

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

INTERVIEW OF: CRAIG SCHMAUDER

Wednesday, February 17, 2016

Washington, D.C.

The interview in the above matter was held in Room 6410 O'Neill

House Office Building, commencing at 9:05 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

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Mr. Skladany. Okay. This is a transcribed interview of Craig Schmauder. Chairman Chaffetz requested this interview as part of the committee's investigation of the promulgation of the Waters of the United States rule. Would the witness please state your name for the record?

Mr. Schmauder. Craig Schmauder.

Mr. Skladany. On behalf of the Committee on Oversight and Government Reform, I want to thank Mr. Schmauder for appearing here today, the committee appreciates your willingness to appear voluntarily. My name is John Skladany. I'm with the committee's majority staff.

And I'll ask everyone else from the committee here at the table to introduce themselves as well.

Ms. Aizcorbe. I'm Christina Aizcorbe. I'm also with the majority staff.

Mr. Hambleton. Ryan Hambleton, majority staff.

Mr. Burns. Sean Burns, Ranking Member Cummings' staff.

Mrs. Bamiduro. Portia Bamiduro, Ranking Member Cummings' staff.

Ms. Fraser. Beverly Britton Fraser, minority staff.

Mr. Skladany. I'll go over the ground rules and guidelines that we'll follow during the interview. Our 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 if they choose. And we will go back and forth 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 would like to take a break apart from that, please just let us know. As you can see, there's an official reporter taking down everything we say to make a written record. So we ask that you give verbal responses to all questions. Do you understand that.

Mr. Schmauder. Yes.

Mr. Skladany. So the court reporter can take down a clear record, we will do our best to limit the number of people directing questions at you during any given hour to just those people on 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. We encourage witnesses who appear before the committee to freely consult with counsel if they so choose. And you are appearing today with counsel.

Would counsel please state your name for the record?

Ms. Weis. Sure. Megan Weis, Army Office of General Counsel.

Mr. Skladany. Would you like to introduce yourself for the record too?

Ms. Jenkins. Angela Jenkins, paralegal for the Army.

Mr. Skladany. Thanks, Angela. 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 or if you do not understand one of our questions, please just let us know. 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 the information from someone else, just 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 please inform us who, to the best of your knowledge, might be able to provide a more complete response.

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. Schmauder. I do.

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

Mr. Schmauder. I do.

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. Schmauder. I do.

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

Mr. Schmauder. No.

Mr. Skladany. I'll just note that the content of what we discuss here today is confidential. So we ask that you not speak about this interview to anyone not in the room to preserve the integrity of our investigation. That is the end of my preamble.

Is there anything that anyone would like to add?

Ms. Weis. I just want to add that Mr. Schmauder is here today to speak to his own opinions and recollections and not to represent any official Army or DOD positions.

Ms. Berroya. And I walked in after the introductions, but my name is Meghan Berroya. I'm the chief investigative counsel for the ranking member.

Mr. Skladany. All right. By my clock, it is 9:09. So we'll get started with the first hour of questions.

Ms. Aizcorbe. Thank you, John.

#### EXAMINATION

BY MS. AIZCORBE:

Q Thank you for coming, Mr. Schmauder. We'll start off with some background about your current role with the Army. What is your current role?

A Currently, I am the Deputy General Counsel of the Army at the Army's Office of General Counsel. My principal client, one of my principal clients, is the Assistant Secretary of the Army for Civil Works.

Q And how long have you been in this role?

A I've been in this role since 2004.

Q And what did you do before 2004? Anything, any prior time with the Army or Corps?

A Yes. Prior to 2004, I was the acting chief counsel for the United States Army Corps of Engineers for about a year, and before that, I was the Deputy General Counsel with the Army Corps of Engineers here in Washington, D.C.

Q And how many people work in the Army Office of General Counsel?

A How many people?

Q Currently.

A In my section, or in the whole Office of General Counsel?

Q Both.

A I would say roughly 35, 38 probably total. In terms of attorneys, you're talking about, probably half a dozen, six to eight administrative staff. I have about 10 people that work in my section.

Q And what section is that?

A It's the Deputy General Counsel for Installations, Environment, and Civil Works.

Q And who do you directly report to?

A General Counsel of the Army.

Q Who is?

A Currently, it's Alissa Starzak.

Q What is your background or expertise in environmental compliance?

A Well, I have grown. Let's see, I started with the Corps of Engineers in 1980. I've worked through, from 1980 through 2004, when I was reassigned to the Pentagon. I'm very familiar with all of the Corps' legal issues. Although I was never -- I was not a subject matter expert in environmental law, but I certainly had staff that were experts. Since about the 1985 timeframe, I was in management in the Legal Services of the Corps of Engineers. So I've always been a supervisor or a manager, to include various assistant chief counsel positions, then the deputy chief counsel, and eventually the acting

chief counsel before I came to the Pentagon.

