

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES,
WASHINGTON, D.C.

INTERVIEW OF: CHARLES R. "CHIP" SMITH

Thursday, January 21, 2016

Washington, D.C.

The interview in the above matter was held in 2247 Rayburn, House
Office Building, commencing at 11:06 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

JONATHAN J. SKLADANY, SENIOR INVESTIGATIVE COUNSEL

RYAN HAMBLETON, SENIOR PROFESSIONAL STAFF MEMBER

CHRISTINA AIZCORBE, COUNSEL

MEGHAN BERROYA, MINORITY CHIEF INVESTIGATIVE COUNSEL

PORTIA BAMIDURO, MINORITY COUNSEL

BEVERLY BRITTON FRASER, MINORITY COUNSEL

SEAN BURNS, MINORITY COUNSEL

For CHARLES R. "CHIP" SMITH:

MEGAN WEIS, ESQ.

ANGELA JENKINS

SPECIAL COUNSEL TO THE GENERAL COUNSEL

101 Army Pentagon

Room 2E724

Washington, DC 20310

Mr. Skladany. This is the transcribed interview of Chip Smith. Chairman Chaffetz has requested this interview as part of the committee's investigation of the Waters of the United States rule.

Would the witness please state your name for the record?

Mr. Smith. My name is Charles R. Smith, and I go by Chip.

Mr. Skladany. On behalf of the Committee on Oversight and Government Reform, I'd like to thank Chip for appearing here today. We appreciate your willingness to appear voluntarily and to work with us on scheduling. My name is John Skladany, and I'm counsel with Chairman Chaffetz's staff. And I'll have everyone else here at the table from the committee please introduce themselves as well.

Ms. Aizcorbe. I'm Christina Aizcorbe. I'm also counsel with Chairman Chaffetz's staff.

Mr. Hambleton. Ryan Hambleton, staff with the majority staff.

Mr. Burns. And I'm Sean Burns. I'm counsel with the Democratic staff.

Mrs. Bamiduro. Portia Bamiduro, also counsel on the minority staff.

Ms. Berroya. Meghan Delaney Berroya with the ranking member's staff.

Mr. Skladany. Thanks everybody.

I'll go over the ground rules and guidelines that we'll follow during the interview. The questioning will proceed in rounds. The majority will ask questions first for 1 hour and then the minority staff will have an opportunity to ask questions for an equal period of time,

and we'll go back and forth that way until there are no more questions and the interview is over.

Typically we take a short break at the end of each hour, but if you'd like to take a break apart from that, please just let us know.

As you can see, there's an official reporter here with us taking down everything we say to make a written record, so we ask that you give verbal responses to all the questions. Do you understand that?

Mr. Smith. I understand.

Mr. Skladany. Thank you. So the court reporter can take down a clear record, we'll do our best to limit the number of people directing questions at you during any given hour to just those people from the staff whose turn it is. It's also important that we don't talk over one another or interrupt each other if we can help it. That will be helpful to the reporter.

We encourage witnesses who appear before the committee to freely consult with counsel if they so choose, and you are accompanied by counsel today. Would counsel please state their name for the record?

Ms. Weis. Sure. Megan Weis.

Mr. Skladany. Thank you. We want you to answer our questions in the most complete and truthful manner possible, so we'll take our time. If you have any questions, if you do not understand one of our questions, please let us know, and we'll do our best to clarify.

If you honestly don't know the answer to a question or do not remember, it's best not to guess. Please give us your best recollection. And it's okay to tell us if you learned information from

someone else. Just please indicate how you came to know the information. And if there are things you don't know or can't remember, just say so. And if you can inform us who, to the best of your knowledge, might be able to provide a more complete answer, that would be helpful.

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

Mr. Smith. I understand that.

Mr. Skladany. This also applies to questions posed by congressional staff in an interview. Do you understand that?

Mr. Smith. I understand that.

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

Mr. Smith. I understand that.

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

Mr. Smith. No reason.

Mr. Skladany. Thank you. I'd just like to add for the record that the content of what we discuss here today is confidential, so we ask that you not speak about the interview with anybody who isn't present here today after we wrap up.

And that is the end of my preamble. Is there anything my colleagues would like to add?

It is now --

Ms. Weis. For the record -- sorry.

Mr. Skladany. Sure.

Ms. Weis. I just want to note for the record that the witness is here today to speak to what he knows, and will not be presenting any official Army positions.

Mr. Skladany. Thanks. It is 11:09, and we'll start the first hour of questions. Christina will take it from here.

Mr. Smith. Okay.

Ms. Aizcorbe. Thank you, Jon.

EXAMINATION

BY MS. AIZCORBE:

Q Mr. Smith, what is your current role with the Army?

A My current role is assistant for environment, tribal, and regulatory affairs. I'm the principal advisor to the assistant secretary of the Army for civil works, the Honorable Jo-Ellen Darcy, and have served in this capacity since 1996 for whoever was assistant secretary.

Q 1996. How many years has that been?

A Almost 20.

Q Almost 20. Okay. And are those 20 years your only time with the Army or Army Corps?

A No. Before I came to the Pentagon to work for the assistant secretary, I spent approximately 5 years in the Corps of Engineers Headquarters. My job there was to review decision documents before

they went to OMB and Congress. And I reviewed about 500 in that time period for compliance with environmental, historic preservation, tribal, and regulatory matters.

Before that, I spent a little over 9 years in the Rock Island District of the U.S. Army Corps of Engineers. I was an assistant chief of planning division there, as well as, of course, when I started out, I was district archeologist, and then I was a study manager for flood protection projects.

Is that okay?

Q Absolutely.

A Good.

Q So that's about 34 years total you've been --

A Yeah. We're coming up on 30 --

Q Okay.

A -- 5 or 6 years total --

Q Okay.

A -- when you add in all the odd months. And then 3 years in the Marine Corps, I'm up to about 39 years.

Q Okay. And what are your primary duties in your current role?

A My primary duties are to make sure that I oversee regulatory, historic preservation, Indian affairs, and environmental and restoration and protection programs, projects and activities. I help write testimony, I review and draft legislation, I do a lot of interagency meetings and dispute resolution. I'm the primary staff

level GS-15 senior policy advisor to the assistant secretary in all those areas.

Q Can you elaborate a little bit about your background in a few areas, first in environmental compliance?

A Environmental compliance. I started doing environmental compliance back in the 1980s when I was in the district, Rock Island District. I wrote EIS's, I wrote environmental assessments, I reviewed all of the projects that the district proposed for compliance with environmental laws and regulations, and usually wrote sections of reports, in those days they were reconnaissance reports, feasibility reports and general design memorandums.

When I went to the Headquarters -- oh, and then when I was assistant chief of planning, I oversaw about 67 staff of engineers, scientists, and other social scientists, economists as they prepared these reports to go forward to Congress.

When I was in the Corps Headquarters, I primarily reviewed, like I said, about 500, we call them decision documents, it's slang for reconnaissance reports, feasibility, and engineering reports. And, again, my role was to make sure that all environmental laws were complied with, that the EAs and the findings of no significant impact were sustainable and made sense, that the environmental impact statements followed Army policy. And if I found problems, I would go back and talk to the district that wrote the reports and help bring them up to speed before I would ultimately forward them to the assistant secretary's office.

In my current job, I'm just at a higher level doing a lot of the same stuff. I have the entire Nation in those areas that are in my portfolio. I'm responsible for overall policy compliance review and oversight of the Army Civil Works program in all of those areas and for principal expert in the areas that I previously listed.

Q Is there anything that you did not just previously state that you could elaborate regarding your background in the regulatory program?

A When I came to the assistant secretary's office in 1996, I spent my first 3 or 4 years there improving relationships, which were bad, and created a team with the Corps Headquarters. I have my very parsed out role as oversight. The Corps implements, but we work together very collaboratively, but I think we both understand our roles. There are some things that are my responsibility and for me and the assistant secretary only, and there are some things that are the Corps' responsibility and for their purposes only, but we always try to work together as a team. That's the only way we can get this done.

I helped write the 2008 mitigation rule, I helped prepare and get clearance for the nationwide permits 2012, and in the 5-year cycle before that, which would have been about 2008. I've done other guidances and regulations. I review all of the regulatory, we used to call them regulatory guidance letters, RGLs, we don't do many of those anymore, but I used to review and help prepare those.

I do training. I'm a keynote speaker for attorneys all across

the country in regulatory affairs and environmental impact assessment. So I do teaching, I prepare courses. I also help train regulators across town in regulatory. There's more, but that's probably enough for the --

Q Thank you.

A Yes.

Q We'll get into this a little bit later, but you were discussing your background with writing environmental impact statements --

A Yes.

Q -- and some of those NEPA compliance documents.

A Yes.

Q About how many of those have you completed?

A How many did I write or review?

Q Either.

A I've reviewed over 500 and I've written -- frankly, I can't tell you an exact number, because it was when I was in the Rock Island District 1981 to 1990, but several dozen environmental assessments and several environmental impact statements.

Q And about how many rulemakings would you say you have been involved in?

A I can think of seven.

Q Is that in your current capacity?

A Yeah, in my current capacity. Several cycles of nationwide permits, the 2008 Mitigation rule, the Clean -- well, now the Clean

Water rule. The Waters of the U.S. rule, we also, which never got launched, but we worked on it, was the Definition of Fill rule, which, as I'm sure you know, Congress has prohibited us from completing, but it's done sitting in a shelf. And we also worked on a Waste Treatment System Exclusion rule, but struggled with it, frankly, and put it aside, other issues were more important. So those are the ones that come to mind immediately.

Q How does that compare with others in the Army or Army Corps who have worked on the Waters of the United States rule?

A In the Army in terms of working on rules?

Q Correct.

A There's, to my knowledge, nobody else in the Army that comes anywhere close to that. In the Corps, there are people who have worked on as many rules. And the one person who I -- unless I'm forced to, don't intend to actually name, has worked on more rules than I have, but he was not involved in this particular rule, so --

Q Okay. How long have you been involved in the Waters of the United States rule?

A Since February of 2009, what I understand to be the very first meeting of principals where EPA announced their intention to pursue this rule, and I was there because we did not yet have appointees, so I was the only man standing. I went.

Q I see. And in that capacity, what did you do with respect to the rulemaking?

A Well, I mostly listened while Administrator Jackson and her

senior attorney, Bob Sussman, announced that they wanted to do a rule on the Clean Water Act and that they intended to move ahead, that it was their opinion that the Clean Water Act was their act, and that while it was a joint regulation we were replacing, they fully expected EPA would fully control the rulemaking and the process.

Q And can I clarify whose belief was that?

A Administrator Jackson personally, I sat next to her, and Robert Sussman.

Q And that is the administrator of what agency?

A EPA.

Q Okay.

A Now it's Gina McCarthy.

Q Can you provide the names of other primary staff in the Army and Corps who also worked on the Waters of the U.S. rule?

A Okay. Going back to 2009?

Q However's easiest for you.

A Okay. Let's see. Let's start with Army. It would be myself; and principal deputy Terrence Rock Salt, who's now moved on; principal deputy Marie Therese Dominguez, who's now moved on. They were in appointee oversight roles. They didn't actually write parts of the rule, but they were responsible for overseeing its development. An attorney down in Army general counsel.

And I don't know. Am I supposed to say who or just say staff?

Ms. Weis. You can answer the question.

Mr. Smith. Okay. Craig Schmauder, and he had at the time, an

attorney, who's now left for another job, Patricia Morris. And other than the assistant secretary herself, who, again, didn't write parts of the rule, but was briefed periodically, to the best of my knowledge, that's it.

And as far as the Army Corps of Engineers Headquarters, that list may be a little longer. The principal people were the chief of the regulatory branch in 2009, and that was Margaret Gaffney-Smith, then replaced by Jennifer Moyer. So those two chiefs were involved. On their staff, we had Stacey Jensen.

And this is where it gets complicated. Every year we bring on detailees, and they get four a year, I get two a year. Detailees also helped with the rule. And I don't know if you want those, but I think I've given you the primary people who were responsible for working on the rule.

Q Of the Army staff --

A Yes.

Q -- working on the rulemaking, would you say that you had the most significant wetlands or subject matter and regulatory expertise?

A Yes.

Q Does anyone in the Army share your role with respect to clean water policy or the Army Corps regulatory program?

A No.

Q Have you played a similar role in the rulemaking process for other Army Corps rules?

A Yes; those ones I previously mentioned.

Q Okay. What is the Army's role in the wetlands program?

A The Army's role is, as it is for everything the Corps of Engineers does, it's a Civil Works activity, which means public project as opposed to military work. We provide policy oversight and direction. So from the President down through the assistant secretary, we get policy direction. We follow the Constitution, the laws and the regulations of this land, but as you know, there's some flexibility, and depending on who the President is, we get direction to focus on this, focus on that, prioritize work, make decisions about budgeting.

Q And how did those communications flow from the President to the Army?

A Well, I can't talk about how they flowed to my boss, Assistant Secretary Darcy, but typically those directions would come from Ms. Darcy either directly to me or through one of the principal deputies, either Mr. Salt or Ms. Dominguez.

Q And you can't speak to how Ms. Darcy receives --

A No --

Q -- direction --

A -- I cannot.

Q -- because you don't know?

A I do not know.

Q Okay.

A I would not be privy to that.

Q Okay. Is that the same, then, for communications regarding your oversight of Corps rulemakings, communications --

A To be honest, I am not sure how involved in that sort of minutia the President would be --

Q Okay.

A -- but Ms. Darcy, if she had any guidance, would give it to myself directly or through a principal deputy to me.

Q Who from the Army or Corps office would typically field calls or participate in meetings with the Executive Office of the President, and that would include the Council on Environmental Quality or OMB, OIRA --

A Sure.

Q -- any of these parties?

A Well, we're layered, as you know, and so if it's appointees only calls, that would mean only those people who are political appointees would talk.

But for regular, routine staff work, it would be myself in Army as the senior policy person, and in the Corps of Engineers, if we're speaking regulatory program, it would be the chief of regulatory, which is currently Jennifer Moyer, unless she delegated it to a staff member. I interact with CEQ, OIRA, on a regular basis.

Q Did CEQ or OIRA join any meetings or calls regarding the WOTUS rulemaking?

A I'm trying to think back. OIRA did in the beginning. There was a period in 2009, EPA's strategy was to do guidance first,

try to do it quickly and then follow it up with a rule. OIRA was part of those meetings. Because we'd been very successful with OIRA being present, we did the 2008 Mitigation rule.

We worked on the guidance for about a year, and we struggled, because writing guidance, you can't be as clear as you can when you do a rule, and so the EPA decided to flip to do a rule instead and table the guidance. And CEQ, I don't believe, to my knowledge, anyway, didn't show up for those meetings very often. Occasionally they might come for a check in just to hear a status, but no more than a status.

Then we flipped back to guidance for a year, then we flipped back to the rule. And I would say that OIRA -- the more time went on, the less OIRA was part of this.

Q And you mentioned that there was an effort to complete the guidance quickly?

A Uh-huh.

Q Who was trying to complete it quickly?

A The administrator and Robert Sussman.

Q Are you aware of why they were trying to complete it quickly?

A Well, when I was in that initial couple of meetings when there were no appointees and I was the only one who could go from Army, they just said they thought they knew what the answer was, they thought they ought to move quickly fast. It was early in the administration, let's ride this wave and let's get it done.

And there was -- thinking that guidance could be written fairly quickly, but if you've looked at some of this stuff, it's really hard.

I mean, it's one thing to write the words, but then how it plays out in the field is tough. Nature is hard to describe, and so we got kind of -- you know, I'm not pointing fingers at anybody here; it's just hard to do that.

And so after trying to do guidance, which, as you know, has a lower threshold for getting it cleared and getting it out, we corporately decided rulemaking was better, and that means Army and EPA. We just thought that -- let's just do the rule, and that's why we went back and forth. And then we struggled with the rule, so we went back to guidance, and then we went back to the rule and stuck with the rule for the next 3 years.

Q Were you ever asked to brief either Craig Schmauder or Assistant Secretary Darcy on policy issues before those calls?

A Before the calls. Which calls?

Q Calls with anybody from the Executive Office of the President.

A I briefed Assistant Secretary Darcy several times on the status of the rule and -- or the guidance. It was not frequent, and that's not unusual, considering her rank and level. And usually Craig Schmauder was invited as the attorney for the Army. But I did not ever brief him, so to speak. He was there, just like I was, as part of a briefing for the assistant secretary.

Q You mentioned that some of those calls might be appointee only calls?

A Yes.

Q Was Mr. Schmauder a part of those calls, to your knowledge?

A I can't say, because --

Q Okay.

A -- I wasn't on them. I really don't know.

Q Was he on the other calls that you were a part of?

A Yes. Not all, but some, and toward the end, all the calls, and we were not on most of the calls.

Q In a recent briefing, Mr. Schmauder informed committee staff that throughout the rulemaking, he brought Jennifer Moyer and Lance Wood in to meet with Assistant Secretary Darcy prior to making decisions regarding the rule. Are you aware of these briefings?

A Could you repeat that one, please?

Q Absolutely. Committee staff have been informed that throughout the rulemaking, Mr. Schmauder would bring in Jennifer Moyer and Lance Wood to meet with Assistant Secretary Darcy prior to making decisions regarding the rule. Are you aware of these briefings?

A I am aware of several briefings. I attended those briefings. They were very few and far between.

Q Okay. Who did you report to throughout the rulemaking?

A Who did I report to? Either of the principal deputies directly.

Q And can you remind us again who those were --

A Terrence --

Q -- when you refer to principal deputies?

A I'm sorry.

Q That's okay.

A Terrence Rock Salt for the first -- I think he was there about 3 years, and then he was replaced by Marie Therese Dominguez.

Q And is Marie Therese the current principal deputy?

A No. She moved on to DOT, I believe, and we now have Lowry Crook. He's only been onboard a couple of months. He's just getting settled.

Q Was he involved in the rulemaking?

A No.

Q And these principal deputies, were they presidential appointees?

A Yes. Well, they came off a list. They're not, like, confirmed by the Senate, but they come off a --

Q They're not career staffers?

A Right.

Q Correct.

A They are appointees -- we consider them appointees, yes.

Q Did you communicate with Mr. Schmauder on policy matters through the rulemaking?

A I did for the first few years. The last year, he would not talk to me.

Q Were you given any reason why he would not talk to you?

A No. I would ask to be included in meetings, and was not included. I would ask questions about what's going on, I would get no response. So there were occasional times where we'd as a group get

together, but starting in November of 2014, without any word from anybody, he began to slowly eliminate myself and the Corps. And although we had occasional meetings over the next few months, as time went on, we were eliminated more and more and more.

Q Do you have any indication of a precipitating factor that caused his distancing?

A He and an EPA staffer announced in several meetings that we were just too difficult to live with because we kept making arguments about sound science, sound economics, proper consultation with Indian tribes, and they wanted to get the rule out because that's what their bosses wanted.

Q Who is the EPA staffer who you're referring to?

A Chief of staff in the Office of Water.

Q Do you know his or her name?

A Yes. Gregory Peck.

Q What is Mr. Schmauder's background, to your knowledge?

A I can't speak to anything other than he's obviously an attorney. He works for Army general counsel and he has been our attorney for years.

Q Do you know whether he's ever served in the field?

A I do not, no.

Q Are you aware of whether Mr. Schmauder made any technical or policy decisions in the rulemaking?

A Absolutely.

Q Mr. Schmauder informed this committee that he himself

drafted the Waters of the United States guidance and rule along with Mr. Peck of the EPA. In your time with the Corps, is it common for an attorney with the Office of General Counsel to draft a major rulemaking such as this?

A No. It has never been done before.

Q Is it common for an attorney with no background in the rulemaking or the underlying subject matter to draft rules --

A No.

Q -- for the Army Corps? Are you aware of why Mr. Schmauder had such a prominent role in this rulemaking?

A No.

Q Are you aware of whether Assistant Secretary Darcy has any background in clean water or wetlands jurisdiction?

A I'd like to ask a clarification on that one.

Q Absolutely.

A When you say "background," does that mean formal education and experience in the field or does it mean oversight?

Q I'm speaking more to experience.

A No, no experience, to my knowledge, delineating wetlands, reviewing permit applications, or doing regulatory work as we would do in the field or as I did in the field.

Q The committee understands that the chief of the Army Corps regulatory program only communicated with Ms. Darcy on four separate occasions regarding the rule during the entirety of the Waters of the United States rulemaking. In your experience, is it common for the

head of the regulatory program to provide such infrequent input --

A No.

Q -- in rulemaking of this magnitude?

A No.

Q All four of these meetings with the chief of the Army Corps regulatory program and Ms. Darcy took place during the interagency review process. In your experience, is it common for the assistant secretary to have no interaction with the Army Corps on an Army Corps rulemaking prior to that rule entering the interagency review process?

A No. We do briefings before we get there so that we know we have the boss's support before we submit to OIRA for the interagency review process.

Did I understand your question correctly?

Q Correct. Yes, that's correct. And I was asking a question about the fact that these four meetings took place after the interagency review process had begun.

A Yes.

Q So --

A Yes, correct. That's my recollection and I was in, I think, three of the four.

Q Okay. The committee understands that a team of eight staff from the Army, Army Corps, and the EPA met regularly regarding the rulemaking. Can you explain the role of this team?

A In either October or November of 2014, there was an urgent desire to move the rule forward. Obviously we're on a time schedule

having to do with the administration and the time left and just getting it done, we'd been working on it for so long, so that we created this team of eight.

I was one of the people on the team of eight. And the goal was to get together on a weekly or even more regular basis and talk about rule issues, try to resolve them so that the rule text could be adjusted by EPA, and then any issues that were unresolved, we would quickly elevate to our appointees for a solution so we could keep things moving, but as it turned out, we only met, I believe, in person twice and we had maybe two phone calls, and all the other weeks typically EPA would not meet with us. For whatever reason, they were busy or whatever.

Q When you refer to "us," who are you referring to?

A The Army and Corps people, which was Craig Schmauder, the chief of operations at the time, the chief of regulatory, and myself.

Q We understand, similar to what you just expressed, is that the team met from approximately fall of 2014 to around the beginning of November, at which point the meetings ceased --

A Yes.

Q -- until mid-January. Do you know why these meetings stopped during this period?

A I do not know. I know that I reached out and the chief of regulatory reached out to say are we having the weekly meeting? And we would either get no response or we would get a response saying, not this week. But I do not know the reasons for that. I just know we did not meet.

Q The draft final rule was shared with the team by EPA shortly after the meetings commenced in January. Do you know who drafted this draft final rule?

A Well, it was EPA. I can't say who personally drafted it. It was not myself and it was not the Corps.

Q Were you consulted at all during the drafting of the draft final rule while these meetings were not taking place?

A It is true we were consulted, but the consultation was minimal and it was usually -- text was provided us and we would be given a couple hours, maybe a day or two, to look at it and then react.

Q How much text were you given a day to work on?

A It could be a paragraph, it could be 80 pages. It just never -- whatever was transmitted from EPA through Mr. Peck, to Mr. Schmauder, to us. We just didn't know. We would wait and when text came, then we'd look at it and meet the suspense that was given to us, send our comments back, and then we would wait until another batch of something would come.

