rulemaking process, despite inaccurate Republican claims that the “EPA routinely and intentionally ignored the Corps.”<sup>11</sup>

Mr. Schmauder, the Deputy General Counsel for the Army, explained during his interview with Committee staff how the rulemaking process included both the EPA and Army:

I would say that we met with great success in putting out a rule that, again, met those three tenets that I kept talking about earlier, a rule that was grounded in science, consistent with the law, and provided clear, consistent, and unambiguous guidance to the regulated public.<sup>12</sup>

Mr. Schmauder also informed Committee staff that the Army Corps was never excluded from the rulemaking process:

Q: Were you, at any point in time, directed to exclude Corps staff members from the rulemaking process?

A: No, I was not.

Q: Did you, in fact, exclude Corps members from the rulemaking process?

A: No, I did not.<sup>13</sup>

Mr. Schmauder noted:

[T]he Administrator has the authority, as defined as the statute provides and as the Attorney General has interpreted the provisions of the Clean Water Act, that at the end of

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<sup>9</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Jo-ellen Darcy (Mar. 29, 2016), at 73.

<sup>10</sup> *Id.* at 154.

<sup>11</sup> *Politicization of the Waters of the United States Rulemaking*, Republican Staff, House Committee on Oversight and Government Reform (Oct. 25, 2016), at 180.

<sup>12</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Craig Schmauder (Feb. 17, 2016), at 64.

<sup>13</sup> *Id.* at 204.

the day, there is one person that has been given the authority, by Congress, for the Clean Water Act, and that's the Administrator, not the Corps of Engineers or the Secretary of the Army.<sup>14</sup>

Mr. Schmauder also told Committee staff that concerns expressed in the comments to the proposed rule were considered by the agencies:

Q: In your experience with rulemaking, in a rule where there were a million comments, would you expect that all 1 million comments would be responded to individually?

A: No.

...

Q: Did the Corps and the EPA—excuse me, did the Army and the EPA consider the concerns that were raised in the comments in the comment period?

A: Yes. We did.<sup>15</sup>

When asked if the rule was inappropriately influenced by politics, Mr. Schmauder replied: “No. Not at all.”<sup>16</sup>

The Republican staff report relies heavily on statements from one individual within the Army Corps, Chip Smith, the Assistant for Environmental, Tribal, and Regulatory Affairs, who claimed that he was retaliated against and removed from work on clean water issues as a result of his recommendation that an environmental impact statement be completed rather than a finding of no significant impact (a “FONSI”).

Unfortunately, the Republican staff report disregards other statements from Mr. Smith and from additional witnesses. For example, during his interview with Committee staff, Mr. Smith was asked if he had ever received an instruction to disregard science. He replied: “No.”<sup>17</sup>

The Republican staff report also omits this key exchange Mr. Smith had with Committee staff:

Q: You mentioned earlier when you were explaining what you believed the retaliation to be a feeling of walking on egg shells, things of that nature. Did you suffer a pay loss?

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<sup>14</sup> *Id.* at 67.

<sup>15</sup> *Id.* at 122-123.

<sup>16</sup> *Id.* at 203.

<sup>17</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Charles Smith (Jan. 21, 2016), at 47.

A: I did not.

Q: Did your grade change?

A: No.

Q: Did your title change?

A: No.

...

Q: Were you removed from involvement in any other rulemakings or development of guidance for any other rules?

A: No.

Q: So you were only asked to step back from WOTUS. Is that correct?

A: Correct.

...

Q: Were you asked to take unpaid leave?

A: No.

...

Q: You mentioned that the Assistant Secretary wrote in a memo the reason that you were being reassigned from WOTUS, correct?

A: Uh-huh.

Q: In that memo, does she state that the reason for your reassignment is because you did not recommend a FONSI?

A: No.

Q: Is it written anywhere from anyone in the Army, Army Corps, EPA, that your reassignment was because you did not recommend a FONSI?

A: I have not seen anything in writing. It was all verbal. What's in writing is—I think I testified last time I was here about two emails where I, based on my conversation with Ms. Darcy before I went on vacation July 2015 that I was back

as the senior policy adviser that I sent out, and then she used those as the reason for removing me in writing, saying that I had overstepped the understanding.<sup>18</sup>

In addition, the Republican staff report omits the explanation provided by Mr. Schmauder during his interview with Committee staff about why Mr. Smith's work assignments changed:

When he came in and told his boss and the work product that he delivered in respect to the EA, the decision was made by the Secretary's office to assign the responsibility of drafting an EA to somebody else. So he was relieved of his responsibility to do an EA. That's all he was relieved of. Subsequently—subsequently—as the rule moved into further stages and his responsibility—there was no longer any need for an EA, Mr. Smith had conversations with Ms. Darcy, what his role was going to be moving forward. Ms. Darcy did not commit to leaving Chip and having any responsibilities with the rule, but she took no action. It's my understanding that, following those conversations that he had with his superior, that he made incorrect and false statements as to the conversation that he had with Ms. Darcy. ... And, at some point in time during that process, Ms. Darcy said she had lost confidence in her ability for Chip to represent her since he was misleading statements, misleading conversation that she had with him personally and, at that point at that point—based on that mistrust, based on his communications to other agencies, that she decided to relieve him of any responsibilities for the Clean Water rule. He is still responsible to the regulatory program and tribal affairs.<sup>19</sup>

Mr. Schmauder also had the following exchange during his interview with Committee staff:

Q: Are you aware of any other measures taken against Mr. Smith in the course of this rulemaking or after its promulgation?