Q And, during that time, did you review or process any permit applications?

A No.

Q During that time, did you review or make field jurisdictional determinations?

A Well, again, almost my entire career, with the exception of about 5 years, I spent in the headquarters of the Corps of Engineers. Most of the permit applications and permit processes are done out in the districts of the Corps of Engineers. I suspect I probably had an issue, several issues that came up, regarding issues of jurisdictional status, but I was not an action officer on any particular permit.

Q During that time, did you review or draft any NEPA documents?

A Draft or review, I've certainly reviewed NEPA documents, yes.

Q And how many waters or wetlands have you completed JDs for? Or is that also taking place in the field?

A Yes, I mean, the applications for jurisdictional determinations, permits are all originate out in the Corps of Engineers field offices. I was only assigned to one field office in my career during the Corps of Engineers. That was a brief period of time that I was down in Huntsville, Alabama. And the office that I worked in down there did not have any civil works responsibilities.

Q Okay. And when you say that you reviewed some NEPA

documents, can you explain maybe how many or what your involvement was?

A It would have been in a review, an overall review of a project or a program that was subject to a NEPA analysis. And the NEPA document, whether it was an EA or FONSI or an EIS, would have been part of the overall project.

Q Okay. And would that have been a review for legal sufficiency or subject-matter quality? What kind of review are you referring to?

A Well, certainly a legal sufficiency review, but overall compliance with NEPA and consistency with the program itself.

Q What is your background or expertise in implementing the Corps' regulatory program?

A Well, again, having served as both the deputy chief counsel and the chief counsel of the Corps of Engineers for a brief period of time, close to a year, I certainly was involved in all of the legal issues that arose within the Corps of Engineers, to include environmental issues, issues of NEPA compliance, issues of regulatory compliance, and the like.

Q And we understand that you led the Army and Army Corps' effort through the WOTUS rulemaking. Is that correct?

A Yes. I just want to -- you said "led." I was part of a team that was responsible throughout the entire process, starting with, and I might add, starting with the 2008 guidance document that was -- that was developed at the end of the Bush administration, leading into the Obama administration's efforts to promulgate guidance, the

guidance document, and then leading, eventually, to both the proposed and final rule.

Q Okay. And as far as this WOTUS team that you referred to, who tasked you with this role?

A The Assistant Secretary of the Army for Civil Works.

Q Have you played a similar role within the Army Office of General Counsel for any other Corps rules?

A Again, this is, when you say "Corps rules," I just want to be precise, I'm not trying to, I played, I played a similar role and have been asked to play a similar role in terms of leading negotiations in the interagency review process several times, both for the previous administration's Assistant Secretary -- it would have been Secretary Woodley -- and for Secretary Darcy. Again, I was involved with the initial guidance, joint guidance that went out between EPA and the Army, as well as the drafting of the guidance that went to the Federal Register but never was released as guidance, then the proposed rule, and then the final rule. So, in terms of rulemaking, I have certainly served since 2008 in a similar role that I served under the current WOTUS rule.

Q When you say that you led interagency negotiations, are you discussing the subject matter of these rules? Are you discussing hashing out agreements? What do you mean by that term?

A Well, you know, I work at the policy level. I mean, I think that's a fair characterization of the work of the Assistant Secretary and the Secretary of the Army who are my clients. And my serving on their behalf both in a legal capacity as well as a senior policy

adviser. So I would certainly always look to the technical experts that may, you know, given a particular policy issue, if it involved technical substance, we would get that technical input from others.

Q Did you understand that your role would primarily be in leading those negotiations then for the WOTUS rulemaking on behalf of the Army?

A Yes. Given, given, again, the history of my involvement with, since the Rapanos case, when the Rapanos case came out, I was in a senior legal role. And, of course, this was a very significant Supreme Court case impacting the jurisdictional status of the Clean Water rule. So I was certainly involved from a legal capacity. And, then, as I said -- I've already testified -- I was involved in developing the joint guidance. It was joint with EPA back in 2008. The guidance document that we developed early on in the Obama administration was a joint document. And, of course, the rule was joint as well. So I've had a lot of experience. And, given that experience, both on rulemaking as well as my involvement in brokering, for example -- I'll give you another example -- in the nationwide permit program, the marine fisheries had issued a BiOp or was contemplating issuing a jeopardy biological opinion. And I was asked again by Secretary Darcy to work on her behalf, working with my counterpart, Lois Schiffer, who is the general counsel for NOAA, we were trying to broker an arrangement where we could get the jeopardy biological opinion down to a nonjeopardy biological opinion on behalf of the nationwide permit program. So it was those types of

involvements I think led Ms. Darcy to believe that I could work interagency, take her policy, you know, input, and then work with the team, with EPA and the Corps, and try to come up with a solution that presented the best policy decisions.