Q When you were given this time to review those sections of the draft final rule, would you make comments or recommendations back?

A Yes. I would personally mark up the draft rule text, whether it was a paragraph or a page, if I had comments, and put comment boxes on the margins and I would put red line strike-outs using track changes of things that I would propose changing in the text, and send that back.

The Corps did the same, because we typically -- for efficiency,

not so that EPA didn't have to look at two documents, I did mine, the Corps did theirs independently, and then we had a staffer blend them so that we sent one thing back.

Q Do you know whether those recommendations or changes were incorporated into the final draft final rule?

A I know recommendations that I personally made for the most part were not incorporated.

Q Were you given any justification or reason why?

A No.

Q The EPA and Army Corps were tasked with drafting option papers to inform the team's discussions about the rule during these meetings. Did the team discuss those option papers before the draft final rule was circulated?

A We did.

Q And do you feel that the option papers were reflected in the draft final rule?

A No.

Q And why do you say --

A Not completely. In other words, the option papers were done in draft, and to my knowledge, none of them were ever really fully discussed, vetted, briefed to our principals and completed. Instead, what happened was Mr. Schmauder and EPA just made decisions as to how to move forward, and they did it and then declared what the answer was to us, to the Corps and I.

Q And when they had these conversations with you about what

the answer was, were you given any opportunity to provide feedback at that stage?

A Not really, no. It was considered a decision made, no further discussion wanted.

Q Okay. I'm going to move on a little bit to the --

A Okay.

Q -- public comment period.

A Okay.

Q And if you could start off with giving us a little bit of background on what your role is in these rulemakings, or specifically to the Waters of the United States rule once the rulemaking process is underway and those public comments are received on the draft rule.

A I would like to, if it's okay with you all, use the 2008 Mitigation rule and the nationwide permits from 2012 as examples. Typically what happens when we do a rulemaking, we go out, we get comments. Like, for the nationwide permits 2012, I think we got 20,000 comments. The Corps staff and the Headquarters would sort them into what we call form letters versus unique substantive comments, in other words, those with individual contributions and something other than "I support" or "I hate."

And then we would sit down and go through the substantive comments, sort them into topics or issues, and some particular letter may go in multiple piles, and then we would sort of divvy them up if there were a lot of them, if not, one person could do it. We would write up the comments as a category, we would write a draft response,

and then we would get together, meet, discuss, and decide what, if anything, we were going to do about it, did we find the comment had sufficient merit to make a change in the rule.

Did it require us, oh, good idea, but we better brief our bosses before we make a change in the rule, or is it something we don't need to worry about, not relevant. We get a lot of comments like that. So that's the typical process. For the nationwide permits, 20,000 comments, maybe I don't know, at most 2,000 were unique substantive. It took 8 months to go through that process.

For the Mitigation rule, it was similar. We didn't get that many unique substantive comments, but that one is a good example, because we sat down with EPA in a conference room and had a series of very collaborative meetings going through the comments, talking about them by topic, and deciding to do the same process. And we had a few where we thought there were good ideas, we briefed our principals, and then we may or may not have made changes, but that's the process.

Q And so I understand, the nationwide permit and the Mitigation rules were both joint EPA --

A Nationwide is just us.

Q Okay.

A But the Mitigation rule is joint. So I gave you two examples, one that's just us, one that's joint. And then we come to the Waters of the United States rule, we got a million comments. At last count, I thought I heard 20,000 were unique substantive, and then out of that 20,000, there were about 3,000 or 4,000 that we thought

were really critical ultimately, but the difference was we didn't follow the same protocol and process.

First we waited to see what the process was going to be, and then sometime -- this is my recollection, and you know, others may have other recollections, but in, I think, about January or so of 2015, we heard from EPA staff that they were starting to write responses to comments. And we weren't part of that. So the chief of regulatory thought, well, we better get our views on the table, so she put some of our detailees to work and I think brought in extra people to start going through comments. I think there were six of them maybe, there might have been a couple more. So we started doing our own sorting, evaluating, and starting to draft responses.

I did not attend a single meeting interagency to talk about the comments, the responses to comments, and the possible either changes, or briefings of, principals as a result of those comments.

Up until the very last day before the rule was submitted for promulgation as a draft, we were still reading and reviewing comments to decide -- internally, meaning the Corps and myself, what to do about them, and then, of course, the rule was promulgated and it all became rather moot.

I understand that EPA has generated responses and posted them on the Web, but I guess my point is, it was not the typical collaborative process that considers comments thoughtfully, comes up with joint agency responses, and then jointly we brief our principals and get a decision as to what to do with the comments.

Q So I understand, and will recap some of what you just stated, is that the EPA was still reviewing public comments when the rule was promulgated?

A That's my understanding. I know we were still looking at comments and we were hoping we would have an opportunity to pause and deal with them, but that opportunity did not present itself.

Q Do you know why --

A No, I do not.

Q -- why the EPA moved forward with promulgating the rule --

A No.

Q -- without addressing comments?

A I would ask them why.

Q Okay.

A I don't know.

Q The committee understands that efforts were made to address public comments on the WOTUS rule only after the draft final rule entered the interagency review process after the preamble was drafted. But we understand that the Army Corps ordinarily addresses public comments in that preamble. Is it a common experience to wait until the interagency review process to draft responses to those comments?

A No. Typically it's not common we get a million comments either, but typically we at least tee up some drafts so that all the agencies can see what the comments were, benefit from that and how we might react to them, because they may have equities depending on what we do to change the rule.

Q Is it your understanding that the Army intended to address those equities in the final rule?

A It was our intention to address those equities in the final rule.

Q Are you aware of whether anyone within Army or Army Corps expressed concern to the EPA about moving forward without addressing those comments?

A We did regularly.

Q And who --

A The chief of regulatory, had one of her key staffers working on it, myself, whenever we had an opportunity to pick up the phone or send an email, we'd say, hey, when can we meet on these comments, when can we talk about comments, we're concerned about the pace of this.

This is in direct response to your question. When I marked up different drafts we got, you'll see window boxes that says, we have not yet reviewed the comments; can we review the comments before we make this statement in the final rule?

Q Do you know who within that team of eight was promoting addressing comments later in the rulemaking process?

A EPA. Gregory Peck and Craig Schmauder were the two. I won't speak for the EPA staff, they were relatively silent when it came to that, but the chief of operations at the time and the chief regulatory at the time, myself, and Lance Wood, the attorney, the primary attorney for the Corps all said let's address these comments as we typically do.

Q And when you were having these communications, those communications were with EPA staff?

A Yes.

Q Did you ever make the same comments to Ms. Darcy directly?

A Yes.

Q Okay.

A But we only had the opportunity to meet with her a couple of times, but each and every time, we brought it up, and she said that her principal concern was addressing comments --

Q Did Ms. Darcy ever explain, I mean, if that was her principal concern, why was --

A No.

Q -- the EPA was moving forward?

A That is not something I would be privy to.

Q You mentioned that with respect to the nationwide permit program rule, you received about 2,000 unique --

A Yes.

Q -- or substantive comments.

A Yes.

Q And in that review, it took Army Corps staff, and only Army Corps staff, correct, because this was not a joint rule?

A You're talking about nationwide permits?

Q Nationwide permits.

A Yes.

Q So it took Army Corps staff 8 months to review 2,000

comments.

A Correct.

Q The final Waters of the United States rule was sent to OMB for final interagency review a mere 5 months after the public comment period closed. If it took the Corps 8 months to read, review, and respond to 2,000 unique comments with respect to the nationwide permit program rule, how did the EPA and the Army Corps do the same with respect to 20,000 unique comments that were received on the WOTUS rule?

A Well, I can't speak for EPA, but speaking for myself, we simply didn't have time to finish the job. And I myself, typically I rely on the Corps to read the comments and sort them, but I wanted to get a quick read on what the sense of the comments was, so in December, I read, I think, about 65 letters. And that right there was close to 500 pages of text, very complex, nuanced letters from attorneys and organizations, everything from environmental to ag, and it took time. So I have no answer really other than that.

Q And so I understand, then, the rule as it is final and as it was finalized did not address all of the public comments that were received?

A In my opinion only. Others will say other things, I'm sure.

Q You said earlier, and correct me if I'm wrong, that the EPA was still addressing public comments after the rule was promulgated. Correct?

A That's our understanding, yes.

Q Okay. You mentioned that the EPA began creating responses

to these public comments around January of 2015. Are you aware of when the Army or Army Corps began its review of public comments?

A My recollection is that Ms. Moyer decided we better get moving on this, and she had two new detailees come in and she added another, I believe, six pulled in from the field specifically to look at comments somewhere in the January, February timeframe. And, again, that's the best to my recollection. They were there for several months, and that's all they did is read comments.

Q And it's a typical practice for the Corps to bring in extra staff to review these comments --

A Yes.

Q -- on other rules?

A We affectionately refer to them as tiger teams. And people love to come and do a special task for the Headquarters and they -- yes.

Q And was one of these teams brought in on the nationwide permit program rule as well?

A I do not remember if we did or not.

Q Okay. Do these staff have expertise on the rulemaking or --

A The staff that were brought in?

Q Uh-huh.

A Are all what we consider to be top notch expert regulators with field experience reviewing applications, reviewing mitigation proposals, helping the commander make permit decisions, and actually being out in the field delineating waters and wetlands.

Q And you said when you were reviewing these comments, you would separate them into issue areas, at least those that were substantive. Did the Corps, or did you, make recommendations regarding those comments and what should be added or edited to in the final rule?

A Yes.

Q Based on those comments?

A We did.

Q Who did you provide those comments to?

A I would copy Craig Schmauder, I would copy the Corps Headquarters, and sometimes EPA. It sort of depended. Early on, we would communicate directly with EPA. Sometime early in 2015, we were told that that would no longer happen, all communications had to go through Craig Schmauder, unless they were empowered to have a meeting and talk about a purely technical matter, then that was okay. I'll stop there.

Q You said in early 2015.

A Yeah. January, January.

Q And who informed you that all communications with the EPA would have to go through Mr. Schmauder?

A Craig Schmauder did.

Q And you said those were all communications except those that were technical in nature?

A Very technical, and usually we would have to make sure that Mr. Schmauder was aware of it first on our end and EPA staff would have

to make sure that Mr. Peck was aware of it on EPA's end.

Q And that's with respect to communications by all Army --

A Yes.

Q -- and Army Corps staff?

A Yes. To me, that's my recollection and how it worked, and I certainly had to do it.

Q How was this communication made by Mr. Schmauder?

A He announced in our meetings that we would -- like, our gang of eight meetings, or team of eight, whatever we called ourselves, that all communications would go through him and then he might, depending on an issue that would bubble up, he would say, okay, so-and-so and so-and-so, why don't you meet and talk about X and then report back, and so it would be a very precise task having to do with a technical matter.

Q So you're not aware of whether your recommendations on the public comments were ever transmitted to the EPA?

A I can't say for certain. I did not send them, because that wasn't how we set the protocol up.

Q Mr. Schmauder never informed you of who he was sharing the recommendations with?

A No. Well, he said he shared the comments, but we did not have a record of that sharing, but he said he sent them over to Greg, and rest assured they are being considered.

Q Do you know when the EPA began drafting the final rule?

A The final rule. That's a tough question, because within

30 days of the first meeting we had on guidance in 2009, without our knowledge, EPA had already written the guidance and provided it to us. And that document and the principles embodied in it became the basis for the guidance, the rule, the guidance, and the rule.

And so while there was evolution along the way, it all started with the very first sort of opening document that EPA provided early in 2009 with the stated purpose of assert jurisdiction to the broadest extent possible allowable by law and Supreme Court decision, and that's in the briefings we gave during that time period.

And so the final rule, it sort of evolved. It was never like an individual thing where you can point to a date. I would say that the final draft rule and the final rule are a lot the same except for some key changes made in the last month or so. So I don't know if that helps you or not, but that's the best I can do with a thing that evolved.

Q We understand that the Army Corps also was unaware of when the EPA began drafting the final rule. Is it common in your experience that the Corps would not be aware of when its own joint rule is being drafted?

A No. It is unheard of.

Q You mentioned that the guidance when you first met with the EPA had already been drafted by the EPA --

A Yes.

Q -- and that that guidance became much of what is currently the final rule?

A Yes. With fleshed out more regulatory details, because

when you do rulemaking, you can be more precise.

Q At the time the guidance had been drafted, had EPA drafted the connectivity report that --

A No.

Q -- was the underlying --

A No.

Q -- scientific basis for the rule?

A No. The connectivity report came later. We became aware of it. It was not called the connectivity report at that time. I can't remember what it was called, but it was basically a literature search of the general ecology of streams and wetlands.

Q And we'll speak a little bit more about --

A Yeah.

Q -- the report later, but --

A Yeah. That was later. It was --

Q Okay.

A -- a couple years down the road.

Q Okay. Do the Army or Corps typically review a draft final rule before it is sent to OMB to ensure that comments are publicly -- or are appropriately addressed or incorporated?

A Is this a rule that the Corps will implement?

Q Correct.

A Yes.

Q And, for example, in a joint Corps rulemaking with EPA?

A Yes. Absolutely.

Q Okay. And did this happen in this rulemaking?

A Restate that question again.

Q So my first question was do the Army or the Corps typically --

A Yes.

Q -- review a draft final rule before it gets sent to OMB to ensure that comments are appropriately addressed or incorporated? And you said --

A Yes.

Q -- yes.

A That is correct.

Q And I asked if that happened in this rulemaking with respect to the Waters of the United States rule?

A We were given an opportunity to see the rule, but no real meaningful opportunity to make any changes. It was made clear to us that decisions had been made and no changes really would be entertained unless we found, like, a technical mistake or something of that nature.

Q Who communicated that to you?

A Mr. Schmauder.

Q Are you aware of whether the EPA or Army discussed recirculating the draft final rule for a second round of public comment after changes were made to the draft final rule?

A In gang of eight meetings, both myself and others, at least on the Corps side, talked about recirculating it. We thought the changes being proposed were significant and not in sync with the draft

rule, and that the public really should have an opportunity to comment on those, what we believed were significant changes.

Q And what was the response from the rest of the team?

A The EPA side of the team and Mr. Schmauder said they thought the changes logically flowed from the draft rule and that there would be no recirculation, it was not necessary and it would not comport with the administrator's schedule.

Q Were you given any reason as to why they believed that your disagreement was not significant?

A No.

Q We spoke a little bit about the timeframe that it took to review these public comments and that, in your understanding, public comments were still being reviewed and responded to as of the time the rule was promulgated. Despite the fact that the final rule was sent to OMB for final interagency review 5 months after the public comment period closed, in your experience, is this short of a timeframe for review and incorporation of comments typical for an Army Corps rulemaking?

A Considering the magnitude of the comments, the number, their significance, no.

Q Do you have any indication as to why the EPA and Army were operating under this very rapid timeframe to finish the rulemaking? I mean, a rule that had suffered so many deficiencies or disagreements between the Corps and the EPA, and so important that the EPA themselves consider it a generational rule?

A Well, I would ask them, but they did tell us in the gang of eight meetings, that was the schedule that Administrator McCarthy wanted and we were going to stick to it. And they did say also in the very same meetings that it was part of a package of rules, and they wanted to make sure they didn't all sort of bollix up. They wanted to be able to sort of flow them out in a sequence.

Q Package up EPA rules or --

A Yes.

Q Okay.

A Yes.

Q Do you believe that politics played a role in the timeline to roll out this rulemaking?

A Yes.

Q And why do you say that?

A The schedule was driven by politics; the policy decisions, some of them, in my opinion, were driven by politics; and in particular, several of the last minute changes in the last few months, in my view, were not science or economic based, but driven solely by politics.

Mr. Hambleton. Just to follow up on a previous question. Do you know what other rules were in this package of rules that you mentioned?

Mr. Smith. Some of the climate change stuff and the coal ash and that whole suite of things, and I'm not privy to all of those rules, because I'm not working on any of those, but that's what was told to us, that there was a whole series of these rules and they wanted to make sure there was an ordinary release.

BY MS. AIZCORBE:

Q And who informed you of that?

A Mr. Peck said it in some of our gang of eight meetings.

Q The committee understands that the Army made some requests to the Army Corps to engage in social media promotion of the rule during its development, including tweeting, posting comments online -- or content online, and participating in the social media platform Thunderclap. Were you aware of these efforts to promote the draft rule?

A I was aware of the efforts to promote the draft rule, and advised against it.

Q And why did you advise against it?

A We have never social media'd, in my 36 years of experience, a rule like this. I'm not saying it's lobbying, but it gives the perception of sort of lobbying for what you want to do, and we just thought -- considering how contentious this rule was, myself and several others in the Corps thought it was not a good idea, but we didn't have any real control over that.

Q And who did you advise to not engage in those activities?

A We brought it up in the gang of eight meetings; we brought it up in a couple of meetings before we had a gang of eight, when we had a gang of a dozen or more. They were -- you may remember there was a video produced at one time. I can't remember the fellow's name that was in it. That was sort of the first indication that social media was going to be used, and we were told that it was for educational

purposes only.

But, again, we're very concerned about perception. And I'm not judging whether it's lobbying or not lobbying, but the perception just wasn't something we thought we should participate in.

Q What was the response from the rest of the team?

A Well, the Corps folks were onboard with that and the EPA went forward, so I --

Q And that's all you know --

A Yeah.

Q -- of their decision?

A That's all I know about it. Yep.

Q Okay. Do you know who directed the Army to engage in these activities?

A No. I don't believe we were directed to, or at least I wasn't directed to. I was asked to, and I declined.

Q By whom?

A I'm trying to think of who asked. We would get calls from various staff in EPA, could you come and do this event or that event, or do you want to help with talking points for a particular thing, and I would say, no, I believe it's not appropriate to do that while we're still in the rulemaking and clearance process.

After the rule is finalized, we can do all kinds of social media and educate the public, but before that time, it's still a draft, it's still a proposal, and we shouldn't be behaving in that manner.

Q And so you had those conversations with EPA staff?

A EPA staff, some at my level or below. I can't say for certain who else, but it did come up in casual conversation and we'd get invites to things, meaning the chief of regulatory, her staff and myself, and we would typically decline for those reasons.

Q Okay. Did Ms. Darcy ever express to you whether she was inclined to engage in those activities?

A I had no discussions with her about this.

Q Did Mr. Schmauder?

A I would not know.

Ms. Aizcorbe. Okay. Did you have any more questions?

Could we go off the record?

[12:18 p.m.]

BY MR. BURNS:

Q So again, my name is Sean Burns, and I represent the ranking member's staff on the committee. So I'm just going to ask you some questions about your prior testimony this morning.

A Okay.

Q So you mentioned that you believed the rush, so to speak, or the rulemaking was politically motivated, or driven rather?

A Yes.

Q How do you know that? What's your basis of that?

A I heard that in my gang of eight meetings from EPA staff. We were told that when we would brief Assistant Secretary Darcy that there was an urgency to get this done. And I believe that that drove the schedule, and I also believe it drove the quality of the science and the economics in consultation that occurred or did not occur as part of the rulemaking.

And I was personally reminded by EPA staff, while Mr. Peck -- I cannot say about the staff, but Mr. Peck, that there was an urgency to get this rule done because there was extensive opposition to it, and if they could find ways to assuage concerns of USDA and DOT with political fixes to the rule, we would move it forward as quickly as we could.

Q And this was by Mr. Peck?

A Peck.

Q And who was present in the room?

A The gang of eight. I can't remember everybody from EPA, but on our side it was James Hannon, now retired chief of ops, myself, Lance Wood, and Jennifer Moyer, the Chief of Regulatory. Craig Schmauder, Army general counsel, and frankly I don't remember which staff EPA brought in addition to Greg Peck. They have staffs of 30. We have staffs of 4, you know, and so I lose track of it. Yes, go ahead.

BY MS. BERROYA:

Q So your basis for believing that the rule was politically driven is that Mr. Peck said in a meeting that there was urgency?

A Yes. And it isn't a meeting. It is a series of meetings, phone calls, and interactions over a 6-year period. This began from day one that way and continued throughout. So it's not correct to say it was a meeting. It was constantly we have to do this for our constituencies. We have to do this because it's what the administrator wants. And there was always a reason that never said we have to do it because of good science. I'll stop there.

Q Did someone say the administrator wanted it for a reason related to politics and not good science?

A I can't say that, no. They just said they wanted it -- well, it depends when we're talking. Are we 6 years ago when all this started, or are we within the last few months? It sort of makes a difference. But the entire 6 years was flavored by politics, in my view, and pandering to constituencies that the EPA favors.

Q I understand, sir, that's the way you feel, but I'm asking whether someone said --

A Oh, yes, yes.

Q -- that this was based on not good science -- we got to not talk over each other, and let each other finish. Whether someone actually said it was based on not -- not based on good science, but based on politics?

A I don't think I can answer that the way you phrased it.

Q Why not?

A What I did hear was that getting the rule out was what mattered, whatever it took.

Q So does that mean that you did not hear anyone say that the rule was not based on good science, but instead on politics?

A Well, I guess so, yeah.

Q You said that you heard from Mr. Peck over many meetings over the course of 6 years that urgency was important?

A Yes.

Q Did you consider 6 years to be quick?

A No.

Q So, in fact, the rulemaking was not handled quickly?

A No, it wasn't.

Q Is there any other reason besides the statements by Mr. Peck that the rule needed to be handled with urgency that makes you believe it was politically driven?

A Could you restate that?

Q Absolutely. Is there any other reason beyond the statements by Mr. Peck, that the rule be handled urgently that makes

you believe it was politically driven?

A Yes.

Q And what is that?

A We were told by Mr. Peck and others that the rule was dead. We couldn't get it cleared unless we made some changes to help USDA and DOT. And those changes were made in the last month or so over the Corps' objection, over my objection.

And then the rule went forward in draft and was promulgated as a draft. But those statements were made that we needed to adjust; and without referring to science, we needed to change the rule to address concerns of these two agencies.

BY MRS. BAMIDURO:

Q I'm sorry, who told you that?

A Mr. Peck is one.

Q Are there others?

A I shouldn't list any other names because my recollection at this point -- there were 30 people involved in these meetings, and who said what is hard to parse out other than the head person.

Mr. Burns. And these were during meetings? Were they in emails, memorandums.

Mr. Smith. These were in meetings. In our gang of eight meetings it came up.

Mrs. Bamiduro. Did you ever receive a specific instruction to disregard science?

Mr. Smith. No.

BY MR. BURNS:

Q And during this process, do you have any reason to know that these comments were not considered when the final rule was promulgated, incorporated into it, the views, the comments were not actually considered and then incorporated into?

A Which comments are you referring to?

Q The comments with respect to after the proposed rule came out and there was a comment period?

A You're talking about the public comments?

Q The public comments.

A Not our comments?

Q Exactly.

A Okay. Now ask the question again now that I know what you're talking about.

Q Okay. All right. I'll focus back on we were talking about the political comments, so to speak, that there was a rush, that there was a rush and there was an urgency so to speak. And you said it was directly communicated to you by Gregory Peck?

A Uh-huh.

