

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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<http://oversight.house.gov>

March 16, 2016

The Honorable Howard Shelanski  
Administrator  
Office of Information and Regulatory Affairs  
725 17th Street NW  
Washington, D.C. 20503

Dear Administrator Shelanski:

On July 14, 2015, the Committee issued a subpoena to you for documents related to the “Waters of the United States” rule.<sup>1</sup> To date, you have neither produced all documents responsive to the subpoena, nor invoked a valid legal privilege to justify withholding them.<sup>2</sup> Your continued failure to comply with the subpoena has delayed the Committee’s ongoing investigation and undermined the Committee’s constitutional obligation to conduct oversight of the Executive Branch. So our investigation can proceed despite your unwillingness to comply in a timely manner with the subpoena you received eight months ago, the Committee must conduct transcribed interviews with Office of Information and Regulatory Affairs staff to address questions that might otherwise be answered by the documents and communications that are being withheld.

Your staff stated, repeatedly, that complying with the subpoena is a burden on OIRA’s resources because of the breadth of the documents that are covered.<sup>3</sup> To accommodate that concern, and setting aside the fact that the subpoena covers a discrete set of documents, the Committee asked for some details about the volume of records

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

<sup>2</sup> H. Comm. on Oversight & Gov’t Reform, Subpoena to Hon. Howard Shelanski, Administrator, Office of Info. and Regulatory Affairs (July 14, 2015).

<sup>3</sup> Staff from the Office of Management and Budget have managed the response to the subpoena on your behalf, despite the Committee’s request to speak to the OIRA staff involved in responding to the Committee’s request.

returned by the OIRA's search. According to your staff, you have only searched for responsive records from four custodians for an extremely limited period of time.<sup>4</sup> Yet you have been persistently unwilling to identify the number of responsive documents that the search returned. Your staff cannot simultaneously insist the subpoena is overly broad and refuse to disclose, or even estimate, how many documents it covers. This position creates the appearance that OIRA never conducted a good faith search for responsive documents in the first place.

Our concerns about OIRA's response to the subpoena were heightened when the Committee learned that two key agency officials, Vlad Dorjets and Stuart Levenbach—both of whom had primary responsibilities related to reviewing the rule—were not included in the group of four custodians whose records were searched. The Committee recently identified a third key agency official, Courtney Higgins, who worked on the rule and was similarly excluded from OIRA's search.

To determine the scope of OIRA's search for responsive records, Committee investigators interviewed an employee to determine, among other things, whether he had been asked to identify or provide documents related to the Committee's subpoena. The witness testified that he had not been asked to do so, even though he led OIRA's review of the proposed rule.

Because OIRA has been unwilling to provide the documents covered by the subpoena, and has excluded key custodians from its search for responsive records, it is imperative that additional witnesses are made available for transcribed interviews. Committee staff requested interviews of Mr. Dorjets and Mr. Levenbach on February 24, 2016. We reiterate that request and also ask that you make Ms. Higgins available, and that you propose dates for those interviews immediately upon receipt of this letter.

In light of our concerns about your effort to comply with the Committee's subpoena, we notified you on October 28, 2015, that it may also be necessary to interview you in a transcribed setting. Since then, Committee staff repeatedly requested that you offer dates for such an interview. You have not. Your failure to comply with the Committee's subpoena, and your unwillingness to appear before the Committee to address our concerns, may expose you to civil and/or criminal enforcement mechanisms.

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<sup>4</sup> OMB informed the Committee that it conducted a search for records covering six months- from September 17, 2013 to March 24, 2014- for records of Howard Shelanski, Andrei Greenwalt, Dominic Mancini, and Jim Laity.

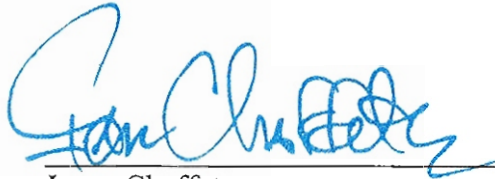
The Honorable Howard Shelanski

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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



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

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member

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

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

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

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,  
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.