Q And you mentioned there were approximately 10 people in the Army Office of General Counsel within your section.

A Uh-huh.

Q Do those other attorneys work in a similar capacity with respect to rulemakings?

A Yes. We don't -- yes. We, I have, I have 3 people in my -- out of my 10, so almost a third of my office is focused primarily on civil works activities. I have one attorney that understands and teaches and has been with the Corps as well as my office that does authorities issues. As you know, the Corps' practice is heavily influenced by the authorization act, the Water Resources Development Authorization Act, and all of the projects are authorized independently. And so there's a lot of issues and development. So I have that. I also had, during the formulation of the proposed rule and leading up to the draft final rule, I had another attorney on my staff that assisted me, Trish Morris, who was the former district counsel for Jacksonville district. And Jacksonville district is the largest district in the Corps of the Engineers and has the -- not the largest district but the district with the largest amount of regulatory issues down in south Florida. And she came up on my staff and helped me with, with all the things that I was working, civil works, since

the time she got there.

Q With WOTUS as well?

A She did. She worked with me in the early parts of the preliminary, the proposed rule. And then she subsequently took a job with the interstate commerce --

Q It doesn't matter.

A -- Interstate, Great Lakes, up there, the Great Lakes Water Commission I think it is.

Q And you mentioned there was a third attorney who worked in this capacity?

A Yes. I have also -- I have an attorney -- he is an Honors attorney -- that provides, I would say, staff-level support to the three of us.

Q Okay. And have any of these three also been engaged in the drafting of rules?

A Probably in the review process, but not to the extent that we were, you know, actively engaged in the policy of this rule.

Q Okay. In the December 15th, 2015, briefing with this committee, you informed us that you took part in drafting the WOTUS rule. How many rules had you drafted before WOTUS?

A Well, again, if you're including the guidance document as rule, I worked on the 2008 guidance document, the early version of the joint Army-EPA WOTUS guidance document that, again, it went into the Federal Register for public comment, and then it was never finalized because then we developed the proposed rule and the final rule.

Q But any other rules besides WOTUS?

A I was involved with the 2008 mitigation rule but not to the extent that I was involved in the WOTUS rule.

Q You didn't draft the 2008?

A I did not. I did not.

Q Of the Army staff involved in the rulemaking, who would you say had the most regulatory expertise?

A Say that again.

Q Of the Army staff --

A Chip Smith. When you say Army, I'm assuming --

Q Not Army Corps. I'm trying to distinguish. When I say "Army," I mean just Army. I'm distinguishing versus Army Corps. I'll usually say "Army and Army Corps" if I mean both. Sorry for the confusion.

A Would you repeat the question?

Q Sure. The Army staff involved in the rulemaking, who would you say had the most regulatory expertise?

A Of the folks that worked with me on the rule, I would say Chip Smith and then probably followed by Trish Morris on my staff.

Q And who in the Army had the most experience and expertise with respect to Clean Water Act implementation?

A Implementation?

Q Correct.

A I would say Chip Smith probably and Trish Morris. Again, having both been, Chip having been out in the field and Trish Morris

having been a district counsel, they probably would have been both very involved in implementation issues.

Q How many times did you meet with Ms. Darcy through the course of this rulemaking to discuss the rule?

A Again, are we talking all the way back to the guidance? Or are we talking about just the proposed and finally rule?

Q When we refer to the rulemaking, I would say that we're trying to be holistic about the entirety of the period. If it's easier to give a frequency or a sense of how frequently you met, that's fine too.

A I would be hard pressed to give you a number. So let me say, I would just answer the question that I met with her a significant amount of times throughout the time from 2009-2010 timeframe through the promulgation of the final rule.

Q And how did directions typically flow to you during this rulemaking? Did those all coming from Ms. Darcy?

A Directions in the sense of the policy, overall policy direction, yes. I took my directions directly from the Assistant Secretary.

Q Were there other directions besides policy that you took?

A I would say time. There were time issues, you know, setting milestones, and the like.

Q And who communicated those time issues to you?

A Well, they were jointly developed between Secretary Darcy and the two Administrators, both Lisa Jackson and then Gina McCarthy,

during the overall, the holistic period of time in terms of setting our expectations and our overall direction.

Q So some of those time directions you did not receive directly from Ms. Darcy?

A No. I received them from Ms. Darcy. I'm saying they were developed jointly between the principals.

Q Are you aware of how Assistant Secretary Darcy received her instruction with respect to this rulemaking?

A No.

Q For purposes of the remainder of the interview, we will use the term "White House" holistically, which includes the Council on Environmental Quality, OMB, or other parts of the Executive Office of the President unless otherwise specified. Does that make sense?