Q And was he the only one in the gang of eight who said that?

A Mr. Schmauder did, too, but other than that I can't remember anybody else expressing that sense of urgency.

Q Did Assistant Secretary Darcy ever express that to you?

A No, not to me.

BY MS. BERROYA:

Q You mentioned that DOT and USDA had concerns about the rules?

A Yes.

Q Were those concerns not based in science?

A Well, that's a tough one. What do you mean by not based in science?

Q Well, you've expressed a concern that the rule was politically driven and that things were not necessarily based on science. And so my question for you is were the concerns expressed by DOT and USDA not based on science?

A That's a tough one. Would it help if I gave an example of a concern?

Q I would really just like your opinion about whether DOT and USDA's concerns were not based on science.

A They were not based on science.

Q And what is your belief for stating that?

A The concerns were things like overregulating ditches, roadside and agricultural, as opposed to connectivity, water quality, or any other factor. It was just simply we don't want you regulating these.

Q Was that an economic concern?

A I suspect. That's part of it.

Q Did you consider that to be a valid concern?

A Absolutely.

Q Was that a political concern?

A The way it was handled, yes.

Q What do you mean by the way it was handled?

A We did not study the concern, come up with options to address the concern, propose options to our appointees to resolve the concern, and then either not take an action or take an action.

BY MR. BURNS:

Q Now you say we did not study the concerns?

A Yes.

Q Were those individuals at EPA evaluating those concerns?

A I have no idea. I can't speak to what EPA did or did not do. I know we did not have the opportunity to evaluate the concerns the way we typically do and come up with options, evaluate the options, propose the options to our boss.

Q But it's your contention that the EPA was leading this rule?

A Yes.

Q You stated that earlier?

A Yes.

Q And this is a joint effort, correct, between EPA and Army?

A It is a joint rule. It is published as a joint rule.

Q Correct. And, again, you had no knowledge that the EPA did not independently of the Army evaluate the concerns?

A I can't say. I can't speak to what EPA did or didn't do.

Q Okay. Now you mentioned the 20,000, I believe you said, unique comments?

A Substantive comments.

Q Substantive comments?

A Uh-huh.

Q And you indicated that these comments were still being reviewed by the EPA after the final rule was promulgated. Correct?

A Correct.

Q Or finalized. Let me back up for a second. So were there trend lines with respect to the public comments? Were there like consistent themes, comments and concerns raised with respect to the final rule?

A There were a series of consistent themes.

Q And what were they?

A You had overreach of jurisdiction. You had under reach of jurisdiction. You had pulling in five categories of waters without doing science, pulling in five categories of waters because they're great for hunting and fishing. We had concerns that the economic analysis that supported the rule uses mitigation, the cost of mitigation, as a benefit. That's unheard of in the civil works program. That's a loss.

There were concerns about the artificial -- not artificial -- the precise foot limits, the use of the 100-year flood plain and the 1,500-foot jurisdiction line and 4,000-foot jurisdiction line. Again, they were contrary to the connectivity report, which was EPA's own scientists speaking. They were contrary to longstanding practice in the Army, and they were contrary to our recommendations about it because they had no basis in science.

There were concerns expressed about impacts on Indian reservations and travel consultation, at least the way we define it, and the Army had not occurred, and tribes commented on that. There were concerns about how these projects might affect homebuilders and energy projects. There were comments, concerns on the other side, that said, boy, you should reach farther and protect more waters. So there was a long list, and that's just the beginning of comments that were covered, or topics that were covered in these comments.

Q So to your knowledge, between the Department of the Army and the EPA, these comments were at least considered?

A I can't speak for EPA.

Q Okay.

A We read them. We started drafting responses. I cannot say that they were considered in the rule from our perspective. EPA may have considered them.

BY MS. BERROYA:

Q When you say from our perspective, who is the our?

A That's the Corps and myself. We were still reading comments.

Q Are you speaking for the entire Army? Corps?

A I'm speaking for the team that was involved in the rule and the regulatory chiefs immediate supervisors.

Q And how do you know what those individuals were doing? I mean, were you supervising them? What was your role in this?

A I had a policy oversight role. We would get together and

talk about comments because we wanted to be ready if and when there were ever interagency meetings, we would have a sense of what our view might be on different comments and topic areas, and if we saw any that were a problem, we wanted to tell our bosses.

For the chief it would have been at the time General Peabody, and for me it would have been Assistant Secretary Darcy. So we were continually working together to try to understand the comments and how we might respond to them. We never got to the point where we actually were able to sit down, talk about them, consider them, and then make any adjustments to the rule, it was promulgated.

BY MR. BURNS:

Q Now Mr. Smith, you mentioned EPA was in the process of drafting responses to comments?

A Yes.

Q My understanding would be they took in the comments, evaluated the comments, and then perhaps incorporated -- they evaluated these comments and then decided which ones to incorporate into the final rule. That's different than, okay, you did that process. You took in the comments. We evaluated them, considered them, okay, we're going to move forward once we decide which comments we're going to incorporate into the rule. We move along with that process.

Then another process, a separate tier process, would be, okay, we're going to draft a response to these comments. Would there be like two different tracks of processes going on at different times, at the

same time rather?

A I can't say what EPA's protocol was. We typically do it all as one process so that the responses feed into the decision about what the final rule would look like.

Q But you have no knowledge that EPA --

A I don't know what EPA did or did not do.

Q So you had no knowledge that EPA did not take in all of the comments and then decide which ones to incorporate and move forward?

A Nope.

Q You have no knowledge of that?

A Nope.

Q Okay. Is it your experience, or rather your expectations that either your personal opinions or recommendations based in science, where you have any expectation that all or some would be incorporated into a final rule, whether it's a proposed rule, the guidance process or the final rule?

A I don't have expectations when I go into the rulemaking process at all. It's follow the law, follow the regulations. In this case, follow the engineering and the science. And whatever comes out, comes out. So I don't have an expectation other than the expectation that we follow the process and that we fully vet the issues and fully consider them.

BY MS. BERROYA:

Q Is it typical that all of your comments are incorporated?

A Typical on what?

Q When you're making comments on a draft rulemaking, is it typical that all of your comments are incorporated in the final rule?

A Sometimes yes, sometimes no.

Q Sometimes every single comment that you make is incorporated into a rulemaking?

A Sometimes, uh-huh.

Q And when did that occur?

A Nationwide permits, 2008 Mitigation rule.

Q How long does it take for a permit to go through the entire rulemaking process?

A A permit?

Q The nationwide permit that you just referenced?

A Oh. We start about 2 years in advance of the expiration. Like 2017, we start in 2015. And the reason we do that is we consult with every agency in town who cares about them. We also do environmental assessments for every single of the 50 nationwide permits. Now it's going to be 52 if we get the two new ones added. And we write a draft proposal. We brief it to the General, now it's Jackson. And before it was Peabody.

We brief the Assistant Secretary. We get a green light. We go to OIRA. They do their 90-day interagency vetting process for public comment period. That's usually 60 days. Out of the box, we often get requests for extensions, so we account for another 30 to 45 in our schedule and planning. Then we spend some months reading, evaluating comments, responding to comments and going back to OIRA with a final

package of nationwide permits for yet another round of interagency vetting before they're promulgated.

So with all the prework and then the process work, it takes close to 2 years overall. Does that help? Does that answer your question?

Q It does?

BY MRS. BAMIDURO:

Q So you said you could think of one instance where all of your comments were incorporated. So there were other instances where all of your comments were not incorporated?

A When I comment on a particular piece of paper, a particular writing, sometimes all my comments are taken. Sometimes some, and sometimes none. It's variable. We're talking about thousands of things I've commented on over the years.

Q So it's not unprecedented for all of your comments not to make their way into the --

A No, no, no. Yes, we're very open about that. And frankly just because I say something doesn't mean it's right. There are many experts out there. We do it as a team, and we discuss it, and we all put our comments in. We discuss them, and then some are taken. Some aren't. It's just the way it goes, and you move on, but the process has been informed by the discussion.

BY MR. BURNS:

Q You mentioned and/or suggested this process was atypical. Can you be a little more specific?

A It was atypical in several ways. The first way was since

this is a joint rule, typically in my experience what happens for any of these administration initiatives, any administration, it doesn't matter what party they are -- the way this works is we'll have an initial meeting. The principals will get together. Some key staff will accompany, such as myself. We'll talk about the issue. Hey, we really need a Waters of the U.S. rule because. They'll bandy it about. They'll to the staff and say, staff, go study it. Find out if there's a problem, and, if so, what is the problem? And then what are your recommendations for addressing the problem? None of that happened.

Usually in the typical process once that does happen, then we're given a charge to write a rule, and here are the principles upon which you will write a rule. That did not happen. Instead we were given a draft the EPA had already written, and in the meeting I attended sitting next to Administrator Jackson at the time, declared what the answer was before we even started interagency discussions. That's atypical.

And then in the first few years we did have very, I thought, productive, useful, collaborative meetings. But as I said before, this is tough. This environmental stuff is really complex and tough. And we got stuck on issues that may sound crazy to folks, but they're really hard, scientific, technical issues. And because we got stuck, over time frustration levels built in the administration, and the collaboration decreased. The declaration of this is the way we're going to go increased. The level of participation which started out with 35 people in a room winnowed down ultimately to the gang of eight.

And then ultimately I was eliminated, and key people in the Corps were eliminated, and we were sort of on the margins. Once in a while there would be a check. All of that is atypical. Typically it is collaborative all the way through. Would brief OIRA together like we did in the Mitigation rule. That did not happen in this case. We would fight, not fight, but we would defend the rule that's proposed to OIRA with the other agencies. That did not happen in this case. We just sat back, and EPA did it all, and we were silent. That was the agreement. We would stay silent. Does that answer your question?

Q From a timeline perspective, you said that the collaboration decreased. When did that first occur?

A I would say the first two and a half years was collaborative and a lot of interaction. We would have 6-hour meetings, 2-, 3-hour meetings in a week. We did guidance rule, guidance rule, and when we got back to the rule the last time, that was sort of the end of it. OIRA was cut out, which was too bad because they were very helpful in the past.

And instead we morphed from that to drafts just coming over. We would get to look at them and send back our comments. And then we would wait several months and another draft would come over of something. It could be a page. It could be 80 pages. We would look at it, send over comments, and then we would wait a couple of months. And then it just proceeded that way really all the way up until the end.

BY MRS. BAMIDURO:

Q Can I just go back just for a second. You said a few minutes

ago that there was an agreement made that you would be silent. Can you explain what you mean by that?

A It was made pretty clear to us without a Chip Smith shut up, that, don't object. This is what EPA wants. We're going to support it, Army, and just don't cause trouble.

And there was at least one and I think two memos that were written, not to me but to the Corps, which were interpreted as gag orders. Do not complain about the connectivity report, and do not complain about the rule. And I don't have the dates of those memorized, but if you were to ask the Corps, they ought to be able to remember them. I've seen them both.

Q Who communicated to you, Chip, be quiet?

A I just said they did not say, Chip, be quiet.

Q How did you come to the understanding that you were supposed to be quiet?

A Because our comments typically were not considered, and when we would ask about it, we were told decisions have been made. Stop asking. And that was Mr. Schmauder.

Q How do you know that your comments had not been considered?

A Okay. Let's put it this way. Most of the key changes we proposed were not taken.

Q Does that mean your comments were not considered --

A I cannot say whether --

Q Sorry. Let's not talk over each other. Does that mean that because your comments were not incorporated that they were not

considered?

A I can't say.

Q Do you know if there were meetings that were taking place about this rulemaking that you were not privy to?

A Yes.

Q So it's possible that your recommendations were considered and then not incorporated. Is that true?

A True is not the correct word.

Q Is it possible?

A It is possible. Theoretically possible.

Q That was my question; is it possible? Is that true?

A Possible.

BY MR. BURNS:

Q And at what stage in the process were you, quote-unquote, "taken out" of the process?

A Starting in November of 2014, and when it escalated over time until we got into the spring of 2015, we were fairly isolated and cut out, other than I had one task left to do and that's write an environmental assessment.

Q What I mean by in what stage in the process when you were taken out, so specifically --

A It was over the holidays.

Q No. This is what I'm getting at. At what stage? For instance, when you had given your feedback, your comments; Army Corps had given their comments, and it was at the desk so to speak of Secretary

Darcy, and the decisionmakers, those above you, was it at that stage you were taken off of the process or eliminated so to speak?

A If I understand your question correctly, it was probably 6, 7 months before that.

Q Six or seven months, okay.

BY MRS. BAMIDURO:

Q Can you explain what you mean when you say you were taken off the process? How did your role change?

A We couldn't get information.

Q Who's we?

A The Corps or I, from Army general counsel.

BY MS. BERROYA:

Q So can we talk just for a second about your role specifically and how your role changed?

A Yes. Go ahead.

Q Did your responsibilities change?

A Yes.

Q How so?

A I was not allowed to participate in the policy discussions and meetings that ordinarily I would have and that I previously were a part of. Mr. Schmauder took it over.

Q Did your job title change?

A Nope.

Q Did your salary range?

A Nope.

Q Did your grade level change?

A Nope.

BY MS. BERROYA:

Q How did Mr. Schmauder communicate to you, if he was the one, in fact, who communicated to you, that you were no longer welcome in those meetings?

A He would not invite us.

Q So, let's not talk about us. I'm just asking about you.

A Yeah. Okay. He would not invite me, but he would report that he met with so and so and this is what we decided.

Q Did you ask Mr. Schmauder if you could continue to be included?

A Absolutely.

Q And what was his response?

A No response.

Q Did you make these requests in written form?

A Email and phone and occasional meeting that did happen, I would ask him face-to-face, hey, could you include me in the future.

Q And he said nothing in response?

A Right.

BY MRS. BAMIDURO:

Q But there were meetings that Mr. Schmauder was attending that he was reporting back to you on?

A The gang of eight.

Q Mr. Schmauder would go to meetings and then report back to

the gang of eight?

A Yes.

Q Were you raising concerns at those meetings at which Mr. Schmauder was reporting back to the gang of eight?

A What kind of concerns?

Q Any concerns.

A Oh yes. Sure.

Q Mr. Schmauder could have been taking the concerns that were raised at the gang of eight meetings back to the meetings that he was attending. Is that possible?

A Theoretically.

Mr. Burns. But you don't know for sure?

Mr. Smith. I don't know. How could I possibly know?

BY MS. BERROYA:

Q You mentioned earlier that you thought you were no longer included as a result of a comment made, I believe, by Mr. Peck. And if I'm misstating your earlier statements, please let me know. Is that correct?

A Say it again now.

Q Let me just ask the question. Why do you believe Mr. Schmauder stopped inviting you to meetings?

A Boy, that's a speculation. He did stop inviting me, and that's all I think I can say. You'll have to ask him why.

BY MRS. BAMIDURO:

Q You can tell us why you think he stopped inviting you to

the meetings?

A Can I? I mean, I don't know.

Q You have a basis to know what you think.

A What I think is because I continued to raise questions about the science, the economics, tribal consultation. And asking that we do more studies, analysis, and work, and that did not comport with the schedule that we were on.

Q Did Mr. Schmauder, in fact, ever tell you that was the reason why he stopped inviting you to meetings?

A No.

BY MR. BURNS:

Q Did anyone suggest that to you verbally or in writing?

A What?

Q The reason why you were not invited to meetings anymore?

A No, I can't say that.

Q And you mentioned that Jen Moyer at one point was no longer involved in the process. How did you know that?

A Well, for the first several years of this, the chief of regulatory, whoever it was and myself, were always, not only in the meetings but leaders in the meetings, and then the last probably, well let's just say in 2015, we less and less became either participants or leaders and more and more dependent on indirect communications through the office of counsel chain. And occasionally we would ask each other, did you get invited and she'd say no. And she'd say, did you get invited, and I'd say no. And we'd ask to be invited, and no

response. So I don't know what else to say. We just weren't part of it.

Q Is it customary in the rulemaking processes you've been involved with where at a certain point, you, whether it's Jen Moyer, or other technical experts so to speak, were not involved at the, quote-unquote, "decisionmaking" stage? Better put, was it a process when the technical decisions were taken into account and solicited and taken into account and then another stage was entered to and the decisionmakers pretty much huddled to themselves and took into account your comments and then made that decision, and you may or may not have had a liaison at those decisionmaking meetings from your team of eight to communicate things back to you?

A For rulemakings, no.

BY MS. BERROYA:

Q You mentioned a few minutes ago that the EPA declared at the first meeting about this rulemaking what the answer was going to be.

A Uh-huh.

Q I was a little confused by that statement because the rulemaking process took many years.

A Yes.

Q So if EPA declared the answer, what was the point of all of the meetings and the discussion and the draft and then the final and changes between them?

A Okay. The answer was to assert Clean Water Act 404

jurisdiction to the broadest extent possible under law and court decision. Now, how you implement that is very complex, and there are lot of factors that go into thinking about what does that mean for traditional navigable waters, isolated waters, territorial seas, tributaries, perennial, intermittent, and ephemeral streams, wetlands that are adjacent, wetlands that are neighboring, and wetlands that are isolated.

And so effecting the answer took time, and the more we talked about it, the more we realized -- I mean, it just took a long time to talk through it. We had a dozen scientists and regulators sitting around the table, and we just really struggled. And so it took time.

I think part of the reason was we never did what I said to this other gentleman's question, start from the beginning, study the Clean Water Act, do we have a problem, what's the problem, what are the options, and then move forward with solutions. Instead we have this broad answer, and staff in both agencies, we struggled to figure out what that meant and how to implement it. And so it just took forever.

Q Had anyone studied the issue prior to that meeting --

A No.

Q -- to your knowledge?

A None. No. We have had the same regulation in force since 1986 as amended by the guidance that came out as a result of SWANCC and Rapanos court decisions.

Q Do you know whether anyone in the EPA had studied the issue?

A No.

Q Is it possible that people in the EPA --

A Yeah, it's possible.

Q -- were studying the issue?

A It's possible, yeah.

Q So if the answer was to assert jurisdiction over water to the broadest extent acceptable under law --

A Uh-huh.

Q -- it seems like then the discussion was to figure out what the science and the law supported?

A Correct.

Q And so all of the back and forth was figuring out the answer to that, and that's really where the meat is. Is that correct?

A That's a lot of the meat.

Q I guess my confusion is that to me when I'm sitting here listening to that, that doesn't sound like the answer. That sounds like the task, and the answer is determining where the line is, where the line that the law and the science supports is. What am I not understanding?

A Well, there is no science really, very little science on Clean Water Act jurisdiction. There is a lot of science on the general ecology of streams and wetlands. And so when you think about professors in college, they don't study where the jurisdiction line is, they study ecology. So we have all this hundreds, thousands of journal articles and books on ecology, but we have almost no science on jurisdiction.

The struggle was translating general science to something very arcane, the 404 program. And we had not had the opportunity to have our scientists at ERDC or the scientists in EPA's ORD actually study the questions of, what is a significant nexus? What does neighboring mean? What is a significant effect on the biological, physical, and chemical integrity of a downstream water? We had no science on those points, and that's why it took so long, because we just didn't know -- we struggled.

Q So you and the Army Corps were struggling with those questions and reviewing the science and trying to determine what the appropriate approach was from the inception until the draft rulemaking. Is that correct?

A That is not correct. That's what we wanted to do. This process did not enable us or allow us to do that. We just took EPA drafts of guidance or rule and commented on it as best we could with just, I don't know, practical implementation knowledge without science specifically on those points that I mentioned.

Q Were you spending time trying to review the science that there was and struggle and understand those issues so that your comments were helpful in that manner?

A We studied what science there was. But as I said, there's a lot of general ecology stuff out there and wetlands stuff out there, but there isn't really science targeted at what 404 jurisdiction is and the terms that are in the Supreme Court decisions that are so troublesome to us.

BY MR. BURNS:

Q Did you ever have an opportunity to actually have a one-on-one with Assistant Secretary Darcy to discuss your specific concerns with the proposed final rule based on science?

A One-on-one?

Q Uh-huh.

A No.

Q Okay. Did you ever express your concerns in any kind of formal communication, whether it's memo, email, to Secretary Darcy?

A Yes.

Q And what was her response?

A Just to continue working on it.

Q To continue working on it?

A Uh-huh.

Q And working on what?

A Of trying to come up with answers, to work with EPA to come up with a rule that can be promulgated as draft and final. We briefed her. We'd raise the issues, and our charge was to go to work, troops. And that's not uncommon. That's typical of how stuff works at that level.

Q Do you have any knowledge of whether or not Secretary Darcy communicated your concerns to EPA?

A No, I don't. I have no direct knowledge of that.

Q And, again, you never had a one-on-one meeting with Secretary Darcy on your concerns?

A I had one one-on-one meeting July, I think, 2015.

Q And was anybody else present in that meeting?

A No. You said one-on-one.

Q Good point.

Mrs. Bamiduro. What was discussed at that meeting?

Mr. Smith. The rule. I was getting ready to go on vacation. The rule had been promulgated. It was done. It had been a painful process. And I -- I requested the meeting so that I could talk to her about the future. I expressed my concerns about being cut out. I expressed my willingness -- all the issues are done, the rule is final, it's promulgated, we have our orders, we're the Army, we'll march. And I gave her my assurances I would do everything I could to implement the rule as effectively and as efficiently as possible.

I asked her what she envisioned my role to be. She said senior policy adviser. I said thank you very much. I went back two more times to make sure I heard it correctly. And at the end of the meeting we shook hands. I said, "Do we have a deal?" We shook hands, and she said yes. And I interpreted that to mean that going forward I would be the senior policy person.

And that did not play out. I came back from vacation and I was removed permanently from anything having to do with the Clean Water Rule. I'll just leave it there.

BY MR. BURNS:

Q But there were others at the Department of Army who advised Secretary Darcy on -- that provided advice. There were other staff members as well?

A Only the attorney. No other staff. I'm the only person who does regulatory on our staff. We're a small staff.

Q And that's Mr. Schmauder?

A Yeah.

BY MRS. BAMIDURO:

Q When you said you were cut out completely when you came back from vacation, can you just reorient us to the timing of this again?

A Sure. I went on vacation. I was gone for 2 weeks over the Fourth of July holiday and I had my one-on-one meeting that I requested just before that. So it would have been the late 20s of June. And when I came back somewhere in mid-July she called me in for another meeting and said that she was removing me, she no longer had confidence in me and my abilities. Continue all other duties, but you won't work on Clean Water Act implementation.

I asked her why. She couldn't give me a reason. I said, well, you have to give me a reason. You have the right to take me off and reassign me, but what is the reason. She just said, I just lost confidence in you, and she said that about six or eight times.

And finally I said, ma'am, I request that you put it in writing and give me the reasons, because I can't improve, I can't change, I can't be more effective in my job if I don't know why this action is

being taken.

Q Did she?

A About a month later she did. And the basic reasons are recommending an EIS instead of a finding of no significant impact when I did the environmental assessment, and raising issues of science and economics in the runup to the promulgation of the final rule, and because, based on our handshake, I sent out two emails saying that I'm back in the game, please coordinate with me and invite me to meetings again. Because I had been cut out for the last 4 months, I wanted folks to know that I was back in the game. And so she wrote up a 2-page memo and said for those reasons you're removed.

