

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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<http://oversight.house.gov>

October 28, 2015

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
U.S. Army Corps of Engineers
The Pentagon, Room 2E569
Arlington, VA 20130-0108

Dear Ms. Darcy:

On July 24, 2015, the Committee requested information from the Army Corps of Engineers related to the development of the “Waters of the United States” rule.¹ Your staff subsequently informed the Committee that your office would respond. To date, however, the Corps has only produced two documents responsive to the Committee’s request. These two memoranda raised serious legal and scientific questions about the Waters of the United States rule. The Corps’ unwillingness to voluntarily produce the balance of the documents that were requested on July 24, 2015, requires the Committee to obtain testimony from witnesses who can answer questions regarding the rule’s development.

The two memoranda from Major General John Peabody, Deputy Commanding General for Civil and Emergency Operations, were dated April 27, 2015 (April Memorandum)² and May 15, 2015 (May Memorandum).³ The memoranda, and attachments, detail serious concerns about the various legal and scientific deficiencies of the rule. The April Memorandum states “[t]he rule’s contradictions with legal principles generate multiple legal and technical consequences that, in the view of the Corps, would be fatal to the rule in its current form” and that as is, the rule will be “legally vulnerable, difficult to defend in court, difficult for the Corps to explain or justify, and challenging for the Corps to implement.”⁴ The April Memorandum also states the rule has abandoned principles of “sound science” and “introduced indefensible provisions into the rule.”⁵

¹ Clean Water Rule: Definition of “Waters of the United States,” 80 Fed Reg. 37,054 (June 29, 2015).

² Memorandum from Major General John Peabody, U.S. Army Corps of Engineers, to Hon. Jo-Ellen Darcy, Ass’t Sec’y of the Army for Civil Works, U.S. Army (Apr. 27, 2015).

³ Memorandum from Major General John Peabody, U.S. Army Corps of Engineers, to Hon. Jo-Ellen Darcy, Ass’t Sec’y of the Army for Civil Works, U.S. Army (May 15, 2015).

⁴ *Supra* note 2.

⁵ *Id.*, Memorandum from Lance Wood, U.S. Army Corps of Engineers, to Maj. Gen. John Peabody, U.S. Army Corps of Engineers (Apr. 24, 2015), at 1.

The May Memorandum states that the Environmental Protection Agency (EPA)'s Economic Analysis and Technical Support Documents related to the rule are "flawed in multiple respects," and the Corps' could not find a justifiable basis for many of the EPA's conclusions.⁶

The memoranda make clear that EPA obtained data from the Corps and subsequently misused that data to support the rule and failed to consult with the Corps. According to the May Memorandum, "Corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate data sets" and the analysis EPA used to justify the rule contains "numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies, and logical inconsistencies."⁷ Such analysis "can only be characterized as having been developed by the EPA" and "[t]o either imply or portray [the Corps] as a co-author or contributor to these documents, other than as the provider of raw unanalyzed data, is simply untrue."⁸

In a July 29, 2015, hearing before the Committee, EPA Administrator Gina McCarthy testified that it was her understanding that all of the concerns raised by the Corps had been satisfied in the final rule.⁹ The April Memorandum contradicts her testimony. It states, "... to date, the fixes have not been adopted so the flaws remain."¹⁰

In light of the information contained in the memoranda, and the Corps' failure to produce any additional documents in response to our request, the Committee will conduct transcribed interviews of Army and Corps personnel involved in the development of the rule. Please make the individuals who participated in the rulemaking¹¹ available for a transcribed interview as soon as possible, but no later than November 11, 2015. The Committee will identify additional witnesses to be interviewed as soon as practicable.

Please also produce all documents and communications covered by the Committee's July 24, 2015, request immediately. The Committee will consider the use of compulsory process to obtain those records if the Corps' remains unwilling to produce them voluntarily. It is our understanding that the Corps has made arrangements for a contractor to aid in its response to this inquiry.¹² To better understand what duties this contractor will undertake in producing your response, please provide the Committee with this information along with your response.

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."

⁶ *Supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ *EPA Mismanagement Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015).

¹⁰ *Supra* note 5.

¹¹ As identified in the Email from Craig Schmauder, Deputy General Counsel, Installations, Environment & Civil Works, U.S. Department of the Army, to Committee Staff (Sept. 8, 2015).

¹² *Id.*

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Please contact Christina Aizcorbe of the Committee staff at (202) 225-5074 with any questions about this request, or to make arrangements for transcribed interviews. Thank you for your attention to this matter.

Sincerely,



Jason Chaffetz
Chairman



Cynthia M. Lummis
Chairman
Subcommittee on the Interior



Jim Jordan
Chairman
Subcommittee on Health Care,
Benefits and Administrative Rules

cc: The Honorable Elijah E. Cummings, Ranking Member

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

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

The Honorable Harold Rogers, Chairman
Committee on Appropriations

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,
SENTHOUR, 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.