A Uh-huh.

Q Did you ever --

A Could I just go back and clarify?

Q Sure.

A Ask me the question right before you clarified the term "White House." I think I answered the question no. I just wanted to make sure.

Ms. Berroya. Just so I'm clear, so "White House" is going to mean anything from, like, President Obama to --

Ms. Aizcorbe. Anything within the Executive Office of the President. I'm saying for ease of discourse, we're using the term "White House."

Ms. Berroya. -- if the witness is going to be able to understand that. I will defer to the witness' counsel.

Ms. Aizcorbe. If it's easier, I can also use "Executive Office of the President." Whatever you prefer.

Mr. Schmauder. And I'm going to testify to only facts as I know them. And that's why I want to make sure that the question that I answered --

BY MS. AIZCORBE:

Q The question was whether you know how Assistant Secretary Darcy received her instruction with respect to this rulemaking.

A Yes, and I'll qualify my answer slightly from the answer no. And that is I participated in meetings with Ms. Darcy and Ms. McCarthy where they discussed, you know, perhaps broader discussions that they had with others to include, shall we say, the Executive Office of the President. I was not personally at those, that level of discussion. But I, in the overall discussion between the two principals in terms of laying down guidance and what have you, I probably did overhear, it may not have been necessarily attributed to any particular office in the EOP or the Executive Office of the President. But I wanted to be truthful and make sure you understood that.

Q You don't specifically remember any particular part of the Executive Office of the President that was directing the Administrators?

A I do not.

Q So if "White House" is unclear, we'll just go on with "Executive Office of the President," unless otherwise specified, if that makes sense. Is that okay?

A I'll do my best.

Q Okay. Did you have any conversations with the Executive Office of the President regarding the rulemaking? And that would include OMB, OIRA, CEQ, any of these components.

A And the answer would be yes. During the vetting of the proposed rule and the vetting of the proposed final rule, there is significant OMB, OIRA interaction.

Q Who with OMB and OIRA did you interact with?

A Jim Laity on the proposed rule. And then, on the draft final rule, both Jim and Vlad Dorjets.

Q And did you have these discussions or similar discussions with anyone in the Executive Office of the President besides OMB?

A We discussed several issues from time to time. I discussed them with the Counsel for Environmental Quality.

Q Were those meetings with just yourself? Or were there other participants?

A There were -- there were -- there were several meetings. I recall one -- and I can't remember exactly the timeframe -- but I remember that myself and Ms. Dominguez, who at the time was Ms. Darcy's principal deputy, we -- there was a meeting at CEQ, an interagency meeting, I know I attended with Ms. Dominguez. And EPA was there and almost all of the agencies that would have had a stakeholder-type

interest in the rule. And I think it was just a, I if recall correctly, it was just a briefing on where we were relative to the proposed or the draft final rule.

Q Do you recall if there were any Corps staff there as well?

A At that meeting, there was not, because it was a principals plus one meeting. And the principal was Ms. Dominguez, and I was the plus one.

Q What type of input did you provide at this meeting?

A It was general briefing, where we stood on the process.

Q And, in your meetings with OMB or OIRA, did you provide similar briefing information? Or were those discussions of a different quality?

A They were briefings in terms of the process to get through the interagency review. As I think you're probably aware, that once a rule is finalized to the point where the principals support the rule moving forward, it's uploaded into I think it's a system called ROCIS or something like that. And then it goes to OMB-OIRA. Then they electronically disseminate that rule to the interagency points of contact. And then there's meetings that go on with the other agencies to resolve their comments. Those are all managed and done through OMB-OIRA. I think they particularly frown on having off, you know, off-the-record kind of comments. They like it all to be done on the OMB-OIRA record, as well as they have an executive order process. OMB-OIRA does, that they take input --

Q I'm sorry to cut you off. But just for time purposes, we

understand that process. So we'll move forward.

A That's fine. I'm glad you do.

Q Nothing personal. For those interagency meetings, who else would participate with you and Mr. Laity? Or I guess at the interagency meetings, it was you, Mr. Laity, and Vlad I think you mentioned.

A A lot of those were -- a lot of those were calls. Some of them were face to face, but a lot of them were phone calls.

Q And did anybody else from Army or the Corps participate in those?

A I don't want to say no like they were excluded. But I don't know at that point whether there were many at the Corps was involved. I know Jim Laity and both Vlad, frequently when they had a question, they would reach directly to the Corps technical people. So I'm sure that they were involved but not necessarily always through me.

Q And would EPA join those calls as well?

A EPA, sure.

Q Were CEQ also on those calls? Or was it just OIRA?