Q At the meeting at which she told you she had lost confidence, was anyone else in attendance?

A Yes. Let Mon Lee.

Q Who? I'm sorry?

A Let Mon Lee.

Q Who is that?

A He's -- you know, I'm not sure what his title is, but he's like a special assistant to her, and he serves as the deputy assistant secretary for policy and legislation.

Q Did he have any input in that meeting?

A He was there as a witness only. He did not speak, to my knowledge. He was just -- I think he was just simply there to witness her handing me -- or her telling me that I was removed.

Ms. Berroya. Has your pay changed?

Mr. Smith. No.

Ms. Berroya. Has your GS scale changed?

Mr. Smith. No. Title same.

Mrs. Bamiduro. Did the remainder of your portfolio of work stay the same?

Mr. Smith. Yes.

Mr. Burns. And on what basis did Assistant Secretary Darcy come to the conclusion that given because you did not -- that you are recommending an EIS and not recommending a FONSI, how did she come to that conclusion? Did that make sense?

Mr. Smith. No, it doesn't.

Mr. Burns. So what, if anything, did you do to recommend an EIS?

Mr. Smith. Oh, I wrote an environmental assessment, a draft. I took it as far as I could take it up until April 27th, roughly, 2015, just before the rule was promulgated, and I couldn't really finish it because we still hadn't received the EPA's economic analysis and some other key documents that typically you summarize and feed into your environmental assessment that helped you make your recommendation.

But I had enough information about what the final rule was going to be look like to know that a couple of key changes in my professional opinion resulted in an adverse effect to the quality of the human environment, which is the threshold, and that is basically eliminating jurisdiction over tens of thousands, possibly hundreds of thousands of acres of wetlands and waters we currently had jurisdiction over. And that is a threshold, at least in my opinion, for stepping back,

studying it, and doing an environmental impact statement, and those were just last-minute changes that were made.

When the draft was promulgated, I was teeing up to do a FONSI, a finding of no significant impact, because all we were doing was increasing jurisdiction. But those last-minute changes changed the dynamics.

So I took my draft and I turned it in as a courtesy and said I can only take it so far because I'm still waiting for some key EPA documents, but based on what the rule says, in my opinion, there will be an adverse effect on the quality of the human environment. We've met the threshold for an EIS. What would you like me to do?

And my document just sort of, I don't know what happened, but about a week later I was told I was done working on it, and somebody else did another -- did an environmental assessment and then a FONSI.

Ms. Berroya. Who said that you were done working on it?

Mr. Smith. Letmon. But that was based on he was told to do that by Secretary Darcy, he said.

BY MR. BURNS:

Q And who asked you to draft the EA?

A Okay. Typically, EAs, NEPA documents, are done by the implementing agency, the Corps of Engineers. In this case, when all of this started many years ago, we were working on four or five rulemakings, and the Corps headquarters regulatory staff is only a branch of six people. They were overloaded, and so I talked with the chief of regulatory at the time, and we thought that one way to take

some pressure off of them, and because of my experience writing NEPA documents, would be for me to take and do the environmental assessment and help take some of that workload off of the staff.

So that's how I proceeded. I had two detailees a year help me. I experts in the field I circulated drafts with. I checked with OIRA. I checked with CEQ and their experts as I went along to make sure what I was doing was appropriate.

We got up into the runup to the final rule -- and I think it's in March, and there are emails on this -- it occurred to me that all these other rulemakings were now done, all we had left was the Clean Water rule, and let's get this back where it belongs, to the Corps, and let them finish it, because at that time I was overworked.

So I asked the Corps if they would take it back. General Peabody said, yeah, we'd be happy to take it now. We can do it.

So then I went to -- asked Army, and Craig advised that, no, let Chip keep it. Okay. Fine. So then I brought it as far as I could bring it and turned in my preliminary draft with a recommendation for an EIS, and then that's when I was taken off of it permanently.

Q And how did you specifically reach a recommendation for an EIS if you did not have specific information from EPA?

A I had the rule. The other stuff was fleshing out the full picture of the economic impacts, tribal consultation, and other things, endangered species stuff. The threshold for NEPA is adverse effects on the quality of the human environment, and if this rule, the final rule retracts jurisdiction that we currently have over the vast numbers

of acres of waters and wetlands, that meets the threshold.

Whether I ever got the economic data or anything else just really didn't matter. That fleshes out the picture. It was the fact that hundreds of thousands of acres and waters would no longer be protected. And in my view, we should step back, look at it. That meant do maps, do field work, figure out exactly what the universe of waters and wetlands that were no longer protected are.

Then we could do whatever we want. We could make a science and policy decision to protect them, not protect them, mix and match. But we need to understand what the impact is and what the policy is and what the public thinks about it. And that's why I made the recommendation I made.

Q And is it not true under the Clean Water Act there is a carveout in which EPA does not have to conduct an EIS?

A That's not correct. Under the Clean Air Act?

Q Clean Air Act.

A I'm sorry. Did you say Clean Air Act?

Q Clean Water Act.

A Clean Air Act. They have a carveout in the Clean Air Act.

So I did NEPA on behalf of the Army and the Corps for 404 only. There is no NEPA for what EPA is responsible for, 311, 401, or 402, and the decision was made to go ahead and go that way because EPA rested on its Clean Air Act -- carveout, you call it, carveout?

Q Carveout?

A Yeah, or exemption, whatever it is, yeah.

BY MS. BERROYA:

Q So you were told not to do the EIS, to leave the document alone, from Letmon?

A Yeah. Came through Ms. Darcy and Craig Schmauder.

Q And how did he communicate that to you?

A Face-to-face. He just said, you're done, you don't have to work on this anymore. And then they assigned somebody else to do an environmental assessment, the one that you, I think somebody had it here. I saw it. It's published.

Q How do you know that the message came from Ms. Darcy?

A Okay. I can't say that. That's just -- that's our boss, so --

Q So you don't know whether --

A No, I won't say that.

Q -- it came from Ms. Darcy? Letmon told you that you're done.

A Yes. I'm done.

Q And you know it came from him and him only?

A Yes. Correct.

Q Was Letmon involved in the rulemaking process?

A Not really.

Q What was his role?

A For me, he supervised me in other aspects of the portfolio. He's, at least again with me, never been involved in the rule. What he did with Ms. Darcy, I have no knowledge, but he was not really

involved.

Mr. Burns. Should we break?

Ms. Berroya. I have a couple more quick things.

BY MS. BERROYA:

Q In the last hour when you were speaking to my colleagues in the majority you were asked about the number of meetings that Ms. Moyer had with Ms. Darcy.

A Uh-huh.

Q Do you know whether Ms. Moyer had any meetings with Ms. Darcy without you present?

A I don't know.

Q Is it possible that she had meetings --

A It's possible, sure.

Q -- with Ms. Darcy without you present?

A Sure.

Q I know it's natural for us to talk over each other because we do it in normal conversation, but for the sake of the court reporters we have to try to let each other finish.

I want to have a better understanding of your role with respect to this rulemaking from its inception to completion. So in the very first meeting you went to the principals meeting because there was no one standing?

A Uh-huh.

Q Then I assume Army Corps and Army got staffed up. What was your role?

A I went to the first two meetings, principals only, because I was the only person to go. And then after that I retreated to my role as senior policy adviser to the assistant secretary and sort of general oversight of rulemaking activities or guidance, depending on which we were working on.

Q And for this rulemaking what did that role entail?

A Reading drafts, discussing issues with the Corps, and sending comments back.

Q Sending comments back to whom?

A In the beginning it was directly to EPA, and then toward the end it was only to Mr. Schmauder.

Q You mentioned in the last hour in the conversation with my colleagues in the majority that at a certain point Mr. Schmauder became the sole communicator with EPA. Is that correct?

A That's correct.

Q When did that occur?

A Early in '15, 2015.

Q And how did that come to pass? How was that communicated to you?

A In gang of eight meetings, or we had a couple calls if I remember correctly, and it was agreed that all communications would flow between the two individuals, between Mr. Schmauder and Mr. Peck, and that would cut down on extraneous traffic. Yeah.

Q Was there a lot of traffic taking place prior to that between people involved in the rulemaking in Army Corps, Army, and EPA?

A Yeah.

Q It was a complicated rulemaking?

A Very.

Q Going over a long number of years, correct?

A Correct.

Q And there are a lot of people involved in the analysis in all of the different agencies, correct?

A Correct.

Q So having two different point people in Army and EPA simplified the communications stream. Is that your understanding?

A Correct.

Q Did that make sense to you at the time?

A Yes.

Q Did you have any reason to believe once Mr. Schmauder became the primary communicator with EPA that the information you and the gang of eight were sharing with him to be communicated was not, in fact, shared?

A I would have -- no, I can't speculate on that.

Q That's all I have. You know what? I'll ask you one other thing.

At the first meeting on the rulemaking in which you heard that the task was to have the broadest jurisdiction under law for the water, did you think that was inappropriate?

A It's not my position to decide appropriateness or not.

Q Was there anything that struck you as odd or out of place

about that goal being shared?

A No, not at all. Appointees can share whatever goal they like, and then we follow the law and regulations and approach the problem, whatever it is.

Q And, in fact, the goal being shared was to follow the law and regulations?

A Yes. Yes.

Q So what, if anything, was concerning to you at that meeting when that particular goal was shared? And I'm sorry, who shared that goal?

A It was Lisa Jackson, the Administrator, Robert Sussman. He was like the senior attorney, counselor, adviser for EPA at that time.

Q So at that first meeting when Administrator Jackson shared the goal that the law and regulation should be followed in the creation of this rulemaking, what, if anything, was concerning or off-putting about --

A There's nothing wrong with that particular statement. It was the follow-up statement that if we could do it alone, we would, but because we're replacing a joint rule we've got to bring you along, but we're going to dictate what the answer is. That's what bothered me.

Q And when she said dictate what the answer is, what was your interpretation of that?

A That they would establish the policy objectives and the answer and whatever the final rule was would reflect their beliefs and

whether or not they reflected Army's or the Corps', if they did they did, but if they didn't, tough.

BY MRS. BAMIDURO:

Q You said, I think, in the first hour that you've been with the Army about 35, 36 years?

A Yes, ma'am.

Q Over that length of time, about how many rulemakings have taken place?

A I have only worked on about six, so I can't say how many overall have occurred.

Q Can you approximate how many rulemakings?

A No, I can't.

Q Dozens?

A I really don't want to answer that because I haven't -- I can only talk about the ones I actually worked on.

Q Were there others outside of the ones that you worked on?

A Oh, sure --

Q Over the course of?

A -- having nothing to do with my portfolio.

Q Sure.

A Yes.

Q So outside of the six that you worked on, there were, in fact, other rulemakings that were done by the Army?

A Yes, ma'am.

Q And you participated in about six?

A In about six.

Mr. Burns. And who would have worked on those other rulemakings?

Mr. Smith. I am aware of real estate rules, transferring land, budget issues, collecting fees at recreation area issues. And so whoever had that in their portfolio would be the lead, and I would not do that because those aren't things I work on.

BY MRS. BAMIDURO:

Q Is rulemaking formulaic?

A Yeah. There is a formal process established in executive order and regulation, and OIRA follows it, and all agencies are supposed to follow it.

Q But does every rulemaking unfold in exactly the same manner?

A In terms of process, it's supposed to, yeah.

Q Does it, in fact?

A Other than this one, in my experience, yes.

Q So every rulemaking followed an identical timetable and it stayed to that timetable --

A Not --

Q -- every single time?

A The timetable is not always the same because the issues could be -- like this one was vast and complex, so it took a long time. If it's a simple fix, transfer of property, no controversy, then the minimum timeframes would apply, and you could get it done in a couple of months.

Q Are teams comprised for each rulemaking in an identical

manner?

A I'm not sure what you mean by that.

Q The members who work on each rulemaking, are they comprised the same way for each rulemaking?

A We look for the experts in the area to work on the rule.

Q Okay.

Mr. Składany. That's an hour. Are you guys at a good stopping point?

Mrs. Bamiduro. Okay. We'll go off the record for now.

[1:59 p.m.]

BY MS. AIZCORBE:

Q It is about 2:00.

We'd like to understand a bit more about the science underlying the guidance and the proposed and final rule. We've heard without this Clean Water rule that 117 million Americans did not have or will not have clean water. Have you heard of this statistic?

A I've heard of this statistic.

Q Was this number developed by the Army or the Corps?

A No.

Q Do you know where this number came from?

A No, not for sure.

Q Or who was involved in its development?

A EPA and a couple of key environmental groups.

Q And how were you aware that those environmental groups were involved?

A We saw the same number in literature for both. And since we didn't develop it, that is a speculation, but we assume that that's where it came from.

Q Okay. Committee staff was told that the 2008 guidance implementing Rapanos was rewritten in 2010 to reflect new science from other reports. Are you aware of what these other reports are?

A No.

Q Okay. Are you aware of what new science was developed between 2008 and 2010?

A On what point?

Q That would have been informative to or the basis of the guidance for the Clean Water rule?

A No. I'm aware of no new science specifically on point to Clean Water Act jurisdiction.

Q And this is something that you would know otherwise?

A Yes, I would ordinarily be involved, yes.

Q Okay. What was the EPA's role with respect to the connectivity report?

A It is EPA's report, and I believe they hired their EPA Office of Research and Development, ORD, to put it together.

Q Did the Army or the Corps initiate the report?

A No.

Q Did the Army or Corps play any part in its development?

A No.

Q Did the Army or Corps review or weigh in on the report before it was finalized?

A Yes.

Q How so?

A When it was draft, we were given the opportunity to provide written comments, and we did. And when it was -- we were not given the opportunity to comment on the final.

Q Approximately when were you given the opportunity to comment on the draft? Do you remember?

A Let me think just a minute here, if I can count back in my

mind. It probably was sometime in 2013.

Q Do you know when the report was initiated by the EPA?

A I first heard of it myself sometime in 2011, but I do not know when they initiated it.

Q So it was after the guidance had been drafted by EPA?

A Yes. Yes.

Q Do you know when the report was finalized?

A My recollection is final publication was January 2015.

Q And so I understand, that's after the rule was promulgated, correct?

A As a draft --

Q Okay.

A -- in April of 2014.

Q Okay. Have you read the EPA's connectivity report, which was ultimately used as a basis for the rule?

A Yes.

Q Do you believe that the connectivity report supports the Waters of the United States rule?

A It's mixed. Parts do and parts don't, because they're silent on it.

Q And did you make comments or recommendations regarding those parts that you believed did not support the rule?

A Yes.

Q Were those comments adopted or addressed, to your knowledge?

A Some were, but a couple key ones were not.

Q Do you know offhand which key recommendations were not addressed?

A Yes. I recommended that we do science specifically on how to determine a significant nexus; how to determine effect on a downstream water's chemical, physical, and biological integrity; and how to properly define flood plain, considering we have 8 to 10 major ecoregions across the country.

And that science is not contained in the connectivity report. And, in fact, in the briefing Dr. Laurie Alexander gave presenting the report, she specifically said these are topics we did not address.

Q And she gave no explanation as to why they were not addressed?

A Yes. It was not her charge. The EPA charged them to do a connectivity of tributary systems study and did not charge them -- that's the term of art we use -- to look into those topics and several others that I mentioned.

Q So to your knowledge, no science was performed or research performed on any of these three areas that you made recommendations on?

A I would say we didn't -- we, meaning Army or the Corps -- didn't perform any and none was published from EPA. Whether they did it or not, I do not know.

Q Can you explain how a rule that was based on a report that was not finalized until after the draft rule was finalized came to be?

Was there any discussion about the fact that the connectivity report was not finalized or peer reviewed before that draft was completed?

A Yes, we expressed concerns, starting in summer of '14 and all the way up until it was promulgated final in, I believe, May of '15.

Q Who did you express those concerns to?

A In briefings to Assistant Secretary Darcy; we had discussions in our big interagency group of Army Corps and EPA staff; and then, of course, the infamous gang of eight.

Q And what were the responses from any of these individuals who were involved in these discussions?

A The response from then-political appointee Nancy Stoner was that the report covers it, and that was seconded by Mr. Peck on her staff.

Q When you say the report covers it, you mean that the report, even though it was published after the rule was drafted, still supports the rule?

A Yes, ma'am.

Q Okay. And did Assistant Secretary Darcy respond to your concerns?

A No, her guidance was keep working it.

Q Okay. And did anybody else in the team of eight express concern about the fact that the report was not finalized before the rule?

A Yes. Yes.

Q And how were those concerns received?

A Not well.

Q Who did not receive them well?

A Mr. Schmauder, Mr. Peck, in particular, said that the report covers everything we want to do in this rule.

Q Did you ask whether they would consider addressing any of these specific concerns that you outlined earlier?

A Yes.

Q And what were you told?

A No.

Q In a letter to the Senate Committee on Environment and Public Works, Assistant Secretary Darcy admitted that the WOTUS rule was not based on case-specific jurisdictional determinations of the Corps, even though the preamble to the rule makes that claim. Can you explain why different JDs were used in the economic analysis from those used in the preamble?

A I can't explain it because we didn't write it. All I can say is, we gave EPA 260-some cases that we had looked at -- or the Corps had looked at -- out of 70,000 we do every year. And based on that small set of data, EPA finalized a rule and did its economic analysis.

Q Were you ever given the opportunity to weigh in on these references to JDs in the rule?

A No.

Q Are you aware of any case-specific JDs that support the rule?

A Well, jurisdictional determinations are done today for

existing conditions to decide whether the law applies or not. It doesn't really translate, I think, the way you phrased the question. We take the current law and regs and we go out and we look in the field and we say, okay, where should the line be or what's in or what's out.

Q Was there any communication with EPA about how they were using the Corps JDs?

A Yes.

Q And what did that conversation consist of?

A We should do a larger sample, look in the file and get more data on the different types of water bodies across the country. And we weren't convinced, based on what we saw in writing in the preamble, that the JDs had been used and evaluated properly, and in the economic analysis.

Q And by "we," you mean Army Corps?

A The Corps and I, yes.

Q Okay. Have you read the EPA's economic analysis underlying the rule?

A Yes.

Q When did you receive the analysis?

A I believe it was in April of 2015, in the 20s. I'm not sure exactly what day. But I know I was wrapping up my environmental assessment on or about the 27th. In the previous 2 weeks, I'd been asking over and over again to Mr. Schmauder: Can you get the economic analysis? I've got to fold this in. And finally they sent it over just almost about the same time that I had to turn in my preliminary

EA.

Q And what was Mr. Schmauder's response to you when you asked for the economic analysis?

A Oh, he tried -- he kept trying to get it, and it just -- EPA just didn't finish it.

Q So when you say that you had to fold in the economic analysis into what you were producing, what does that mean in terms of a rulemaking timeline?

A Well, what I usually do -- what anybody would do is -- this is an important piece, the economic effects of the rule. And so I would take the economic analysis, I would read it, I would summarize it and put whatever it warranted in my NEPA document. It could be a paragraph. It could be a page.

But then I might make comments about how it will or won't have economic effects on the American public and whether those effects warrant the cost, whether the cost is onerous or not. And all these things would be discussed in the EPA's economic analysis.

Q So you were not given an opportunity to review or make comments about the economic analysis before you executed the NEPA documents?

A Not at that time, no.

Q Were you asked to provide comments on the analysis at any time?

A I believe we saw a draft almost a year earlier and we made comments then, but it was irrelevant in April of 2015 because the rule

had sufficiently changed over what was used for the draft that was published for public comment. So they had to redo it.

Q So on the redrafted economic analysis, were you given any opportunity to comment before the rule was finalized?

A No. We just got it and had to use it, ma'am.

Q Did you receive the analysis before the rule went to OMB for interagency review?

A No.

Q Was anyone else with the Army or Corps given the opportunity to provide comments or analysis on that second draft?

A I don't want to speculate on that. I just know when I received it, which was in April, in the 20s, '15.

Q Are you aware of the so-called Peabody Memoranda, a series of memoranda written by senior Army Corps staff involved in the rulemaking?

A I am.

Q I'd like to enter those memoranda as exhibit 1.

[Smith Exhibit No. 1

Was marked for identification.]

Ms. Aizcorbe. I have copies for both of you.

Ms. Weis. Thank you.

Can I ask you a question off the record?

Ms. Aizcorbe. Off the record.

[Discussion off the record.]

BY MS. AIZCORBE:

Q This exhibit contains all of the Peabody Memoranda and attachments, with the exception of the voluminous attachment, over 50 or so pages, that we won't be referencing in this discussion.

Have you read the Peabody Memoranda?

A Let me flip real quick.

Q Sure.

A I've read the memoranda 15 May, '15. I've previously read the memoranda 24 April, 2015, and attachments with comments. Let's see. Is this tab the next one?

Q It's the previous page, but yeah. I tabbed where we'll be referencing the text.

A Okay. And I've read the Paul Scodari memorandum of May 11, 2015.

Q Okay. Great.

Are you aware then of the concerns raised in the memoranda regarding scientific, legal, and procedural deficiencies in the rulemaking before they were drafted?

Let me redo that. Sorry.

A Yeah, please.

Q Are you aware of the concerns raised in the memoranda regarding the scientific, legal, and procedural deficiencies in the rulemaking?

A Yes.

Q Did you ever discuss those deficiencies at any point in the rulemaking with senior management at the Army?

A I discussed the deficiencies but not the memoranda. I did not know they were being written.

Q Did you discuss any of the deficiencies with management at the Corps or senior staff with the Corps during the rulemaking?

A Yes.

Q In a May 15 memo, the chief of the Army Corps regulatory program states that the Corps had, quote, "no role in selecting or analyzing the data that EPA elected to use in drafting" the economic analysis of the proposed final rule, and, quote, "no role in actually performing the technical analysis or drafting" the technical support document for the rule. This is on page one.

A Oh, I see. I missed a tab, okay.

Q I'll give you a page number next time just so you're clear.

A Got it. Thank you.

Q Do you agree with these statements about the role that the Army Corps played in the development of the economic analysis and the technical support document?

A Yes, I agree with the statement in paragraph two in this memoranda.

Q Is it common for the Army Corps to have no role in performing the analysis supporting one of its own joint rules?

A No.

Q Were you aware that the Corps did not receive a copy of either the economic analysis or TSP until after they had been sent to OMB for interagency review? It's the committee's understanding that

the Corps did not receive them before they went for interagency review.

A That is correct. I got them at the same time the Corps did.

Q In your experience with joint rulemakings with the Army Corps, is it common for underlying analyses to be first shared with the Corps only after the draft final rule is completed and sent to OMB?

A No.

Q Approximately when would the Army Corps see these types of documents in a rulemaking?

A Typically we would develop them together, and we would have seen it incrementally all along. At the very least, we would see a draft and comment on it and resolve any issues before it went to OIRA.

Q And this was not done with respect to the Waters of the United States rulemaking?

A It was not done.

Q Were the Corps afforded an opportunity to review or comment on the EPA's economic analysis or TSP before they were finalized?

A I was not afforded the opportunity. I prefer you ask the Corps.