A: Any other?

Q: Personnel.

A: No.<sup>20</sup>

#### **IV. Multi-Year Process Based on Science and Input From Stakeholders**

Contrary to Republican claims that the rule was rushed through for political reasons and not based on science, the witnesses interviewed by the Committee explained that the rulemaking process took several years, which was typical for similar rulemakings.

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<sup>18</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Charles Smith (Feb. 19, 2016), at 49-53.

<sup>19</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Craig Schmauder (Feb. 17, 2016), at 148.

<sup>20</sup> *Id.* at 150.

Jennifer Moyer, the Chief of the Regulatory Program for the Army Corps, confirmed during her interview with Committee staff that the Army Corps was directly involved in outreach to stakeholders:

Q: The EPA held numerous outreach meetings with outside groups to discuss the rule during its development. What was the Corps' role in these meetings?

A: The Corps participated in about 72 or 73 of those meetings.<sup>21</sup>

Ms. Moyer explained that while the final rule may not have incorporated every recommendation of the Army Corps, the process was a collaborative effort:

I think that any final rule always has areas that could be made more clear. Because this was a joint effort between Army and EPA, there were compromises that were made. So I think when any group of people engage in the Monday morning quarterbacking, especially a group of technical experts, we're always going to find areas that we would change, we would modify, we would polish.<sup>22</sup>

Ms. Moyer also had this exchange with Committee staff:

Q: Were you ever told in any way or feel pressured to achieve the administration's objective in this rulemaking?

A: I did not feel that pressure. My sole objective in this effort was to provide the best technical advice and recommendation for options as I could.<sup>23</sup>

She concluded: "to me, the objective was very clear, that providing clarity to a rule that is pertaining to jurisdiction and supportable by science and law."<sup>24</sup>

The Republican staff report relies selectively on statements from Ms. Moyer's transcribed interview to argue that the rulemaking was politicized, but it disregards this portion of Ms. Moyer's interview:

Q: Do you have any reason to know whether politics, in fact, was—

A: No.

Q: —the impetus behind the timeline shift?

A: No, I have no reason to.

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<sup>21</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Jennifer Moyer (Dec. 17, 2015), at 20.

<sup>22</sup> *Id.* at 19.

<sup>23</sup> *Id.* at 114.

<sup>24</sup> *Id.*



Q: Do you have any reason to believe that Assistant Secretary Darcy would enter into a rule that she did not support?

A: I have no reason to believe that she would do that, no.

Q: Do you have any reason to believe that Ms. Darcy was pressured into entering—excuse me—into entering into this rulemaking? ...

A: No, I don't know any of the inner-workings of her office other than my interaction with her on a technical basis.

Q: Do you have any reason to believe that the final rule does not, in fact, reflect the Army's view?

A: No. In fact, I've heard her say exactly the opposite.<sup>25</sup>

In addition, Jim Laity, the Chief of Natural Resources and the Environment at the Office of Information and Regulatory Affairs (OIRA), stated during his interview with Committee staff: “As I’ve said numerous times now this afternoon, I did not feel any pressure to cut corners or shortchange a review in any way, nor did I do that.”<sup>26</sup> He added that OIRA reviewed the final rule for six weeks, which is a typical length:

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

A: I believe it was about 6 weeks.

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

A: No.

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

A: No.<sup>27</sup>

Ms. Stoner, the Acting Administrator for Water at EPA, agreed, stating during her interview with Committee staff that the six-week period was “very typical for OMB review.”<sup>28</sup>

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<sup>25</sup> *Id.* at 167.

<sup>26</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Jim Laity (Mar. 8, 2016), at 176.

<sup>27</sup> *Id.* at 46.

<sup>28</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Nancy Stoner (July, 21, 2016), at 49.

Similarly, Vlad Dorjets, the Desk Officer for Natural Resources and Energy at OIRA, had this exchange with Committee staff:

Q: Is there anything atypical about the fact that it was concluded in less than 90 days?

A: No.<sup>29</sup>

He also had this exchange:

Q: Were you pressured by anyone at EOP [the Executive Office of the President] to take shortcuts in your analysis of this rule?

A: No, I was not.<sup>30</sup>

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<sup>29</sup> House Committee on Oversight and Government Reform, Transcribed Interview of Vlad Dorjets (May 10, 2016), at 57-58.

<sup>30</sup> *Id.* at 83-84.