A Most of the times, I think it was mostly OIRA folks. There may have been a time, if it was a particular issue, that CEQ did. But generally not.

Q You don't recall any specific instances where other parties would join those calls?

A No. Unless OMB or OIRA staged a bigger briefing type of meeting.

Q And with respect to the conversations you had with OIRA during the proposed rule, we just spoke about the interagency proposed final, but for the proposed rule, were those meetings similar? Did you discuss technical parts of the rule at those meetings?

A Yes. They were similar. I think I've given indications before that it's my view that the process that we used both in developing the guidance, the proposed rule, and final rule, the process was all generally the same.

Q So, in those meetings, was it similarly just you from the Army and Army Corps on those calls?

A Say that again.

Q With respect to the proposed rule conversations you had with OIRA, was it just you on behalf of the Army and Corps who participated?

A Sometimes. And, again, sometimes I know that they reached down directly to the Corps and had conversations with the Corps. We would try to inform each other if they have had conversations.

Q But you were not a part of those conversations?

A Not necessarily, no.

Q And EPA would, similarly, be on those calls about the proposed rule?

A With just the Corps? I don't know.

Q No --

A When I was on the call, typically EPA counterparts were on the call as well.

Q And who were your EPA counterparts who you referred to?

A Well, my, Greg Peck, the chief of the staff of the Office of Water, had a similar lead responsibility for the Administrator as I did for the Assistant Secretary, and then John Goodin, and lawyers from EPA's General Counsel's Office.

Q In the December briefing with the committee, you informed us that throughout the rulemaking you brought Jennifer Moyer and Lance Wood into meet with Assistant Secretary Darcy before making decisions regarding the rule. Could you explain that process a bit more?

A Sure. Throughout the process of developing the proposed rule and the final rule, I took my responsibilities as was trying to bring the agencies, the Army and the Army Corps and EPA together on a particular policy. We would have meetings with the technical input from both EPA and the Corps. The Corps, the Corps and frequently Chip, Chip and Jen Moyer participated in those calls, as well as others from the regulatory office. And if you're talking about the larger period of time, prior to, during the proposed rule, Meg Gaffney-Smith was the chief of the regulatory branch, so she had a much more prominent role and worked with her on the development of the proposed rule. And then I believe she got moved up to a different job. And Jen Moyer assumed the responsibilities of chief of regulatory. So I worked primarily through Jen Moyer. But others within Jen Moyer's shop were involved as well as Chip.

Q Did Ms. Darcy consult you outside of these meetings on any technical or policy decisions she had to make?

A We certainly discussed the policy issues, the discussions

that she was to make. But I would say she didn't rely on my technical input. She took the input from the technical people.

Q So you did make recommendations in those discussions with Ms. Darcy?

A The Corps made recommendations. EPA made recommendations. My principal job was to make sure that she had the information she needed to make the policy decisions that she made.

Q So your job was to relay those recommendations. You, yourself, did not make any recommendations?

A No. I didn't make any recommendations.

Q Okay. You didn't make --

A Not with respect to technical decisions.

Q Did you make any recommendations regarding accepting technical recommendations or not accepting technical recommendations?

A No. If you're trying to -- if you're trying to get to, like, I substituted my nontechnical judgment for technical people, that's not what I did and would not have done that. My job was to relay and discuss and share with the Assistant Secretary what guidance and thoughts and discussions we had with the collective group, where people were, what the issue, how it was developed, and the like.

Q You just mentioned that you did not make any technical recommendations. So I was trying to understand what you were differentiating that from.

A I think I answered the question. It was not my job to provide technical in the sense of being a technical or technocrat. My

job was to help her formulate her policy.

Q We understand that the head of the Corps regulatory program only met with Ms. Darcy on four occasions. And these were all while the rule was being finalized by the EPA. Can you explain why Ms. Darcy did not consult with the Corps before this stage of the rulemaking process?

A I'm not sure the general timeframe that you're referring to here. Maybe if you'd break it down for me.

Q The committee understands that a draft final rule was provided to the so-called Team of Eight in a certain timeline, which was around January of 2015.

A Uh-huh.

Q And three of the meetings that we understand Ms. Moyer took with Ms. Darcy happened after that point. Only one happened prior to that point, prior to the final rule being drafted. So I'm trying to get an understanding of how Ms. Darcy consulted with the Corps. If you were her primary, just trying to get a read on --

A Yes, I don't, I don't second guess the number. That sounds, perhaps, right in the general timeframe. If you're talking about from September 2014 through, say, March of 2015, that's the general timeframe that the proposed final rule was developed. And if you're saying that Jen Moyer met with Ms. Darcy four times within that period, that sounds about right. Then the question I think you are saying is, she was saying, she was informing the committee that she didn't have any similar meetings prior to the development of the final rule with

Ms. Darcy?