Q Okay. Did you receive any instruction on how to review the economic analysis or TSP or to treat the EPA's conclusions with a certain level of deference?

A We were not allowed -- I was not allowed to review and comment on the final economic analysis, and it was implicit that it would be accepted on its face value and part of the record.

Q And do you say that it was implicit to be accepted on face

value because of the timeline of the rulemaking at that point or because something was said to you in addition to the timeline?

A Typically, we get a document, we're specifically asked to review and comment. We were not asked to review and comment. Between that and the timeline, the effect was, you know, we had no input.

Q Did you or anybody within the Corps or Army, to your knowledge, make recommendations for changes to the second economic analysis or TSP? I know you already answered with respect to the second economic analysis on your behalf, but are you aware of the same for the TSP?

A I can't -- I can't -- oh, is that the technical support document?

Q Uh-huh.

A I didn't make comments on the final one because I did not see it really until after the final rule was promulgated, so I had no ability to comment.

Q Was that the first time that you were seeing the technical support document?

A I saw a technical support document version months before associated with the draft that was promulgated for public comment.

Q Was it still in the similar form by the time the final rule came out or -- similar to the economic analysis where you said that it had changed substantially, because the rule had changed substantially. Do you know whether the technical support document also changed?

A No. I did not at that point bother to read it.

Q So you did not read the technical support document?

A I didn't read the final technical support document with an eye of reviewing and commenting. I skimmed it so I would understand what was in it, but I knew that it was done, and all I needed to do was be familiar with it.

Q Okay. Did you take any meetings on the economic analysis or TSP with OIRA?

A No.

Q Do you know whether anybody else with the Army or Corps met with OIRA regarding these analyses?

A Not to my knowledge.

Q Okay. In the same May 15 memo that we referenced earlier, on pages two and three, the chief of the regulatory program states that some parts of the economic analysis and TSD have no information on how the EPA obtained their results, including that the EPA, quote, "grossly overestimates the amount of compensatory mitigation required under section 404 of the Clean Water Act," unquote, and that such benefits should have been described as costs. I know you referenced this earlier.

Were you aware that the EPA did not include information on how they obtained their results in the economic analysis and TSD?

A Yes. And during the gang of eight meeting we asked how they were going to use the information, and we never did get a reply as to how they were going to use the information on the 260-some-odd cases

that we provided them to look at.

Q Nobody responded to your questions in those meetings?

A No.

Q Do you agree that the EPA grossly overestimated the amount of compensatory mitigation required under the 404 program?

A Yes, based on ORM2 data, which is a record that the Corps keeps. So we know -- well, as precisely as we can based on what is entered for each and every application and each and every mitigation -- the Corps' numbers in that database, which I have looked at myself, do not match what the economic analysis said, which was written by EPA.

Q Did you bring that to anybody's attention?

A We did. I did.

Q Who did you speak with?

A We brought it up during gang of eight meetings.

Q And what was the response?

A They believed that -- the way it was phrased is, you know, we understand you have your ORM data, but we have this feeling it's not right. We think the numbers should be higher or different.

Q And when you say "they," are you referring to --

A We're talking to EPA staff that were there. It'd be Mr. Peck and his staff, and I don't remember all of whom were there.

Q Towards the back of your packet, another author echoed these concerns in a May 11 memo, on pages two and three of that memo, stating that, quote, "The Corps has always recognized that section 404 benefits

analysis is meaningless," unquote; and, quote, "From the beginning, EPA was intent on including a benefits analysis that would show the rule benefits outweigh costs," unquote; and finally, that the Corps, quote, "is just going to have to live with it and leave responsibility for defending it to the EPA and OMB," unquote.

Were you aware of EPA's manipulation of cost and benefits in these documents?

A I had read an earlier draft associated with the draft rule promulgated in April 2014. When I finally did receive the final economic analysis in April of 2015, my personal reading, notwithstanding what Mr. Scodari says in his memorandum, is that benefits were based on anecdotal information, they were inflated, and they were not typical of the rigorous analysis that we do for Corps of Engineers water resources projects.

And my major concern continued to be that whoever did the economic analysis for EPA used the cost of compensatory mitigation, which is replacement of a loss, as an economic benefit. And that's something I had never seen attempted before in any of my review or work in my career.

Q Have you seen those costs characterized -- excuse me. Have you seen those mitigation numbers characterized as costs before?

A Yes, absolutely.

Q And that's typically the way they would be characterized?

A Yes. We have regulations on the books for our planning program in particular because that's where we really analyze these

things. We look at the cost -- to make it simple -- of a levee and a pump versus the benefits of protecting structures from flood damage. And you come up with a ratio, and as long as the benefits exceed the costs, you're good to go.

Mitigation is never factored in as a benefit. It's a project cost. But we usually set it aside and don't use it to bring down the benefit-cost ratio. But it is registered as a cost in the cost estimate. So the regulatory program, while they don't have comparable regulations, because we just don't do that kind of analysis, we consider compensatory mitigation a loss of function, a cost to the applicant, that has to be then -- that is not a benefit.

Q Were you ever given any explanation as to why EPA characterized those amounts as benefits?

A No.

Q What was the Army or the Corps', to your knowledge --

A Yes, ma'am.

Q -- what were their involvement in the development of costs for the rule?

A I don't believe -- I had no role in development and costs, and I was informed by the Corps team working on this that they were not intimately developed in the costs for this rule.

Q Meaning they were never asked by EPA to provide a cost analysis?

A Right. They were asked to provide some case file information, the 260, whatever, that I had mentioned, and then the

EPA made decisions based on that information without our involvement.

Q I know you mentioned that you have been taken off of clean water --

A Implementation of this rule --

Q -- the clean water portfolio implementation of this rule, but have you been involved in justifying the EPA's economic analysis or technical support documents since they were published?

A No.

Q We understand that differences of opinion may arise in a joint rulemaking. Is it your opinion that the concerns raised in these memos were opinions or statements of facts?

A I believe the statements made in these memorandums are statements about violations of process, proper science, and proper economic analysis.

Q In your experience, has Army Corps ever expressed such dissension over an ongoing rulemaking?

A No.

Q Is it normal for senior regulatory staff to express such concerns with respect to a rule that has already been submitted to OMB for final interagency review?

A No.

Q Because at that point you would have worked out a lot of these concerns that we're seeing here in these memos. Is that a fair characterization?

A Whenever you do a joint rulemaking, the objective is and

always has been, in my experience, until this one, for the two agencies to co-write and develop the rule, discuss and evaluate and resolve any issues, and go forward to OIRA linked at the hip and prepared to answer any challenges from other agencies together. That did not happen in this case.

Q Going back to the memos, in Ms. Moyer's May 15 memo she states that "the Corps cannot corroborate the numbers or conclusions" in the technical support document regarding the rule's distance limits for adjacent waters. That's on page five.

Do you know how these distance limits in the rule were determined?

A They're not -- I know they are not based on science.

Mr. Peck said they're not based on science; they're based on his opinion and anecdotal information of what seemed reasonable.

Q So did Mr. Peck develop these limits?

A I don't know -- I can't say that.

Q You don't know who proposed them --

A No.

Q -- or finalized them?

A No. I just know they weren't in the ORD connectivity report and that I have seen or read no science anywhere that lists any limits, let alone those limits.

Q And you received no information regarding how these limits were developed, I mean, even outside of science, besides just people's opinions that they might be an appropriate distance?

A The only statement I recall is that this may be acceptable,

an acceptable compromise to various constituencies on both sides of the issue. It seemed reasonable.

Q Do you know how those constituencies were asked to receive their input on these limits?

A I do not.

Q Were public comments sought -- on the specific distances -- sought, received, or considered?

A No.

Q Were you or anyone else in the Corps given the opportunity to weigh in on these limits?

A We discussed them in gang of eight meetings, we discussed them on two conference calls, and we discussed them in our written comments on some draft materials that were shared with us in the runup to the final from Mr. Peck to Mr. Schmauder to the Corps and to I.

And we universally, as outlined in these memos, which you have put into the record, said that there is not a scientific basis. We have no problem exploring limits, but we need to do an EIS so that we can evaluate what are the appropriate limits based on science.

Q And an EIS was never developed or attempted?

A No. That would have taken another 18 months, and that did not comport with the schedule that we were on.

Q How were your comments in these team of eight meetings or any other meetings with EPA, Ms. Darcy, or anybody else received, comments about the distance limits, that they were not based in sound science? Who did you make these comments to, and did you receive any

sort of response?

A Mr. Peck, Mr. Schmauder basically said this is what the Administrator wants and the Army will concur.

Q And so Ms. Darcy never responded or provided any input on the limits themselves?

A I have no idea. She may have had conversations that I would not be privy to with the Administrator.

Q But to you, she never --

A But to me, she never said -- yeah. Right.

Q Did you ever make a comment to her about the limits directly?

A I don't recall.

Q Okay. In Ms. Moyer's April 24 memo, on page two, she provides that the guidebook that accompanies the Rapanos guidance states that, quote, "It is not appropriate to determine significant nexus based solely on any specific threshold of distance," unquote.

You stated that you don't know how these distance limits were developed, but do you know why they were included in the final rule despite this assertion?

A The only thing I can say is what I believe I heard Mr. Schmauder and Mr. Peck say, and that is the rule needs some bright lines. Public comments were not asking for numbers necessarily, but we want clear regulations. That's what they meant, I think, by bright lines. And it was their opinion that by putting threshold numbers in there that provided bright lines so you have increased certainty.

Q Were you aware that in the May 15 memo that Ms. Moyer says

that EPA's own connectivity report, the science basis underlying the rule recommends against using line and distance limitations to establish jurisdictional boundaries?

A I read the connectivity report, I went to the two meetings where it was briefed and announced, and I found no reference. In fact, I found statements saying we should not, based on what we know today, establish these number thresholds. And I was not aware of this memo until several weeks after it came out. It was held pretty close. But once I finally was able to read it, I have to say, I do concur with it.

Q From an implementation standpoint, how difficult would it be to implement distance limits such as those included in the final rule?

A One of our concerns here is that sitting at the table in Washington, and we come up with these numbers that may look good on paper, when you get out on a landscape where you've got mountains, you've got topography that goes like this, you've got wetlands and marshes, how is mom and pop, which is 85 percent of our regulatory activity, going to figure out where the 100-yard floodplain is, where 1,500 feet is, where 4,000 feet is on the landscape? And is it straight like this or does it go like this with the landscape?

It's one of these ideas that may sound good on paper but in practice our regulators that I've talked to, and I'm just thinking of myself going back out in the field, I'm not quite sure, where would I -- how would I figure out where that line is?

We saw that as, notwithstanding the scientific issue, an implementation problem that would cause a lot of consternation and would probably lead to arguments and litigation, as you and I argued, is the line -- am I in or am I out? I mean, it's key.

Q Ms. Moyer continues in her April 24 memo, on page three, that to verify the exact portions of waters lost to Federal jurisdiction under these limits, quote, "The Corps would need to complete a robust analysis of its data that would yield statistically significant and reliable results," unquote; and that, quote, "this is precisely the type of research and analysis that would be undertaken in completing an environmental impact statement," unquote.

Do you agree with that statement?

A Yes, I do.

Q Are you aware of whether the EPA, Army, or Corps considered this concern in its determination to execute an environmental assessment only in lieu of an EIS?

A Could you rephrase that again?

Q Did the EPA, Army, or Corps consider this concern that a robust analysis and EIS was not being performed and that these limits would not yield statistically, you know, significant and reliable results in the determination to find no significant impact and not pursue an EIS?

A It's my understanding the recommendations were considered, not adopted.

Q And you don't know why or have any idea of the justification

of why that they were not adopted?

A I do not.

Q Was, in your opinion, any type of robust analysis conducted before the rule was finalized?

A No.

Q Are you aware of whether the EPA engaged in NEPA analysis for its own program under section 401, 402, and 311?

A They did not. They declared they were excluded under the Clean Air Act and would not be doing NEPA.

Q So the Clean Air Act provides them justification for not performing NEPA under something that is within a Clean Water Act jurisdiction?

A You know, I don't have it exactly memorized, but the language says something about that for certain activities of EPA they do not need -- it will be assumed they're environmentally compliant and they don't need to actually go through a NEPA process, because what they're doing is a surrogate for that.

Q In your experience, is that typically how EPA performs its analysis in joint rulemakings with the Army Corps, it does not conduct NEPA analysis, even though it may voluntarily do so?

A We, in 2008, for the joint mitigation rule, we did NEPA for the impacts on the public that would be regulated. EPA did not do NEPA.

Q In Ms. Moyer's May 15 memo, on page seven, she closes by saying, quote, "The economic analysis in TSD should not be characterized as anything other than analyses performed solely by the

EPA," unquote; and that, quote, "The Corps should not be identified as an author, coauthor, or substantive contributor to either document," unquote; and that, quote, "All references to the 'agencies' should be removed as well as references to conclusions drawn based on the agencies' 'experience and expertise,'" unquote.

In your opinion, is this a fair characterization of the Corps' involvement in developing the analysis underlying this rule?

A Yes.

Q We note that your title includes Indian affairs. Can you explain a little bit about what your job duties entail in that regard.

A When I was hired in 1996, then-Assistant Secretary Lancaster asked me to develop an Indian affairs program because we had none. We had a 200-year history of moving tribes around, relocating them, displacing them, and he wanted to see that change.

Since that time, we now, with, I think I can say, my leadership and oversight, we've established an official, formal Indian affairs program. We have tribal liaisons in 38 districts, 8 divisions in the Corps headquarters. I helped develop and I still teach a course called Consulting With Indian Nations. I've written guidance. I've written pamphlets on tribes and civil works projects. And I've worked on land transfers, protection of sacred sites, and consultations. I've worked probably with 200 tribes in my 19-year tenure here in the Pentagon.

So on the brink of my impending retirement in the next couple of years -- after 39 years, I've got to think about it -- I feel like -- just a way of answering the question -- I think I've teed it

up in a way that Indian affairs is now a formal community practice in the Corps of Engineers with its own charter, its own guidance and liaisons throughout the organization. And we are now, I think, a leader in the Federal Government working with Indian nations.

Q So you would say, and it sounds from what you just said, is that your experience is quite extensive with Indian affairs?

A Correct.

Q In her May 15 memo, Ms. Moyer provides that the statement in the economic analysis that, quote, "This action does not have tribal implications as specified in Executive Order 13175, is patently inaccurate," unquote; and that, quote, "the effects have not been identified and evaluated," unquote.

How did Army consult with federally recognized tribes during this rulemaking?

A We did not.

Q Would you typically engage with them?

A Yes, ma'am. We typically -- the littlest action, whether it's a little parcel and we're going to put a comfort station on it, we would at least work with staff and coordinate. But we're responsible under executive order, the Constitution, and other regulations to consult, which means leader to leader or decisionmaker to decisionmaker, with federally recognized tribes.

Because we did not hold the pen, we did not write the rule and the preamble, and we had no real basis to consult with tribes and did not consult with tribes the way that I teach it, which is meaningful,

predecisional consultation, which may have surfaced issues about how this rule will both benefit or adversely affect millions of acres of reservation lands and aquatic resources around this country.

Q Who decided that the rule does not have tribal implications as specified under the executive order?

A Whoever wrote that part of the preamble for the EPA. It was not myself.

Q Was anyone in the Army or Corps, to your knowledge, given the opportunity to weigh in on this decision?

A No.

Q Do you know who drafted the final summary of tribal consultation for the Clean Water rule published in May of 2015?

A I do not.

Q Were you given the opportunity to review this document?

Ms. Aizcorbe. And I have copies here that we'll enter into the record.

[Smith Exhibit No. 2

Was marked for identification.]

Mr. Smith. I reviewed an earlier version in maybe January timeframe where the draft -- an earlier draft of the final rule was starting to say this exact same language that you quoted to me. And I did in written bubble comments in a markup that was passed back to Mr. Schmauder, and whether it got to EPA or not I don't know. It specifically said, we have not done tribal consultation. We have not met with any tribes and specifically discussed this rule and its

potential, if any, impacts on reservation lands, treaty, and trust resources?

BY MS. AIZCORBE:

Q The document that you originally reviewed contained those statements?

A Yes.

Q We'll get to this in a minute.

Ms. Moyer also states in her memo that affected tribes were not consulted as a part of the analysis, which appears to conflict with the EPA and Army's characterization in their final summary of tribal consultation for the Clean Water rule that I just handed around.

To your knowledge, were any tribal consultations conducted in the course of this rulemaking?

A Not by the Corps or I. Had they been done, I would've been the one to do it.

Q Were you aware of whether the EPA conducted any tribal consultations?

A I am not aware of any they conducted.

Q Who with the Army or Army Corps usually conducts tribal consultations? You said you would have been a part of that?

A Yes, ma'am.

Q And those are the consultations that are required under Executive Order 13175?

A That's correct.

Q The EPA and Army tribal summary states that, quote, "In the

course of this consultation, EPA coordinated with Army and Army jointly participated in aspects of the consultation process," unquote. Do you know what aspects this document is referring to?

A I do not, and it did not include me.

Q So you don't know who in the Army was coordinating --

A I do not.

Q -- on this?

A I do not.

Q Does anybody in the Army besides yourself have experience with tribal affairs?

A Not like this, no -- or not like I do, and I'm the only one who works in Army Civil Works, which includes regulatory tribal affairs.

Q Let me restate just to make sure I understand.

A Okay. Yeah.

Q So you are the only staff member in Army Civil Works --

A Civil Works.

Q -- that engages in tribal affairs?

A Yes, ma'am.

Q And you were not consulted at all about this tribal consultation document that we're seeing here?

A I was not.

Q Do you believe that the agencies fulfilled their coordination and consultation mandates with respect to tribes in this rulemaking?

A No, ma'am.

Q Do you know how the Waters of the U.S. might impact these communities or the treaty and trust resources upon which they depend?

A Jurisdiction is very important. Whether something is regulated by the Clean Water Act or not regulated affects them in this manner. If a water body is protected, then Endangered Species Act kicks in, National Historic Preservation kicks in, Clean Water Act 401 and 402 kick in, and there are a whole suite of Federal laws that help protect tribal resources, water quality, salmon fisheries, for example.

If, as waters are not jurisdictional, those other Federal laws don't kick in in each and every case, and therefore for those acres that we have now taken out of jurisdiction in this final rule, those protections aren't there for Indian people.

Q So you would say, based on your experience in what you understand with this rulemaking and the scope and breadth of this rulemaking, that it would be your opinion that this rule would have an impact on tribes?

A Both beneficial and adverse, yes.

Q But an impact nonetheless?

A An impact, yes.

Q Which is inconsistent with the decision that was made or at least communicated in this document that there would be no impact?

A Correct.

Q Do you know whether the Army or Corps conducted outreach

with all 50 States in the course of this rulemaking?

A I did not. The Corps did not. I can't speak for Army general counsel.

Q Do you know whether the EPA conducted outreach with all 50 States?

A Post-promulgation of the draft rule, outreach was conducted, but I don't recall how many States out of the 50 they reached.

Q Were you involved in any discussions regarding certifying that the rule would not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act?

A I was not.

Q So do you know who made that decision that it would not have an impact on small entities?

A It's my understanding that all of the back-end stuff, the compliance with the various laws, tribal, small business, EJ, flexibility, and there's some others, were all done by EPA.

Q Are you aware that the U.S. Small Business Administration Office of Advocacy submitted a formal comment to the Army Corps and the EPA that the agencies improperly certified this rule?

A I am aware, and I've read it.

Q You have read it?

A Uh-huh.

Q Were any recommendations made based on Advocacy's comments?

A By whom?

Q By anybody in the Army, by yourself, by Army Corps. In your knowledge, from who you were having these discussions or hearing from, were any recommendations made to change the certification or otherwise discuss EPA's certification?

A Yes, we raised the issue -- we, meaning myself and the headquarter's regulatory staff -- that this looked like a weakness of the rule and is there a way that we could reach out to States and improve our standing in that regard.

Q Are you aware of whether these conversations led to suggestions that informal outreach might satisfy the EPA's requirement under the Regulatory Flexibility Act to obtain input from the small business community?

A I don't recall her title, but Nancy Stoner commonly would say in meetings, I've heard it before, I know what the comments and concerns are, let's move on.

Q And when she made those comments she's heard it before, was she referring to comments that the small business community would make regarding wanting to provide input on a rulemaking?

A That's my understanding.

Q Do you know whether she was specifically referring to hearing comments regarding this rulemaking?

A Yes, it was for this rulemaking.

Q And she didn't elaborate that she was inclined to take any action to receive that input?

A No.

Q In its comment letter, which we have also for the record, the Office of Advocacy states that, one, the agencies used an incorrect baseline for determining their obligations under the RFA; two, that the rule imposes direct costs on small businesses; and three, that the rule will have significant economic impact on small businesses. I think this is exhibit number 3, so I'll go ahead and mark that for you.

[Smith Exhibit No. 3

Was marked for identification.]

BY MS. AIZCORBE:

Q Are you aware that the 1986 regulation was used as a baseline for this certification which results in narrowing the Clean Water Act jurisdiction, where the economic analysis uses current practice and results in approximate 3 percent increase in jurisdiction?

A Yes.

Q Who made the decision to use the '98 regulation as a baseline instead of current practice, per OIRA's Circular A-4?

A Can I ask a question?

Q Absolutely.

A Do you mean the 1986 regulation?

Q Yes. Did I say -- I'm sorry. I meant to say 1986, so, yes.

A Yes. EPA made that decision. We had no input in that.

Q You had no input.

Do you disagree with the Office of Advocacy that the rule imposes direct costs on small businesses?

A I agree and advocated that it provides direct costs, and

I also agree and advocated that the correct baseline is the '86 rule as amended by the SWANCC and Rapanos guidance.

Q Who did you make those comments to?

A EPA, Army General Counsel.

Q And what were their responses?

A EPA was responsible for doing the regulatory flexibility analysis for this rule and we need not be concerned with it. They would handle it.

Q That was EPA's response or the Army General Counsel's response?

A It was both.

Q Okay. We understand that Army Corps staff collaborated directly with EPA on comments coming in from the public and generally on the rulemaking through its development, as did the Army. Who were you in contact with at the EPA throughout the rulemaking?

A That's a long list. I started out with --

Q And if it's a long list, you can just give us the primary.

A -- David Evans was the chief, replaced by Jim Prendergast, replaced by John Goodin, Donna Downing, Karyn Wendelowski, Gautam Srin -- I never say his name right -- Srinivasan.

Q We have that spelling. That's fine.

A And Nancy Stoner, Bob Perciasepe. Those are the key people that I can recall.

Q And how frequently did you or the Army Corps staff meet with EPA staff during the rulemaking, including phone calls? Was it

frequent? Was it once every week?

A The first couple of years it was relatively frequent. It was at least monthly. The last 4 months it was never, and the last year and a half it was relatively infrequent.

Q What is the standard process in a rulemaking for interagency issues encountered? Do policy and technical staff of both agencies typically meet, or is that handled at a higher level?

A We typically at the staff level, meaning nonappointee, try to work the issues out. And if we -- if for example, the Corps technical staff and the EPA technical staff could not, they would elevate it up to me. And my counterpart today is John Goodin. Back then it was David Evans. We would try to work it out, and if we couldn't work it out, we would elevate it to our appointees, and they would tell us what the answer is and would charge off and follow their guidance.