Q Timewise, three of the four meetings that she took were after the draft final rule was shared with the Team of Eight, after January 1st. So I was trying to understand whether Ms. Darcy had had any engagement with the Corps before it was drafted.

A I don't know whether she had meetings with the Corps. Again, it was in the September timeframe, with the development of the Team of Eight, that it's been referred to as, the principal responsibility of the Team of Eight was to take the proposed rule, given the fact that we had comments on the proposed rule, and the outreach effort that had been going on, and to start developing, to start developing a proposed final rule. So, from September to around November, we were meeting frequently with the Team of Eight to start developing the concepts and issues that we would want to take on in the proposed final rule. Ms. Darcy was not involved much at that early stage of the development of the final rule. As the rule -- from about after the first of the year, so from around January through March, there was an intense effort to work on the proposed rule preamble and rule text. And we had decided that to move this process along, given the timeframe that we had, we had to make sequential policy decisions because a lot of times, they build on each other. So Greg and I decided that we would, we would tee up those policy decisions for our respective principals so that we could start taking those decisions and building on them as we move towards the final rule.

Q We understand that around October or November of 2014,

within that time period that you're talking about the team convening, you and Mr. Peck expressed that there was an urgent desire to move forward, move the rule forward. Can you explain what was happening at that time?

A Well, that's probably generally right. We were meeting -- from September to November, we were having almost weekly meetings. And we called them strategy meetings. I would say that we were -- these were large, kind of strategy meetings. We really weren't focused on a particular recommendation. We had a lot of data, a lot of information, a lot of different concepts in areas that we had specifically requested comment on the proposed rule. So we kind of knew where the public comment was taking us. So we started talking about potential changes to the proposed rule. We were going on through that process. We weren't really developing any specific preamble or rule text at the time we were kind of having these strategy sessions. And it was around the November timeframe that I believe we were being told that the expectations of the administration was that they wanted to get a rule out in the summer, the beginning of the summer timeframe. So we were thinking maybe June-July general timeframe.

Q And who told you that?

A It was relayed probably back to me from, probably from Ms. Darcy or maybe I heard it from EPA. It was generally that was what our marching orders were in terms of generally where we were headed with the rulemaking.

Q Okay. And we understand that these team meetings, despite

meeting frequently on a weekly or so basis, they stopped between November 2014 until about mid-January 2015. What was the reason that they stopped at that time?

A They stopped for two reasons. One is that it was the holiday, and it was very hard to get everybody's schedule to meet up. People were traveling and other things. And then probably, probably more importantly, we decided that, given the timeframe that we had, we had to kind of start the process of putting some thoughts down on paper in the sense of draft preamble and draft rule text. And so EPA took the responsibility to start drafting the beginning, the early origins of the preamble, and the rule text. And so, by January, when everybody kind of came back after the holidays and everything, at that point, we kind of put aside the strategy-type discussions, and we were more focused on actual drafting of the preamble and the rule text language.

Q When you say the EPA began drafting during this period, were you involved in the drafting effort at that time as well?

A I was involved in general discussions. But I was not -- there was a good period, maybe 3 weeks or so, that there was pretty much radio silence because they were drafting. And I didn't have much communication during that process until a very early draft surfaced.

Q Do you have recall when those 3 weeks were?

A It was that November to January timeframe.

Q So nobody within the Army or the Corps took part in drafting

that draft of the final rule?

A That very early, the first shall we say or call it the first version, probably not. Again, I don't know what direct conversations they may have had. You know, Greg and I, working on behalf of our principals, throughout the whole process, staff from EPA I know had conversations with staff from the Corps of Engineers. There were conversations going on throughout the process -- and rightfully so. I mean, technical people needed to be talking amongst themselves. And the policy people were talking amongst themselves. And the principals, I'm sure, were talking amongst themselves.

Q And this is just your belief that EPA technical level staff were reaching out to Army Corps, or do you know that that was happening?

A Well, I know through the process, I can't tell you any particular subject or timeframe, but I know throughout the process, when we were working various issues, Russ Kaiser, who is a former Corps regulator, who is the head of the Wetlands, I think, program at the Corps, at EPA, was having communications with Jen Moyer. I saw emails to that effect, general email thread.

Q But you don't know whether those conversations were taking place during this 3-week period?

A I do not know. I do not know.

Q You mentioned that one of the concerns about meeting over this time period was the holidays or travel. Did you communicate to the individuals in the Team of Eight that that was the reason why they weren't meeting? There seems to be a little bit of confusion as to

why the meetings stopped.

A I don't recall a lot of communications during that general timeframe. I know that there were questions that had come up from the Corps, Jenn Moyer and others, that said are we meeting next Wednesday or is our regular meeting on? And I recall sometimes saying, no, we don't have enough people or whatever. I wasn't trying to keep it a secret from them that EPA was off writing, if that's what their inference was. It was just that, you know, it was busy. Other things creep in. And it was a down time in communications, for sure.

Q So it's not a matter of you and Mr. Peck reaching out to the Team of Eight and asking people to meet and then people saying they weren't available; you just decided it was too busy?

A No. No. I wouldn't say that. There were probably times when we may have tried to meet. But I, you know, I think the best accurate reflection is that, during that timeframe, we had kind of shifted moving away from strategy sessions to let's start putting some of where we think the rule, the final rule will go into language that then we could work off of hard language as opposed to concepts.

Q And did EPA communicate that they would be taking the lead with preparing that draft and then they would get back to you? Or how was that communicated to you?

A EPA assumed the lead in most of the writing, both for the proposed rule and for the draft final rule, as well as the guidance document, and as well as the 2008 document. I think you could probably say that there were different levels of Army and Army Corps involvement

in all of those. But, in my view, it's accurate to reflect that EPA, for the most part, assumed the writing of most of the guidance and rulemaking.

Q So during that 3-week period, when EPA took the lead on drafting this preliminary final draft, did you periodically check in with them to see when you would be meeting next? Or were they in communication with you?

A I seem to recall that there was a down time where we weren't doing much in the sense of communicating. And maybe it was just the expectations of people burning leave and on, you know, for the holidays and people taking off. I recall that there were not a lot of conversations even going on between Greg Peck and myself. It was just down time.

Q You never asked Mr. Peck when they would be finished?

A No. I don't recall ever asking him when that would happen.

Q We understand that the Army and Corps were consulted about portions of this draft final rule. Did you share their comments with the EPA?

A Yes.

Q On every occasion?

A Every occasion that I recall.

Q Did you make any recommendations about whether to accept or reject these comments on the draft final rule?

A We had conversations about the technical aspect of what EPA's technical people were saying versus what the Corps' technical

people were saying and recommending.

Q And when you say "we," who are you referring to?

A Greg Peck and myself and others.

Q Okay. We understand that towards the end of the rulemaking, around November of 2014, within this time period we keep referring to, Mr. Smith and Ms. Moyer stopped receiving invitations to meetings that they would usually attend. Are you aware of any other meetings that the Corps or Mr. Smith were not invited to during this period?

A The only two meetings that I can recall that the technical people, referring to Chip Smith and Jenn Moyer as the technical people, were not invited to a meeting: one was the meeting we already discussed at CEQ, which was principals plus one, and then there was one other meeting, and it was -- I think it was in the 2015 timeframe that I recall, which was a lawyers-only meeting. And Chip would not have been invited to a lawyers-only meeting. But I recall that even at that lawyers-only meeting, Jenn Moyer was there to present a technical portion of the meeting discussion.

Q Was that a meeting within the Army?

A No. It was with EPA, EPA lawyers, and Army lawyers.

Q And what was the purpose of that meeting?

A It was to discuss the 4,000-foot bright line and the implications of the bright line.

Q Approximately when did that meeting take place?

A As I said, I think it was leading, it either occurred right

before, like in the April timeframe maybe, leading up to the proposed, to the publication of the final rule. Or it may have happened during the 90-day OIRA review leading up to the Federal Register notice.

Q So after the final rule had been drafted?

A Uh-huh.

Q Okay. We understand that around January of 2015, you informed staff that all communications with the EPA would go through you, except those that were strictly technical in nature and that had received prior authorization to be shared. Can you explain the reason for this change in policy?

A I'm going to have to ask you to read the question again.

Q We understand that around January of 2015, staff were informed that all communications with EPA would have to go through you, except those that were strictly technical in nature. We're just wondering what the background was for that change the policy.

A I'm not aware of that directive.

Q So it was not your understanding that you would serve as the primary point for all communications to the EPA at any point in time the rulemaking?

A There are, there were two, there was two directives or communications from the Assistant Secretary, not from me, that dealt with communications about the rule. My recollection was that one came out during, both, they were, that they were both issued at a time when, I think one was when the rule, the proposed rule, was out for comment, and the second one was when the proposed final rule went to OMB-OIRA.

My recollection of those, that communication was not that that stuff had to come through me, but it had to come through Ms. Darcy's office.

Q Okay. And both of those memos expressed that sentiment, that all communications go through Ms. Darcy?

A Generally, yes, I would say that's a fair characterization of those memos was that we -- comments on the rules or comments to the interagency process or comments to others, that Ms. Darcy wanted to have a filter through or at least knowledge of all the communications affecting this key administration rulemaking effort. And I think she put out guidance to that effect.

Q Did you have any knowledge that these memos were being put together or discussions with Ms. Darcy about them before they were --

A Yes.