Q The rule was finalized a mere month after the Peabody Memoranda were transmitted. Yet Administrator McCarthy testified before this committee that Jo-Ellen Darcy indicated all of the concerns that the Army Corps raised in these memos had been satisfied, and that Ms. McCarthy also understood that everything had been fully satisfied.

Do you personally feel, with all of your experience and involvement in this rulemaking, that all of the concerns raised by the Corps in these memos were satisfied in the final rule?

A They were not.

Q Did any of the concerns raised in these memos exist with respect to the 2010 Clean Water Act guidance, which was redrafted to

consider some of this new science that was in the process of being developed by the EPA?

A I don't recall.

Q Okay. Do you consider the positions taken in the Peabody Memoranda to be a valid reflection of the rulemaking?

A Yes.

BY MR. HAMBLETON:

Q One question. You mentioned that you teach?

A Yes.

Q Can you describe that a little bit. What do you teach and where?

A I teach consulting with Indian nations. It's a 3-day course that I helped develop. I led the development of it. We've taught it 20 times. We've trained almost 2,000 Corps employees and employees from other agencies on how to work with Indian nations and properly consult and protect Indian rights, people in communities from adverse impacts.

I also teach wetland regulation, I give keynote addresses, and I teach continuing legal education. I don't know if any of you were attorneys and have to do CLE. I teach the CLE International a couple times a year and ALI-ABA a couple times a year, either in tribal historic preservation or the regulatory program.

Q So this would be like SES training or exactly what?

A All staff are welcome and the attorney course is like the CLE International. That's mostly attorneys, but I get a lot of

consultants too.

Q Intergovernmental?

A Yeah, it's inter -- it's a governmental thing, but it doesn't have to be government employees that take it. It's open to everybody who needs to get their bar thing, you know, your credits. I don't know it. You guys do that, right? Yeah.

BY MS. AIZCORBE:

Q Are there any certifications that you currently hold that are related to either teaching in these subject matter areas or your current role?

A No, there aren't any in that. This is kind of new stuff, teaching tribal relations. It's really new, it's cutting edge, and there are no certifications. And there's no certification for -- there's a certification for the specific task of delineating wetlands. I do not have that.

Q Does anybody at the Army hold that, that you know of?

A Oh, yeah, all of our people in the field. They're the ones that need it because they're tramping out there in the marshes putting the tape around here's the boundary. And they have to read the soils, the hydrology, and the plants. I can do all of that, but I don't have the certification.

Q And these staff who you're referring to in the field, were they a part of this team that reviewed the comments and made recommendations on the public comments for the rule?

A A select few, because it was, you know, embargoed internal

work, but we picked some of our best and brightest to help us develop the comments that fed into the Peabody memo, the Moyer memo, the Wood memo, and even my own comments. Every time I travel, I ask my regulators, "What do you think?" and I would get input.

Q And so you would say that these are the most knowledgeable people providing comments that the Army Corps has available on these technical and scientific matters?

A Correct. And, again, this is just my opinion, but it's the Army Corps of Engineers that goes out every day and evaluates permit applications, does jurisdictional determinations. So we do, I think, 90-plus percent of the actual work, and EPA is an adviser, and that's an important distinction.

Now, they run 401, 402, 311. But for 404, the Corps is where the -- in my opinion -- now, I have to say, that's where the expertise is, because we're the ones doing the work.

Q So does it seem then, with your experience with joint rulemakings, you said that EPA holds almost a secondary role in a lot of these 404 program issues that they were the ones drafting and primarily really drafting all of the analysis supporting this rule without consulting or involving Army or Army Corps before the final rule was drafted and promulgated?

A That's correct.

Q It seems a little uncommon then for you based on your experience with joint rulemakings with the EPA?

A Yes, ma'am.

Ms. Aizcorbe. Okay. We can go off the record.

[3:13 p.m.]

Mr. Burns. We're back on the record.

BY MR. BURNS:

Q All right. So we'll begin, Mr. Smith, regarding the line of questioning with respect to the so-called Peabody Memos.

A Okay.

Q So with respect to the Peabody Memos, is it not uncommon for colleagues with identical skill sets, experience, and expertise, such as yourself, would examine the same data but yet reach different opinions, conclusions, or recommendations?

A Okay. Could you rephrase that?

Q Sure.

A Is it an affirmative or a negative question, I'm trying to get the --

Q It's an affirmative question. Again, so individuals such as yourself or your colleagues, I should say, with similar expertise, educational background, experience, is it not uncommon for them to examine the same data but yet reach different conclusions?

A It's not uncommon, correct. Yes.

BY MS. FRASER:

Q Beverly Britton Fraser. Nice to meet you.

A Nice to meet you.

Q With respect to the Peabody Memo, in the last hour, you mentioned that you were in an agreement with some of the conclusions that were in that memo.

A That I was --

Q That you were in agreement with some --

A Oh, yes, yes.

Q -- of the conclusions that were in the memo. Were you involved in any way in developing some of the conclusions that were in that memo?

A No.

Q Did you talk to anybody, like the general, or any of the other people who were involved in writing that memo beforehand?

A No.

Q When did you first become aware of the memo?

A About 2 weeks after was the first time I got the memo and actually was able to read them -- publishing, the published date.

Q Two weeks after the published date, that's when you first saw them?

A Uh-huh.

Q Did you have any subsequent conversations with people in the Corps who were involved in writing those memos about the conclusions that were written there?

A No substantive conclusions; that the rulemaking was done; there was no -- no.

Q And, generally speaking, since you agreed with many of the conclusions that were in the memo, did you have opportunities to raise some of those concerns that you agreed with in the memo to members of your team that were working on the rule?

A Well, we didn't have a team. It was me and Craig Schmauder. That was it. And, no, once these memos were out, that's the general's words, and I had to stay out of it. I didn't have any comment or --

Q I understand that, you know, these particular words were the general's words. But did you at any time raise your own concerns that are reflected in some of those conclusions to Craig Schmauder, who was on your team, and anybody else in the Army?

A Prior to publication of these memos, over a period of months, I raised a number of these concerns in different meetings, starting in the summer of 2014 and all the way up. I even had some -- some of the concerns that are now in these memos were in my draft environmental assessment, which I didn't know these memos existed, but we said about the same thing.

Q And when you raised these concerns in those meetings, was there any kind of discussion about what your concerns were?

A No. EPA, whatever EPA decided was how we were going to go.

Q Well, that may be the ultimate conclusion. But my question is, was any of your concerns the subject of a discussion between yourself, Mr. Schmauder, if he was at the meeting, and members of the EPA team?

A Yes.

Q And there was a back and forth between the two sides or the two sets of people about what the resolution of your concerns ought to be, right?

A It wasn't a back and forth.

Q What was it then?

A "Here's our concern."

"Okay, heard it; the Administrator wants this, next issue."

Q And so every single time you would say that you would raise a concern, that would be the only response that you received?

A Not every single time, but most times.

Q Could you tell us some of your concerns that were raised that were not treated in that fashion?

A Are you asking me some that were debated and adopted?

Q Yes.

A Okay. Let me think a minute here. Oh, boy, I can't off the top of my head. But there were some. In fairness, there were some.

Q Would you say that there were more than 50 percent of your concerns that were debated and adopted?

A No.

Q Less than 50 percent?

A Yes.

Q And in terms of your interaction with Assistant Secretary Darcy, besides Mr. Schmauder, did you have occasion to raise these concerns directly to her?

A We did in four briefings.

Q Four briefings between --

A Over the course of the rulemaking with the team of the Corps. Whoever from the Corps was there. I was there. Craig Schmauder was

there. We raised concerns, but it was just a few meetings, not very many.

Q And when you raised those concerns in the presence of the Assistant Secretary, what kind of discussion took place as a result of your concerns?

A We explained the basis of our concerns and then were told to work with EPA and try to find a solution.

Q And it was after you were told to work with EPA that those concerns were then raised in that team of eight meeting. Is that right?

A We raised them before we briefed the Assistant Secretary. We briefed the Assistant Secretary. We raised them again after we briefed the Assistant Secretary.

Q And then there was a decision made that in some -- at some times did not result in an agreement with the position you had, right?

A Correct. Correct.

Q But other times, it did?

A Correct.

BY MR. BURNS:

Q I believe earlier in your testimony, during the last round of questioning, you mentioned that the Corps, either the Corps or the Department of the Army did not have an outreach with respect to the States. Is that true?

A That's true.

Q And how did you know that?

A I did not do it. I was the only person in my office working

on the rule. And I discussed it with people in the regulatory branch. And they weren't doing an independent outreach before the publication of the draft rule. I'll just -- yeah.

Q Is it possible that Craig Schmauder took on that role after you were, quote-unquote, "frozen out"?

A I can't speculate on that.

Q But it is possible?

A I'm not even going to answer that question.

Q Okay. Do you have any knowledge of whether or not the Environmental Protection Agency reached out to the States?

A When?

Q During the proposed rulemaking.

A After publication of the draft, yes.

Q Okay.

Mrs. Bamiduro. What's your basis for knowing it was after the publication?

Mr. Smith. Because they used to send us lists of engagements so that we were aware of who they were reaching out to. And they would ask us to send one staffer to sit and listen if we had the staff available. And out of the -- all of the engagements on the list, my recollection is we estimated we were able to spare staff about 30 percent of the time. And the other 70 percent, we just simply didn't have enough people to send.

Ms. Fraser. When you say "we," are you referring to the Army --

Mr. Smith. Yes, the Army Corps and then myself. I'm the only

one in our office. So it's myself and the regulators and the Corps Headquarters, which is just a group of six. It's a small group.

BY MR. BURNS:

Q Who to your knowledge attended that meeting with the EPA rep?

A Well, I sat in a couple. Jennifer Moyer sat in a couple. Stacey Jensen sat in a couple. Sometimes we would -- they would send what we call a detailee because, again, our role was to listen and take notes and hear what was said.

Q You mentioned earlier in your testimony that the chief of the regulatory program asked you to conduct the draft environmental assessment. Is that correct?

A I volunteered and was taken up on the offer. It was simply a workload sharing thing, yes.

Q Who took you up on that offer?

A The chief of regulatory back in -- oh, boy -- maybe 2010. That probably was Meg Gaffney-Smith. And then Jennifer Moyer continued the practice as a workload thing. And then I tried to give it back. I wasn't able to.

Q Okay. Meg Gaffney-Smith, is that any relation to you?

A Yeah, my wife. You knew that, or you wouldn't have asked.

Q How often would you have worked with your wife on any rulemaking process?

A This was probably the only one we ever worked on. Maybe nationwide -- oh, gosh, I don't remember when she got moved into the

new job, 1 or 2, 2 at the most.

Q Two?

A Yeah.

Q And what would they be?

A It would have been the 2012 nationwide, if she was still chief. And, frankly, I don't remember, but in the early stages of this one. And then Jennifer Moyer now has been chief for I would think at least 4 years. So she's been my principal contact as we've really focused on the final rule.

BY MS. FRASER:

Q Just so I can clarify, did you say that that is where you got your assignment, that Meg Gaffney-Smith is where you got your assignment to work on the environmental analysis?

A No. I discussed the workload challenge with Terrence "Rock" Salt, the principal deputy, my immediate boss, back in 2010 or so. And I said, Rock -- he goes by Rock -- we got six people in the headquarters. We got four rulemakings; a fifth coming down the pike. And then there were all these other activities going on. We just don't have the bandwidth. How about, because I have all this experience in NEPA, how about I volunteer to do the environmental assessment as a way to manage workload so you can continue to -- the regulators can continue to focus on these administration priorities. And he said yes. I offered. Meg Gaffney-Smith said okay. And so then I worked on the draft environmental assessment. And when I say "worked," it's like I do a little bit of work, and then I pause for months while we caught

up. And then I would do a little of bit of work, and then I would pause for months because this is a process. You can't write the thing instantly. And then when Jennifer Moyer became chief, she said: Chip, keep writing; we're still too busy.

And then in about March -- and I have email on it -- I asked General Peabody, I said: Hey, can you take it back? It's probably appropriate at this point.

He said yes.

And then I asked for permission to send it back.

And Craig said keep it.

So I didn't send it back. I finished it, a draft, yes. So that's how it went.

Q So the beginning in 2010 is when you started drafting the document?

A Uh-huh.

Q And you were essentially doing it by yourself --

A Uh-huh.

Q -- as you went along. And am I to understand that the information that you were putting into this document as you went along is information that came up as the rulemaking process went along?

A That is correct. In terms of the information, I think I said it previously in my testimony that every year I get two detailees to help me for 6-month assignments. And each and every one of them helped me with this over the last 6 years. So while I am certainly the lead proponent and it's all my fault, that environmental

assessment, I've had, let's see four, eight -- at least 8 detailees from the field who are experts help me with this.

Q And, in 2015, you said that you asked General Peabody to take it back?

A Yes.

Q Okay. What do you mean by "take it back"?

A Well, I was a staff of one. I was very busy myself at that point. We, the regulatory people had cleared the decks of all this other activity. And, ordinarily, the implementing agency writes the NEPA document. So since they didn't have the same workload issue anymore and because I was pretty much cut out and the Corps wasn't, at least through the counsel chain, I thought the smart thing to do to make sure we got a sound environmental assessment and for workload reasons to offer to give it back. Because one of the questions he asked when he took command and a very logical question is, why in the heck is the Army doing our NEPA document? It never happened before. And it was only a workload bandwidth issue. And so when I heard that, I said: Gee, General, if you want to take it back, it's certainly fine with me, let me ask. And I asked and was told no. So I ended up keeping it and finishing a draft.

Q So when in 2015 did you -- when in 2015 did the exchange between you and General Peabody take place about taking it back?

A March.

Q It was in March. And the rule was finalized in July?

A Well, we -- I thought we sent it for -- I thought it was

cleared for publication toward the end of May. But by the time it appeared in the Federal Register, it probably was -- I really don't remember.

Q Okay. Well, approximately --

A Yeah. Yeah.

Q -- 2015?

A Yeah.

Q So at the time you asked to give it back, 5 years had gone by. And you mentioned eight separate detailees having worked on it. How would you characterize the percentage of completion that the document was in --

A I had written everything I could write. I was waiting for the economic analysis from the EPA. But, again, that would have been easy to fold in. The only problem is I had such serious issues with it. I was struggling with, thinking ahead, how I was going to characterize it. But setting that aside, I probably had, oh, an 80 percent, 85 percent draft. And I was waiting for somebody to tell me this is the final rule because in that last 6 weeks, every day it changed it seemed like. There were constant changes that we were hearing about. And I just, I mean, I had to wait until I knew what the answer was. I can't do an assessment on a moving target.

Q So you mentioned in the last hour that part of what you were waiting for was the economic analysis that Mr. Schmauder was trying to get for you from the EPA.

A Yes. He was.

Q And that would have constituted the last 20 percent of the document you were working on?

A It would have been a major piece so that I could pull everything together in terms of basic data and information. And then the last 10 percent would be thinking, me thinking and doing the assessment and making a recommendation. And I had already made a preliminary recommendation. But I didn't want to finalize it until I thought I had all the data I was going to get.

Q So two things I want to ask you about now. The first one was you mentioned concerns that you had as you were trying to put together the document. And you mentioned that you were struggling as to how to characterize some of the concerns.

A Right.

Q What exactly were those concerns? And who did you raise them to as you had them?

A Who did I read them to?

Q Raise --

A Oh, raise. I'm sorry. I put them on, I put them in written comments in bubble boxes on drafts of the rule that we saw between January and the end. We did not yet have the economic analysis, but we were told that the language was lifted from that by EPA staff. So I anticipated what was probably going to be in the economic analysis based on what they had stuck into the preamble on economics. I had concerns about counting mitigation costs as a benefit. That is not something we do in the Corps of Engineers or the Army. I was concerned

about the very small sample of files and the fact that they manipulated the data without talking to the Corps or myself. And I was extraordinarily concerned about the fact that -- one day sitting in a conference room getting a call from EPA staff working on the economic analysis, being told: Well, thanks for the data on mitigation in Florida, but we can't use it. The costs are too high; they'll adversely affect our benefit analysis, and our job is to show that the benefits outweigh the costs. So they were manipulating the data. And that's just the beginning. There's -- oh, the big one, well, another big one for me was there's no actual direct State or tribal data requested and used in the analysis. It was all done through surrogate economic evaluation methods, like willingness to pay, ability to pay, and that sort of thing. And that bothered me. And so my struggle was how -- I'm an Army guy, and I'm supposed to support the Army rule. How do I characterize something that had so many flaws in it?

Q Okay. And so this was concerns that you had about things that you had seen in the preamble related to the economics, right?

A Uh-huh.

Q And so you mentioned that you raised these concerns in bubble takeouts on your drafts?

A Uh-huh. Uh-huh.

Q How many drafts did you put together in the period of time that --

A Well, I have two Xerox boxes full of stuff in my office. And I -- lots. Whenever they would fire something over, we would review

it and send it back. Dozens. I can't give you any more precise than that.

Mrs. Bamiduro. Mr. Smith, I'd just ask if you could let her finish her question before you answer just for the ease of the court reporter.

Mr. Smith. Okay. I thought she did.

BY MS. FRASER:

Q So let's pick the time period getting closer to the finalization of the rule. Let's say between August of 2014 and forward, as you were creating those drafts, did you, the concerns that you raised in those bubble boxes, were they the subject of discussion internally between you and Mr. Schmauder or anybody else at the Army in which the concerns that you raised were the subject of the discussion?

A Yes.

Q And how often did those take place?

A I would say between August and Thanksgiving, several times a month. After that, just a couple times.

Q And who was in the discussion with you about these concerns in your draft?

A Craig Schmauder, the Army team, and, when we had our joint meetings, all the EPA people that I listed previously.

Q And Craig and the Army team, who was in the Army team?

A Craig is it, me. There's only two of us.

Q And so, essentially, it was back and forth between you and

Craig about what your concerns were?

A Uh-huh.

Q And how would you characterize Craig's responses to your concerns?

A Unreceptive.

Q Unreceptive?

A Uh-huh.

Mrs. Bamiduro. What makes you say that?

Mr. Smith. He would not engage in a discussion. He would say the decision has been made, or he would say this is EPA's document.

BY MS. FRASER:

Q Now, as you got closer to March 2015, when you were talking with General Peabody about this, was there any other occasion to raise your concerns beyond Mr. Schmauder's level, to the Assistant Secretary, for example?

A What time period again?

Q Around the March 2015 date, when you were having the discussion with General Peabody about taking the EA back.

A I did not have any opportunity, ma'am, because at that point, I was -- other than the environmental assessment, I was not working actively on the rule. And my thoughts are all captured in my draft environmental assessment.

Q I apologize, but I was not here this morning. So I probably missed that portion of your testimony in which you discussed it. When did you stop working on the rule?

A Starting Thanksgiving 2014, I believe that I was being incrementally cut out of meetings, phone calls, and document sharing by Mr. Schmauder. And by, I don't know, January or after, we had a couple of what we call Gang of Eight meetings. It sort of ended. And I was rarely involved. Most of the stuff then moved to the legal chain and was all handled by attorneys. So the technical people in the Corps were cut out. I was cut out. And it was Craig Schmauder to the Corps' chief counsel and back and then to EPA. And they kind of managed it that way.

Q And so did that include the environmental assessment that you were working on? Or did you still have that in your bucket?

A I still had that in my bucket. And I finished the draft.

Q And you finished the draft?

A Uh-huh.

Q And you finished it around March 2015?

A March -- I'm sorry -- April 27th, 2015, roughly, yeah.

Q April 27th, 2015. And you turned that in to who at your office?

A Craig and Letmon Lee. I hand-carried it.

Q Okay. And what happened afterward?

A I delivered the document and said: I'm sorry. I understand that the administration goal was to do an environmental assessment and the finding of no significant impact. But based on the last-minute or last-month changes in the final rule, when I evaluated them, I concluded that under the law and under the regulations, the

new rule would have an adverse effect on the quality of the human environment. We would lose jurisdiction over significant acres of waters and wetlands, and I, in my professional judgment, we needed to recommend an environmental impact statement and go forward and evaluate more thoroughly exactly what waters and wetlands would be lost to jurisdiction and what the impact would be on communities.

Q And so this was a discussion that you had with Mr. Schmauder or Mr. Letmon --

A I only discussed it with Mr. Lee. I electronically provided the draft to both.

Q Okay. So the conversation that you just relayed to me a few seconds ago was a discussion you were having with Mr. Lee at the time you handed it in?

A Uh-huh.

Q Your conclusion that you could not, you know, write an assessment that did not involve a more detailed environmental impact statement, was that one of the things that were in the bubbles, you know, of the concerns that you raised in your draft? Is that something that they knew ahead of time?

A That was a conclusion that we had talked about as an option for about 3 months. When I, when we would have gang of eight meetings or any discussions, I would say: I'm writing the environmental assessment. And I am developing optional endings because I don't know how this is going to end up. It could be a finding of no significant impact. It could be a recommendation for an EIS. We can't

predetermine the answer.

And when I would go to meetings, Mr. Schmauder would always say: So, Chip, how is your EA FONSI going? And I would say sir, respectfully, you can only say EA. I don't know how this is going to turn out because the rule is still evolving, and I can't finish my assessment. So when I was told the rule is done changing, finish your assessment, I did. And based on the facts in the rule, I determined an EIS was necessary. I reported that up the chain, as I just explained. And what I said was that based on the rule I have in hand and the information I have and the information that is missing, this is my recommendation, and I cannot get to a FONSI.

Q So that conclusion, that you cannot get to a FONSI, was based on your analysis, as you just said, of the information that was already available to you?

A Uh-huh.

Q And the information that you believed that was missing still?

A Uh-huh.

Q What information was still missing at that point?

A Well, at that point, we had questions about the impacts on reservation communities, EJ communities, water quality, where jurisdiction would be lost. We had questions about the acres and what parts of the country would be most affected. We needed to do, well, I felt like we needed to do field work, mapping analysis, and working more closely with States and tribes and ask them, what -- how might

these -- how might this proposal affect your community? And because of the uncertainty and because of the lost jurisdiction, the quantity of waters and wetlands that we would no longer regulate, I felt that was an adverse effect that met the threshold under NEPA where we had to do an EIS.

Q So, essentially, on March 27th or April 27th --

A April 27th, right around there.

Q -- is when they understood, when Mr. Lee and Craig Schmauder understood that you were not going to be writing an EA FONSI?

A That is when they understood my answer. It had been discussed for about 3 months, that it could go either way depending on the changes.

Q And when you say "discussed," what do you mean? What do you mean when you say "discussed"?

A The rule was evolving. EPA was making changes. And when you make changes, it changes the scope of jurisdiction. Do we take more wetlands or fewer wetlands, for example? And depending on what the change was, it could affect that ultimate determination. So I was kind of going back and forth. As they made adjustments to the rule, certain changes would support a FONSI. Certain changes would not and, in my view, would have required an EIS. And so it was on the table. It was known to everybody. It was well discussed. The attorneys at the Corps were very bold in their discussion of the issue the last 3 months. And it wasn't until I was told this is it, no more changes, wrap it up, that I was able to actually write the paragraph that says

I recommend an EIS. Up until then, my mind is open.

Q And so the analysis that's in that draft document takes into account all of those concerns that you had --

A Yes, ma'am.

Q -- when you formed your conclusion?

BY MR. BURNS:

Q So with respect to the finding of no significant impact, the final report that was written, can you tell us the individuals who actually wrote the report?

A The one that was published?

Q Correct.

A Okay. I turned mine in. And a couple days later, I was told I would no longer be working on it. They assigned it to another fellow, a planner in our office, who over the next week or so did a new one.

Q Who was that individual?

A Gib Owen.

Q And who else was on that team that drafted the final FONSI?

A I do not know the names. He went to, what I was told is he went to New Orleans district and got two planners that he knows to help him. And I believe we had two economists from our office look at the EA. But this all happened really quick. It took about a week.

Q And had you worked with Mr. Gib Owen on other rulemakings?

A No. He's new.

Q When did he come to the Department of the Army?

A I believe he's been there about a year. He was in the Corps Headquarters for a couple of years before that. And he came from New Orleans district.

Q Okay. Do you know anything about his background, expertise?

A You should -- other than he's a planner, not a regulator -- you should ask him.

Q Okay. With respect to your wife and your working relationship, has it ever been raised that there may be a conflict of interest?

A No.

Q Did you ever discuss the -- any aspects of the rulemaking process with your wife outside of your official duties?

A No.

BY MRS. BAMIDURO:

Q Mr. Smith, I want to ask you a couple of questions about the outreach to the tribes.

A Okay.

Q I believe you said in the last hour that "we did not conduct outreach to the tribes." Who are you referring to? Who is the "we"?

A The "we" is me, the tribal person for the Assistant Secretary, the tribal liaison at the Corps Headquarters, and the regulatory staff at the Corps Headquarters who were -- who implement the program.

Q Are you privy to whether Craig Schmauder would have had

occasion to conduct outreach to the tribes?

A I would not know what he did.

Q I want to read something from exhibit 2, which I think you might still have in front of you. It's the "Final Summary of Tribal Consultation for the Clean Water Rule."

A What page, ma'am?

Q I am on page 3, the third paragraph. It says: This action does not have tribal implications as specified in E.O. 13175. Consistent with the EPA's policy on consultation and coordination with Indian Tribes, paren, (May 4, 2011,) close paren, the agencies consulted with tribal officials throughout the rulemaking process to gain an understanding of tribal views and solicited their comments on the proposed action and on the development of today's rule. In the course of this consultation, EPA coordinated with Army and Army jointly participated in aspects of the consultation process.

Do you see that?

A I do.

Q Do you know who drafted this document?

A EPA. I do not know which person.

Q Do you know whether anyone from the Army had any role in drafting this portion of this document?

A I did not. And I'm unaware of anybody in Army drafting this paragraph.

Q Do you have any reason to believe that this statement is untrue?

A It is untrue, in my opinion, as it pertains to Army. I cannot opine on what EPA may have done or not done.

Q So it's possible that EPA could have had outreach to the tribes?

A It's possible.

Q And it's also possible that Mr. Schmauder could have conducted outreach to the tribes?

A Highly theoretical, possible.

Q But possible?

A Not credible.

Q So you think this document is a lie?

A Yes.

Q What's your basis for thinking that?

A I am the tribal liaison for Army Civil Works. And I conducted no consultation with tribes on the draft rule or the final rule. We did not meet with chairmen or elected officials in any formal way on this.

Q In any formal way?

A That's what consultation is.

Q You testified previously today that there was a period in the rulemaking process that you were cut out?

A Uh-huh.

Q Those are your words I think.

A Uh-huh.

Q You were cut out of the rulemaking process. So were you

privy to everything that was taking place in the rulemaking process during the period in which you were not actively involved?

A No.

Q So it's possible that someone on behalf of the Army was, in fact, reaching out to the tribes in the rulemaking process while you were not working on it. Is that possible?

A Unlikely. I'm the only qualified person to do so.

Q When did you have access to this document?

A Let me look at it. I believe when it was posted on the Web, whenever that was, in May.

Q That's when you first had access to it?

A I believe so.

Q So did you have any input into it --

A None.

Q -- before it was published? Just let me finish my question.

A I thought you did.

Q No. So you did not have a chance to review it before it became published?

A No.

BY MS. BERROYA:

Q Did you, in fact, look at this document in May when it was published on the Internet?

A I believe so.

Q Did you see the section of the document that you are now stating is a lie?

A Yes.

Q And did you notify anyone of the misstatement contained in the document in May?

A I don't recall.

Q Do you recall being concerned that there was what you believe is a lie contained in a document published by your agency?

A It's not published by our agency. It's published by EPA. And it's not my place to opine.

Mrs. Bamiduro. So the title on the cover of the document, it says it is an EPA and an Army document. Do you see that?

Mr. Smith. I do.

Mrs. Bamiduro. So you're saying it's not an Army document?

Mr. Smith. We did not help write it.

BY MS. BERROYA:

Q When you say "we," who are you referring to?

A Myself.

Q But it says "Department of the Army" on the front page. So are you saying that no one from the Department of the Army helped draft this document?

A I can't say.

Q Okay. So were you concerned in May when you first saw this document that there was something you believed to be a lie coming from your agency, the Department of the Army?

A Yes.

Q But you don't recall whether you notified anyone about the

material misstatement or lie contained in this document?

A I don't recall.

BY MRS. BAMIDURO:

Q Did you have a conversation with Assistant Secretary Darcy about your concern over this statement that you are contending is a lie in this document?

A I did not have a conversation specifically on this document. But I did mention in our briefings that we weren't doing tribal consultation.

Q Mentioned to who?

A Ms. Darcy.

Q And her response was what?

A No response, work with EPA. Same as with all the issues, continue to work with EPA and --

BY MS. BERROYA:

Q When did those briefings occur in which you informed Ms. Darcy that tribal consultation was not occurring?

A I don't remember the dates, but they're the same four that Ms. Moyer cited because I was present at those.

Q So those would have been prior to the publication of this document in May?

A Yes.

Q Is it possible that tribal consultation occurred between the time that you informed Ms. Darcy you don't believe that it had occurred and the publication of this document in May?

A No. There's 567 federally recognized tribes. It was physically and logistically impossible.

BY MRS. BAMIDURO:

Q Does the law require consultation with all 500 and some odd number of tribes?

A Well, there -- I am not an attorney. But based on the executive order, the Constitution, Supreme Court decisions, whenever a Federal agency takes an action that may affect Indian people, rights, particularly their treaty and sovereign rights, we're required to consult.

Q So if there are a number of tribes who might not have been affected at all by this rule, is it your position that Army would have had to consult with them?

A We ask the question. And if they say, "We don't care," we're done. If they say, "We care," then we consult.

Q Do you have any reason to know why Assistant Secretary Darcy would allow the Army's name to be put on a document that you believe is a lie?

A I can't comment on that. That's a speculation.

BY MS. BERROYA:

Q Were you upset to find a lie in a document coming from the Department of the Army concerning your portfolio?

A Not really. I was done by then. The rule was done. There was no reason to -- move on to the next task.

Q So you weren't upset that there were lies being promulgated

according to you?

A I acknowledged in my mind that it was not a true statement and go on and work on the next project. There's nothing you could do about it. It's done.

Q Weren't you anticipating that your next project would be implementing this rule?

A No. I was taken off of Clean Water implementation at least in the short term.

Q When were you taken off of Clean Water implementation in the short term?

A In, what do you call, let me think, I'm trying to think of the date here. I believe it's mid-July.

Mrs. Bamiduro. 2015?

Mr. Smith. 2015. I was told, yeah, yeah, that's when I -- that's when I had the conversation.

BY MS. BERROYA:

Q So mid-July 2015, that's several months after --

A Uh-huh.

Q -- you see the statement?

A Uh-huh.

Q So you weren't, in fact, taken off implementation at the time you saw the statement in exhibit 2 entitled "Final Summary of Tribal Consultation for the Clean Water Rule," correct?

A No. I had been cut out and eliminated by Mr. Schmauder and did not have the ability to comment on any of these documents. Once

they were published, up, and approved by appointees, we're marked; we're done. There's nothing for us to say or do.

Q I'm a little confused because you did comment throughout the process, correct?

A Uh-huh.

Q So Mr. Schmauder didn't prevent you from commenting. Isn't that correct?

A Yes and no. On occasions, when he asked for comments, yes. There were times he didn't even ask, share information, and ask for comments. We learned about decisions after the fact.

Q But you were not, in fact, cut out by Mr. Schmauder prior to July 2015 because you were asked for comments and you made comments?

A I was cut out starting in, incrementally starting at Thanksgiving 2014. And over the last couple months, I had very little involvement other than finishing up the environmental assessment.

BY MS. FRASER:

Q Getting back to the, you know, one final question about the environmental assessment draft that you gave on the 27th, was that a draft that you handed in in a form that could be published and incorporated into a formal document, if necessary?

A It was in a -- it wasn't print-ready. But it could have been turned into print-ready when the Assistant Secretary would say, go, wrap up the final print format and go -- if that's the question.

Q Okay. So, basically, you're saying it was in finished form at the time you handed it in?

A In terms of the words.

Q In terms of the words. Okay. My colleague just asked you about Mr. Gib Owen. And you mentioned he was a new person?

A Uh-huh.

Q Do you have any sense of what the background and technical expertise of the other people who worked on the environmental assessment that was published?

A No, I really don't.

Q Do you know whether or not any of the analysis that was prepared in your draft was used in the version that was published?

A I do not know. I have not read the new environmental assessment.

BY MRS. BAMIDURO:

Q I want to go back to the tribal engagement.

A Uh-huh.

Q You stated just a few minutes ago that you were the person who would have done the tribal engagement. Is that right?

A Correct.

Q I want to read for you a portion of the transcript from Jennifer Moyer, who we spoke with on December 17th, 2015. And she said, quote, "We're undertaking a rulemaking right now on the nationwide permit program. And our district offices will consult with the tribes within their area of responsibility," end quote. Do you disagree with that statement?

A No. It's a different kind of rule.

Q So I asked you earlier if all rulemakings were the same. And you said yes. But this is following a different process. Is that right?

A No, it's not really --

Q I'm confused.

A The process is the same. I would be part of overseeing the tribal consultation for the entire nationwide permit package. But in order to effectively consult with tribes, we let our 38 districts do it with the tribes that surround them. It's just not logical or feasible or good to have me doing it from Washington. So I'm in an oversight role. The headquarters helps implement it. And then we have our commanders do the consulting.

Q So why was it different for WOTUS that you would have been the only person who would have consulted with over 500 tribes?

A Because I would be the only one -- this is a national rule that applies to all 404 actions.

Q This being WOTUS?

A WOTUS, I'm sorry, yes. And I was the only tribal person educated, on the rulemaking team, understood what the rule was, and who could have communicated it to tribal leaders. And the districts were not privy to early drafts. They were embargoed. So they couldn't consult. We keep that stuff close hold. And once it's in the OIRA process, we're not supposed to share it whereas nationwides, once they go out, the district commanders talk to the tribes that they live near. So the process overall, you know, is the same. It's just that we

delegate in the nationwide case. We didn't delegate in this case. We would cover all the tribes from D.C.

BY MS. BERROYA:

Q So I want to make sure I understand. Are you saying that in all nationwide rules --

A Nationwide permits are you talking about?

Q Rulemaking. WOTUS is a rulemaking, correct?

A Yes.

Q Okay. So in all nationwide rulemakings, is it your statement that tribal consultation is always handled by one person from the D.C. office?

A No.

Q Okay. Can you further explain so that we understand?

A Okay. My role is policy oversight. And, in this case, as the expert and only one privy to what was in the rule, would be the lead consulter with tribes for WOTUS. But for the nationwide permits, those are handled differently because we pump them out to the districts and require local consultation because that's -- we want the experts in the communities where they live and the tribe lives to have the interaction.

Q When you say you were the only one privy to the information about WOTUS, again, I'm not quite sure that I understand because there were many people, as we discussed earlier, that were involved in the drafting and discussion process as the rule was developed, correct?

A At the national level, yes. Not our districts.

Q How do you know that there was no one besides yourself at the national level that was communicating with the districts or with the tribes directly?

A Somebody could have.

BY MR. BURNS:

Q Is it possible Mr. Schmauder communicated to the districts and the tribes?

A I don't want to speculate on possibilities.

Q I just have one final question. Are you aware that 13 States have filed a legal challenge to the WOTUS rule?

A Yes, sir.

Q Has any other litigant ever contacted you?

A No.

Mr. Burns. That's all I have.

BY MS. FRASER:

Q I'm sorry, I have to follow up on -- when you offered to give General Peabody the right to do the EA that you filed, what did you expect them to do with it?

A Oh, they would finish the drafting. And instead of me and my detailee doing it, General Peabody could call on 1,300 regulators around the country. He could get a team in and really put a lot more expertise on it more quickly than I could. So there was an efficiency and an expertise question there and no longer the workload issue that prevented him from doing it in the first place. It was their proper role to do it. I was trying to help them out. And I thought it was

smart to get it back in the right box as we move forward to final rule promulgation.

Q Why didn't you do that back in, let's say, November of 2014? Why did you wait until the end of March or April to ask him?

A I honestly don't know. I was just busy. They were not as busy. And there was the timing, the timing seemed right, particularly because they could put more resources to bear with technical expertise, broader than my single brain. I just thought it was a smart thing to do.

BY MRS. BAMIDURO:

Q Can I ask you about the Peabody Memo --

A Okay.

Q -- which is exhibit 1. On page 7 of the Moyer May 15, 2015, memo, she says in paragraph 26: The Corps should not be identified as an author, co-author, or substantive contributor to either document.

And by "either document," she's referring to the economic analysis and the TSD. Is that right?

A I believe so.

Q But she doesn't say that the Army should not be identified as an author, co-author, or substantive contributor.

A That's correct.

Q And it was an Army-EPA joint rule and not an Army Corps-EPA joint rule. Is that right?

A It started out as a Corps-EPA rule. It became an Army-EPA rule.

Q So, ultimately, the principals that were deciding on this rule were Army and EPA?

A Yes.

Q And so the statement that she says, that the Corps should not be identified as an author, co-author, or substantive contributor, would naturally follow, correct, since the Corps was not going to be, ultimately, a principal on the rule? Is that fair?

A No. The whole story isn't here. I believe this memorandum, this paragraph is reacting to the fact that there was text, subsequently deleted, that identified the Corps as an author and a contributor to the economic analysis and the TSD -- neither of which is correct. And so she has no right to opine on what Army can or cannot do. But I think she was making it clear that they did not co-author or write either of these two documents and, therefore, should not be cited as an author. That's the gist of it.

Q I want to try and flesh apart what you just said. Would you expect that the Corps would be an author or a contributor to a document that they were not ultimately authoring? In other words, was the Army an author or a co-author or a substantive contributor to either document?

A Not to my knowledge.

Q But, at a certain point, you've acknowledged that you were frozen out from the process. Is that right?

A Uh-huh.

Q And Mr. Schmauder was the point person on the rulemaking.

Is that right?

A That is correct.

Q And he could have been providing authorship or substantive contributions to either of those documents. Is that right?

A I can't speculate on that.

Q It's possible?

A I'm not going to speculate on that.

Q Do you know what Mr. Schmauder's role was after you were cut out of the process?

A What his role was? Could you amplify please?

Q Sure. With regard to his engagement in the WOTUS rulemaking, do you know what his role was after you were no longer engaged in the process?

A I guess he was the single point of contact for Army.

Q Do you know what his responsibilities included?

A No.

Q So you don't know that they didn't include providing authorship?

A I do not know.

Mr. Burns. We're done.

Mrs. Bamiduro. For now.

[Recess.]

Ms. Aizcorbe. All right. We will go back on the record. It is now 4:15.

BY MS. AIZCORBE:

Q I'm going to do some clean up here of some of the issues we've already discussed. So I apologize for any duplication. But this is just to clarify some outstanding issues. We had a bit of discussion regarding the public comments that were received. And you said you did not attend any interagency meetings to discuss how the EPA or Army or Corps would address those comments. Is that correct?

A That's correct.

Q Did EPA respond to any of your requests to meet?

A Yes. Staff said they were directed to work on reading the comments, and they hired a contractor to sort them, and to just stand by -- which we did.

Q After standing by, did they ever get back to you to schedule these interagency meetings to discuss the comments?

A No. They did not.

Q Did they mention who their contractor was?

A I don't recall.

Q But it's your understanding that the contractor was only just sorting the comments; they were not conducting substantive review of the comments?

A That's my understanding. It's not uncommon for that to happen for large rulemakings.

Q Do you consider it the ordinary course of a rulemaking to meet in the context of a joint rulemaking to discuss public comments?

A Yes.

Q In the course of other joint rulemakings, approximately

when would you start meeting to discuss public comments?

A For the 2008 mitigation rule, we started meeting during the -- toward the end of the comment period, as comments were coming in, because we were afraid of a huge volume. And then we met regulatory thereafter to the close of the comment period.

Q About how frequently?

A At least once, sometimes twice a week.

Q For the remainder of the rulemaking?

A Right. Until we went through all the comments and felt like we had a good understanding of how we were going to address them, respond and address.

Q So once or twice a week. Is that common, in your experience, with rulemakings to have that frequent of a discussion?

A Well, we did it for the 2008 mitigation rule. But, again, these are infrequently done. So it's not like we do this every year. That's how we chose to do it, to manage the workload and make sure we read all the comments, discussed them, and responded to them.

Q When you say these are infrequently done, what are you referring to?

A Big rulemakings like this, joint rulemakings. The last one we did was the 2008 mitigation rule. And then before that, it would have been 1986, the original rules.

Q So we've spoken a bit today about how many rulemakings you've participated in and the fact that, besides these rulemakings, there have been a number of other rulemakings that the Army Corps has

engaged in that were not WOTUS or the nationwide permit or mitigation rules, would you say that those other rulemakings then are of the magnitude that WOTUS was in breadth and scope? You said you don't frequently do these joint rulemakings, so --

A No. I agree with the Assistant Secretary that this was a big deal, a generational rule. It's been since 1986.

Q So compared with all these other rulemakings that are going on, you really can't compare the number with the magnitude of what you were, the casework that went into everything in the WOTUS rulemaking?

A I cannot.

Q You mentioned earlier that, when we were discussing when you were cut out of the process, I think you said it started early, around Thanksgiving of 2014. You said other people were cut out besides yourself and some people in the Army Corps specifically. Do you recall who those people were?

A Yes. Jennifer Moyer, Stacey Jensen, Lance Wood. And the reason I know that is we would discuss: Did you hear anything? Did you hear anything? Did you get an invite? Did you get an invite? And more often than not, the answer was: No, we don't know what's going on.

Q Okay. So these individuals were people both from within the team of eight and also outside the team of eight?

A Yes.

Q Okay. You also said that at one point, OIRA was cut out. Can you elaborate a little bit on that? Was that during the guidance

or the rulemaking process? And how did that evolve?

A Okay. We were very successful in the 2008 mitigation joint rule with OIRA and a particular staffer there. So we thought it would be smart to bring him in on this rule to help us broker on behalf of the administration some of these tough issues that we were going to have and help us work to a common understanding and a final rule that we could, that both agencies were comfortable with. So we invited that person to come to the early meetings on the guidance. And I believe he came to at least four meetings. I don't know the dates, but he came to a series of meetings early on. And then when we struggled and decided to go back to try to write a rule, he was at a couple of those early meetings, again, to try to -- some of the issues were the same, so to help us carry them forward. And then after the first couple of years, then he was not invited to come back.

Q What was this OIRA staffer's name?

A Jim Laity.

Mrs. Bamiduro. Jim who?

Mr. Smith. James Laity, L-A-I-T-Y.

BY MS. AIZCORBE:

Q Back to the public comments, when you were discussing those comments and making recommendations -- and we talked a little bit about the fact that sometimes your recommendations were accepted, and sometimes they weren't, and that you had made many of these recommendations to Mr. Schmauder. And you referenced that you felt that you were being cut out because he said that decisions had already

been made. And I'm curious to understand a little bit more about that. In those conversations, after you transmitted recommendations or comments to Mr. Schmauder, and he said, you know, decisions have already been made, suggesting that there was no longer much to talk about there, did you ask him whether your comments were going to be passed on regardless of the fact that decisions had been made?

A We did. And the way it would come about is we would schedule a gang of eight meeting or call. And then we would learn that, and they would tell us this, that Mr. Schmauder and Mr. Peck would meet on a Sunday, hash out the issues, and then hit the meeting the subsequent week, and that they had pretty much already talked through the issues. We had discussions. There were some adjustments made. But, for the most part, the key policy decisions were locked in, and they were sort of worked on in these Sunday meetings that nobody else was invited to. And they would announce that they got -- that's the only -- this is not rumor. They would announce that they got together on Sundays, had breakfast, and worked things out.

Q Is that common for staff to get together on a weekend to work on these rulemakings?

A Not in my experience.

Q Were you given any justification what happened to your comments if they were not considered or incorporated?

A Usually it was that the EPA disagreed.

[4:24 p.m.]

BY MS. AIZCORBE:

Q Would you in any other rulemaking context normally receive an explanation of why, a substantive explanation of why a comment or recommendation was not incorporated?

A Yes.

Q Would you receive that explanation in addition to maybe Corps staff who were making recommendations as well? I would assume that Corps staff had the subject matter and technical expertise, so would they also receive some sort of justification normally as to why something was or was not adopted?

A Yes. That's my normal course of business. The way I work all the time. People give me comments, concerns. We discuss them. I look them in the eye and say: Okay. Thank you very much, and this is why I'm taking it, and this is why I'm not. We all put it behind us and move on.

Q So this was uncommon just to receive a decision or a communication saying that EPA had made a decision, and we're not going to speak any further about why they made that decision or what the justification is? That's just not common in your experience?

A It is not common in my experience.

Q Okay. We spoke a little bit about the nationwide permit program and the fact that in that rulemaking, with respect to tribal consultations, your district office staff would go out to the communities that are nearby and have those discussions with the tribes

they had relationships with or were at least proximately close to.
Correct?

A Correct.

Q And in the case of the Waters of the United States rule, that did not happen because the rule was handled on a national level from headquarters, and you would be the individual who would conduct those mandated travel consultations. Correct?

A I would either conduct them, or I would lead the effort if I decide it appropriate to delegate at some point.

Q So given that this is how these consultations are typically run, you would expect then that if somebody was going around and having these consultations in your communities, that your district officials or staff would inform you that these consultations were going on. Is that correct?

A That's correct.

Q And were you ever informed that these consultations took place?

A No.

Q Again, regarding the nationwide permit program, you were talking earlier about the development of that rule for the next upcoming cycle?

A Uh-huh.

Q Have you had any conversations regarding Waters of the United States language being incorporated into that rule?

A We have not had conversations, but we are getting written

comments from the EPA that is proposing to do that.

Q When were those received?

A This week, I believe, I got them.

Q Are you involved in --

A Yes, I am supposed to be the principal policy person for the nationwide permit reissue 2017 effort.

Q Is that something that has been previously proposed for the nationwide permit program, that the Waters of the United States language be included in that package?

A No. They're entirely separate rules with separate purposes, and they really are not linked ordinarily.

Q Were you given any justification as to why that was occurring now?

A At this point, these are just comments. They have not been adopted or incorporated. They will, I presume, be discussed in the future as part of the OIRA interagency vetting process.

Q Nobody from within Army was making those recommendations?

A No.

Q What is your understanding, or what was your understanding of the objective of the Waters of the United States rule?

A The broad objective was to assert Clean Water Act jurisdiction to the broadest extent possible consistent with the law and Supreme Court decisions. That's the words I heard Administrator Jackson say, Robert Sussman say, and the words I put on my briefing slides for the first couple of years of this effort.

Q Do you believe that the rule, as written, achieves this objective?

A No.

Q Do you believe that the WOTUS rule is an improvement from the existing Clean Water regulatory scheme, that it is more efficient or more clear?

A No.

Q Have others in the Army or Corps expressed concern that the rule is not an improvement, more efficient, or more clear than the existing Clean Water regulatory scheme?

A Yes.

Q Do you believe, based on your experience and regulatory expertise, that the EPA followed all mandatory procedures in its development of the rule?

A No.

Q Do you believe that the Army followed all procedures that were mandated in the regulatory process --

A No.

Q -- in the development of this rule?

A No.

Q We have talked quite a bit about a lot of the deficiencies in this rulemaking, both substantive as well as procedural, including EPA manipulation of Corps data, the adjacency limits not being based in science, the determination that there would be no tribal or small-business impact, the mischaracterization of costs as benefits,

and procedural defects, such as the Army Corps not seeing the economic analysis or TSP until after the rule had been finalized, that the Army Corps was not involved in the drafting of this rule, that they were cut out of the process of developing this rule, that public comments were not incorporated, and that's just to name a few of these deficiencies. Would you, after considering all this information that we have discussed here today, proceed with this final rule, as written, after what you've experienced in this rulemaking?

A Me personally?

Q Yes.

A No.

Q Based on your expertise and knowledge of the regulatory process and how Army and Army Corps proceed in their rulemakings?

A Correct.

Q And based on your knowledge of mandatory, statutory, constitutional, regulatory requirements of an agency in their rulemaking process?

A Correct.

Q Do you believe that it is an unprecedented approach that was undertaken by the EPA in this rulemaking?

A Yes.

Q We have discussed a number of instances where you or other senior level staff disagreed or expressed concerns about the rulemaking. We are learning that many of these concerns or recommendations were not addressed or adopted in the final rule. Were

there any other times that we have not previously discussed today where you expressed concerns regarding the procedures that were being followed or problems with the substance of the rule that you expressed to staff in the Army or EPA or elsewhere?

A I'd like a clarification. Are you just talking about the WOTUS rule?

Q Correct. Just with respect to the Waters of the United States rule?

A No, I don't think so.

Q We have discussed a number of inconsistencies between this rulemaking and others that you've worked on in the course of your almost 40 -- can I say that?

A Yes, you can.

Q -- almost 40 years of regulatory experience, the disparity of the time it took to review public comments, reexecution of NEPA documents, and concerns by senior management of misused data. Do you believe that politics played a role in this rulemaking?

A Yes.

Q A few cleanup questions regarding today's interview, and then I will hand it over.

Did you receive any instruction from the Army or Army counsel in preparation for today's interview?

A The only instruction I received is from the attorney sitting next to me, who told me I'd get bathroom breaks, lunch, and how this meeting would proceed. And I was told to tell the truth. That's it.

Q Thank you.

When were you first contacted by the Army or Corps to appear before this committee for a transcribed interview?

A I believe it was about -- Oh, boy, I might need help. Not very long. A week, week and a half, something like that.

Q You were not aware that the committee was seeking your testimony before that?

A No.

Q Were you given any reason for the Army's delay in contacting you?

A I didn't know they delayed. I just got a contact of -- well, I don't know. Can I ask for help from my attorney? A week or a week and a half ago, I was told I was going to be called. That's the first time I knew I was going to be called.

Q Have you been asked by the Army or Corps to produce documents or emails relating to the rulemaking?

A Yes. Part of a FOIA. Is it FOIA when Congress writes and asks for documents? Whatever you call that. I've been asked to produce.

Mr. Hambleton. Congressional request.

Mr. Smith. There you go. I've been asked to produce documents in response to several congressional requests, and I have done so.

BY MS. AIZCORBE:

Q Are you aware of when you were advised of the committee's request?

A Well, as soon as -- I can't give you the dates, but as soon as the requests come in, I know we had them from Senator Inhofe. We have had them from Representative Gibbs and some others. We immediately get to work on pulling our records together, and we vet them through Army general counsel, and those people handle what ultimately comes to you all. My job is to search my electronic paper files and make sure that everything related to the request is put in a box, and then it's processed.

Q Have you completed your search?

A Yes.

Ms. Aizcorbe. Can we go off the record.

[Discussion off the record.]

BY MRS. BAMIDURO:

Q Mr. Smith, you stated in the last round that you did not believe that the rulemaking process was followed correctly for the WOTUS rule. Is that right?

A Yes.

Q But you also have stated throughout your testimony today that you had limited exposure because you were not involved in the entire process. Is that right?

A For the last 3 months, that's correct.

Q Well, I thought you said that you began getting cut out, to use your words, in January of 2015?

A I believe so, so that's January, February, March.

Q Sorry. Let me rephrase. After Thanksgiving of 2014 is

when you initially said you began to get cut out. Is that right?

A Correct. I sensed I was beginning to be cut out.

Q You were not getting, in your opinion, invited to meetings or on phone calls. Is that right?

A That is right.

Q And then you said that continued incrementally until you were eventually taken off completely in July of 2015. Is that right?

A That's right.

Q So for a period of about 7 months, you were not fully engaged in the rulemaking process. Is that right?

A That's right.

Q So on what basis can you say that the process was not followed accurately here if you were not engaged in the entire process?

A The previous 6 years I was engaged, and we didn't follow the process. We didn't have the interagency meetings. We didn't have the interagency co-rule writing. We didn't have OIRA guiding and helping us. We didn't get together to talk about comments and how to respond to them. All of these things happened before I was incrementally starting to be cut out. So whatever happened during the next few months is -- I can't talk about. But when I was engaged, I would say we weren't following standard process in the requirements we followed for nationwide permits 2012, the cycle before, and the 2008 mitigation rule.

Q So I think in the answer you just gave, you said "we were not engaged in the interagency process," but I thought you said earlier

in the day that there were in the beginning lots of meetings that involved the team of eight?

A That is correct. In the beginning, there were.

Q So that is according to the process. Correct?

A Yes.

Q So, at some point in the process, the rulemaking was going according to the procedure. Is that right?

A When we were working on guidance, yes.

Q And, in your mind, when did it switch over from guidance to rulemaking?

A The first year, we worked on guidance. The second year, we flipped to work on a rule. The third year, we flipped back to work on guidance, and then the fourth year and thereafter, we focused on a rule.

Q And so is it your testimony that whenever it flipped from guidance to rulemaking, that the process fell apart and that there was not interagency communication?

A I would say that the first 2 years, guidance and rule, we worked hard to execute the interagency process that we successfully executed for the 2008 mitigation rule. After that, it degenerated. Meetings became infrequent, and it became more and more dictated by fewer individuals, meaning basically Mr. Peck and Mr. Schmauder and EPA.

Q Who was the final decisionmaker for this rule on behalf of the Army?

A Ms. Darcy.

Q It was not you. Is that right?

A Oh, no.

Ms. Fraser. How many times in the last 36 years have you ever been the final decider on any rule?

Mr. Smith. None.

BY MS. BERROYA:

Q Do you believe that you should have been the final decisionmaker on this rule?

A Absolutely not.

Q So it was appropriate that Ms. Darcy was the final decisionmaker on this rule?

A Yes, ma'am.

Q And you provided your comments and recommendations to Ms. Darcy, correct, about this rule?

A Yes.

Q So she had your input when she was making the decision with respect to this rule, Waters of the United States, correct?

A Partially. I would say she had the input that eyeball to eyeball I gave her. I cannot say whether other comments I had were passed on from Mr. Schmauder to her.

Q But you don't have any specific reason to believe that Mr. Schmauder did not pass on your comments. Correct?

A I don't have any specific to believe he did or didn't, either way.

Mrs. Bamiduro. Is it your opinion that the joint rule that was promulgated violates the law?

Mr. Smith. I'm not an attorney. I'm not going to answer that question.

BY MS. BERROYA:

Q Well, we're not asking you for a legal opinion. We're asking you, in your lay opinion, but with your experience for almost 40 years, do you believe this rulemaking violates the law?

A I still choose not to answer that. I think it's a legal question.

Q I'm asking for your opinion, and I'm asking you to answer the question.

A I'm not going to answer that question.

Q So you're going to just -- okay.

A I am not going to make a legal call.

Q Again, I'm not asking you to make a legal call. I'm asking for your opinion, whether you believe this violates the law. You said you didn't support the rule?

A I what?

Q That you didn't support the rule. So now I'm asking you, do you believe this rule violates the law?

A I'm choosing not to answer that question. It's a legal matter.

Q And what's your basis for not answering the question?

A I'm not an attorney. I can't make that kind of call.

Q I'm not asking you for a legal analysis. I'm not asking you to make some sort of expert opinion. I'm asking you to provide your opinion.

A I'm not going to answer the question.

BY MS. FRASER:

Q Is Ms. Darcy entitled to rely on the expertise of her staff who's involved in rulemaking?

A Is she --

Q Entitled to rely on the expertise of her staff?

A Yes.

Q And is that true whether or not, you know, the opinions of those staff members are different from your opinions?

A Uh-huh. Yes.

Q And by the end of this rulemaking, you essentially disagreed with your boss' position, Ms. Darcy's position, that all concerns that she had about this rule had been satisfied?

A Yes.

Q But you don't know what else she relied on beside your opinion and the thoughts and concerns that you had in coming to her own decision about whether or not her concerns were satisfied?

A I don't know about her concerns. Our -- my concerns were not satisfied. I can't speak for her.

Q But, Ms. Darcy, do you agree that Ms. Darcy is entitled to consider other opinions and recommendations beside the ones that you made --

A Yes.

Q -- in terms of whether she agrees with the final rule or not?

A Yes.

BY MR. BURNS:

Q I have a question going back to the tribal consultations. In the last round of questions -- correct me if I'm wrong -- did you say at some point you would delegate to other individuals to conduct the tribal consultations?

A Yes, I can do that if I feel it's appropriate, and I probably, if it had gone to the -- if things had worked out a little differently, I probably would have because I can't talk to all those tribes. I would -- once we knew what the message was and what the rule was, we would send talking points out to the 38 commanders and ask them to help us out with that.

Q I thought in the last round of questions you said you did, in fact, do that?

A Do what?

Q Delegate.

A On the nationwide permits.

Q On the nationwide permits, okay.

A Yes, sir.

Q Okay. And who did you delegate those responsibilities to to conduct the consultations?

A We asked each district engineer to make sure the tribal

consultation occurred, and they relied on their regulatory chief and the tribal liaison if they had one in the district to reach out to the tribes in their area of responsibility and do coordination and consultation.

Q Is it possible for the WOTUS rule that the district administrators could have been tapped to engaged in tribal consultations after you were, quote-unquote, frozen out?

A No, because we didn't have a final rule until a day or two before it was approved and promulgated, so there was no basis for consulting.

BY MS. FRASER:

Q In a previous round, you commented that politics played a role in rulemaking. What was your basis for saying that?

A Several statements from EPA staff that this is a chance to grab as much jurisdiction as we can, and then statements on the other side of the equation if we don't change the rule and take something off the table, Secretary Vilsack will be angry. This is Greg Peck. If we don't do something for ditches along roadsides, DOT may not chop on the rule. And I can come up with other examples if I had to, but instead of talking about the science and what's the right answer in terms of tributaries and what to regulate and not regulate, there was this constant jockeying for how do we get the rule out the door on a nonscientific basis adjusting the rule to meet people's concerns or other agencies' concerns. To me, that's a political thing, not a science-based thing.

Q Could those statements also be characterized as concerns that those people had for their home agency as opposed to the entity that you worked for, the Army?

A I'm not sure I understand that question.

Q People that you mentioned, Secretary Vilsack and their staff making comments about what would anger their boss, could that be a concern about what the needs of that particular agency were?

A Uh-huh.

Q As opposed to what the Army's needs were and the EPA's needs were or somebody else's?

A It wasn't about needs. I guess I'm not following.

Q Their opinions about what would be effective in terms of this rule.

A The rule was expanding jurisdiction a percentage, and the percentages in the EPA's economic analysis, without arguing over the number and whether it's right or wrong, there was an expansion for 6 years. And then towards the end of the rulemaking process, the rule was held up. And when we had one of our meetings, we were told that we had to find a way to take something off the table for jurisdiction so that we could get USDA and DOT to support the rule, so changes were made in the rule to do that to address their equities, but they were based on -- not on science.

BY MRS. BAMIDURO:

Q Did Secretary Vilsack -- and for the record, he's the Secretary of the U.S. Department of Agriculture. Is that right?

A I think he still is.

Q Did he express those concerns to you personally?

A No. I'm quoting what Greg Peck said in a meeting.

Q When did this take place?

A One of our gang of eight meetings, maybe several.

Q Do you know if Mr. Peck actually heard those words directly from Secretary Vilsack?

A I do not, no.

Q Same question with regard to the equities of the Department of Transportation. Do you know if the Secretary of that agency expressed those concerns directly to you?

A They did not, and I -- no.

Q How did you become aware of those concerns allegedly of the Department of Transportation?

A Mr. Peck making those statements that the rule had to be adjusted regarding ditches.

BY MS. BERROYA:

Q If I understood your statements earlier, the concerns of DOT and USDA themselves were not deemed political by you. Is that correct? They were valid concerns?

A I don't want to speak for USDA and DOT.

Q I think I asked you what the concerns were?

A Uh-huh.

Q And whether they were scientifically based. Do you recall that?

A Ask me again. I'll answer again.

Q Sure were DOT and USDA's concerns about the rulemaking scientifically based?

A I don't believe so.

Q And what were those concerns?

A They were broadening jurisdiction over ag ditches or roadside ditches, which means more permits, more cost, delays for highway projects, and the same for farmers.

Q So they were economic concerns?

A Yes.

Q Did you think that they were necessarily inappropriate or invalid concerns?

A No.

Q I believe you stated earlier that you wanted to have time to explore those concerns?

A Yes.

Q So what aspect of USDA and DOT's concerns was political to you? Was it the timing of the rulemaking? Ultimately, does it come down to the urgency piece that is political in your mind?

A That's part of it, but I think the political part is abandoning science. When you look at a ditch, you've got to decide, is the ditch part of a tributary system or not, or if at some point it becomes a nonjurisdictional ditch, and it takes science to do that. We did not do the science to evaluate the 8 million miles, for example, of roadside ditches and make an informed decision on the impacts of

water quality of declaring by rule that ephemeral ditches and intermittent-flow ditches will no longer be jurisdictional. So if you don't do it by science, then what are you left with? To me, it seemed political because we did not do a basic look at the ditches as part of a tributary system and figure out a science-based reason to say taking them off the table will have no adverse effect on the quality of human environment or not.

BY MRS. BAMIDURO:

Q But you testified earlier that you were not told to disregard the science in going through this rulemaking process. Is that still your testimony now?

A What?

Q Earlier today you testified, I asked you whether you were told to disregard the science in conducting this rulemaking, and you said you were not told that. Is that still your testimony?

A Yes.

BY MR. BURNS:

Q I have a question. You mentioned the interagency meetings and consultations, and you said "we." Who is "we" that were involved?

A Okay. Let me make sure I know -- which interagency meetings are you wanting to know about now? Is this us and EPA or the broader OIRA?

Q You can do both.

A With us and EPA, it was as many as 20 people from EPA over the course of the 6 years, a lot of people. And from Army, it was

typically the chief of regulatory, the principal jurisdictional expert, Stacey Jensen, the principal attorney, Lance Wood; and from Army, it was myself and Craig Schmauder. And for the OIRA process, that's broad. They send our draft rule out to every agency in town that might have equities, and so there were probably a dozen people that commented on the draft rule, I mean, agencies that would have commented on the draft rule. And, frankly, I don't know who the actual people are that commented. Agencies turned in comments.

Q So it is possible that meetings occurred that you weren't aware of, given you were, quote-unquote, "frozen out"?

A Yes.

BY MRS. BAMIDURO:

Q You mentioned in the last round that OIRA had been cut out of the process, and you mentioned someone named James Laity. Is that right?

A Yes. He was just no longer invited because, as Greg Peck said on a phone call with me and Craig Schmauder in Craig Schmauder's office: Jim Laity is a problem for us. He is an impediment. He is too hard. He asks too many tough questions. Let's not invite him anymore.

Q Do you know whether Greg Peck and/or Craig Schmauder had other conversations with anyone else at OIRA separate and apart from James Laity?

A I do not know.

Q When did this conversation take place that Mr. Peck made

those statements about Mr. Laity?

A It would be in the first 2 years of this effort, and I can't narrow it down any further. I just recall sitting in Craig Schmauder's conference room on a conference call with EPA staff, led by Greg Peck, and that was the statement that was made, and part of it, I assume, was angst and frustration over the slow progress of getting the guidance, then the rule, then the guidance, all moving forward.

BY MS. FRASER:

Q And just to be clear, this was between 2010 and 2012 or sometime earlier?

A I think it was between -- let's see, 2009. So it would be 2010 and 2011, right in there.

Q And as far as you know, was there any subsequent communications or any subsequent period when they picked up communications with OIRA again?

A No.

Q When did the rule go into the review process?

A Well, the draft would have gone in -- let's see, if it was published in April, you count back, April -- I can't count back too well, but they take 90 days, so back 90 days. In 2014, I believe January in 2014, the draft went into OIRA, and then it was published in April 2014 for comment. The final went to OIRA in mid-January 2015, I believe, went through interagency vetting, and then I frankly don't recall the final publication date.

Q And during the period that it was being vetted in OIRA, who

was the issuer of communication in that agency?

A During the draft, I believe it was still James Laity, was what they call the review manager. And then he got promoted, moved up in the organization, and a new fellow took over the OIRA process for the review of the final rule.

Ms. Berroya. So after Mr. Peck's comment sometime in 2010 or 2011, Mr. Laity still had involvement with OIRA?

Mr. Smith. He was the official designated -- what do you call it -- action officer. That's what it is, action officer, but he no longer was invited to meetings.

BY MRS. BAMIDURO:

Q But you stated that you don't know whether or not Mr. Peck or Mr. Schmauder continued to have conversations with Laity. Is that right?

A I talked to Mr. Laity over the years because I worked with him on a number of subjects and projects, and he assured me he had no involvement. He was waiting for the rule to actually be turned in, and then the OIRA process would reengage and he would reengage, but he was not part of the discussions in the runup to it.

Q But you don't know whether Mr. Schmauder or Mr. Peck were having conversations about the WOTUS rulemaking with others at OIRA. Is that correct?

A I do not. Correct.

BY MS. FRASER:

Q And in the rulemakings that you've been involved in, OIRA

is generally engaged at the time that the rule is about to be reviewed.

Is that right?

A About to what?

Q Be reviewed.

A Yes.

BY MS. BERROYA:

Q In your experience in the rulemakings you've been involved in, is OIRA actively engaged throughout the entire process?

A In the 2008 mitigation rule, yes, we met, as I said earlier in my testimony, on a regular basis. And the reason for that is the Army and the EPA, while we both have Clean Water Act responsibilities, we have slightly different missions. And so we found it very valuable to have OIRA, if not in all the meetings, at least in one in every four to help us keep on track and bring things together so that we didn't have a train wreck at the end of the process.

BY MS. BERROYA:

Q What about in other rulemakings?

A That's the only joint rulemaking, other than WOTUS, that I've worked on. The others have been Corps-only rulemakings, and I personally consult with whoever the action officer is at OIRA throughout the rulemaking process if I have questions about administration policy or how a particular -- if they have guidance because they have a lot of experience in this stuff. So there's always a dialogue back and forth so that we stay on track, stay focused, and have a good product in the end.

Q So, again, in the other rulemakings, was OIRA involved in all of the meetings throughout the rulemaking process?

A Not all of the meetings.

Q And you said that there are only, besides WOTUS, one other rulemaking that you've been involved in that was a joint rulemaking. Is that correct?

A That was finalized, yes.

Q Is the process for a joint rulemaking somewhat different than a regular process in which Army is responsible for the entire rulemaking?

A Well, I can explain a difference. I don't know if it's a process difference, but the difference would be if it's just Army's rule, we control the writing. We control the text. We do the coordination, take comments, evaluate the comments, and we publish the rule. When it's a joint rule, we're supposed to do it linked at the hip and do it together collaboratively so that both agencies can watch out for their goals, objectives, and equities. And then we come out at the end of the process with a rule that we're reasonably comfortable with.

Q So the process is somewhat different for a joint rulemaking than it is for a rulemaking just by the Army?

A Yeah, I guess you could say the -- I don't know if the process is -- well --

Q You would be meeting with a separate agency. Correct?

A Yes.

Q And you would be consulting with a separate agency?

A Yes.

Q And there is another layer of complexity in a joint rulemaking that is not found in a typical rulemaking?

A And we have equal -- let's say speaking theoretically -- we have equal equities whereas in a rule that's just the Corps', you do the rule, you take comments, you finish the rule. In a joint rule, like the 2008 mitigation rule, you go along parallel and make sure that you're linked all the way down to the end. So it's an even thing as opposed to: Give me some comments, and I'll consider them.

Q Could the fact that WOTUS is a joint rulemaking account for some of the differences that you experienced during the 6 years that you were involved?

A No. We had a 2008 mitigation rule that was an outstanding model of collaborative rulemaking.

Q I understand that you believe the 2008 rule was a model, but that's one rule. Could the fact that it was joint explain some of the differences from the other five rulemakings you were involved with?

A I don't believe so.

Q Why not?

A I just don't.

Q So you just testified that there are differences when there's a joint rulemaking, that the process can be slightly different. There's a layer of complexity. There are additional people,

additional meetings. Correct?

A That is correct.

Q But yet you don't believe that can account for any of the differences that you experienced in the process in your 6 years involvement in the WOTUS rule. Is that correct?

A It doesn't explain lack of coordination, lack of data and information sharing, and only one agency having the pen.

Mrs. Bamiduro. Just one final question. Do you have any reason to believe whether Assistant Secretary Darcy and Ms. McCarthy were not working together at the hip, as you say, in making sure that the interests of their agencies were being met for this rulemaking?

Mr. Smith. No.

Mrs. Bamiduro. Thank you.

Mr. Hambleton. Off the record.

[Whereupon, at 5:03 p.m., the interview was concluded.]

Certificate of Deponent/Interviewee

I have read the foregoing ____ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Witness Name

Date