Q What were the nature of those discussions?

A How to effectively make sure that the -- her office, she took the lead on the rule, how to channel the communications through, and that we were aware of all of the communications, as they would be representing an Army component, that we knew what those communications were. And if I'm remembering correctly, again, it was that all of them had to come through and be filtered through the principal deputy, either Ms. Darcy or her principal deputy at the time. It didn't say through me.

Q Is this sort of thing typical in rulemakings, in Army Corps rulemakings?

A Yes, I think it's fairly typical. In fact, I seem to recall

that, I'm sorry, I seem to recall that even after the rule was final in June, that General Peabody issued similar communications to the field and the Corps that said something to the effect that he wanted all communications about the rule to come through headquarters, through Jenn Moyer, including conversations that were being solicited from the Assistant Secretary's Office. So it's not unusual for folks who have key roles to play to want to make sure that communications relative to those decisions are being filtered through -- and I think that's probably a poor choice of words -- but being managed, shall we say, through a direct communication link.

[10:00 a.m.]

BY MS. AIZCORBE:

Q And so you've seen this in other rulemakings as well?

A I don't know about rulemaking. It's not atypical, I think, as a management choice that if you are particularly responsible for a very key project or program or initiative, that you want to have, and some have managed the control of communications on a particular issue.

Q Sure. My question about whether this was typical was strictly about other rulemakings. So have you seen it in other rulemakings?

A I don't know if it's done in other rulemakings.

Q But you have worked on prior rulemakings for the Army?

A Yeah, and I don't know if those kind of communications went out or not.

Q And would those communications include communications going to the EPA as well as external stakeholders?

A All communications, as initially contemplated, you mean the Darcy memo? Is that what you're referring to? Did that include communications with EPA? Is that what you're -- I think the intent was yes, that all communications with any of the interagency was to come through the Assistant Secretary's office, and I know that General Peabody pushed back on that email, or that directive, from Ms. Darcy.

Q How so?

A He raised issues about that it's typical that during the

interagency review, that the Corps is asked by, say, OIRA for technical input, and he was just questioning whether, you know, those things should be allowed or not. And my recollection is we did not try to -- if OMB OIRA wanted to reach down and ask a technical question, if in one of their briefings that they had with a stakeholder, a question was raised, and the question could best be answered by talking to Jen Moyer or Chip Smith or Meg Gaffney-Smith, they would reach down and get that technical information. I know that went on, and we didn't try to stop that or anything. That just makes common sense.

But if you're talking about providing a comment or a suggestion for change, or a particular reaction to the rule itself, those were the type of communications that I believe the intent in Ms. Darcy's memo was that she wanted to see those before those were communicated outside of the Army.

Q So in your conversations with Ms. Darcy about these memos, did you discuss what this was reacting to, or the reason for doing it at these times?

A There were key times where it was in the best interests of the rulemaking itself from the Army's perspective that we had a unified voice in the Army and not have a bunch of people calling in and getting sidebar discussions and input from all across the Corps of Engineers.

Q So the memos were not in response to any particular or specific concern about prior communications that had gone out that caused a problem, or were slowing the process down?

A No. It was a general concern of making sure that the Army

spoke with one voice. I would say both Army and EPA as a single unitary executive.

Q We understand that you worked closely, as you said, with the Corps and with Mr. Smith through the rulemaking, but that as time went on, and especially during that final year of the rulemaking, you had less engagement with them. For example, we understand that there were occasions in the final year where Mr. Smith would ask about the rule and would receive no response from you. Can you explain that relationship?

A Yeah. It goes kind of like this: I never, in any of my involvement with the rule, ever tried to exclude Chip from anything, from any meeting or any involvement or what have you. If Chip -- this is my perspective now -- if Chip felt that way, it was at his own choosing. Chip, during the whole process, frequently didn't participate in a very active way in meetings that we had, typically deferred to what the Corps position was, and so I think our expectations of him, my expectations of him, kind of dwindled because he was not an active player in the formulation of the technical and policy judgments.

He just would come to a meeting if and when he was available, and I know there were several times when he elected not to come to a meeting because he was TDY or had other responsibilities, which I don't doubt, but he said Jen Moyer can handle it.

So, you know, now I would say during that same general timeframe that you're referring to in this question, there was continuous

involvement from the technical people, all the way right up to the April 2 meeting that I believe was one of the meetings that Ms. Darcy asked and took a technical briefing from the Corps.

Q So was Mr. Smith in every meeting with you and Mr. Peck?

A No.

Q Would it be your expectation through this rulemaking that you've been responsive to Mr. Smith and Ms. Moyer?

A Are you asking me if that's my opinion? Yes.

Q Would you characterize your relationship with the Corps and Mr. Smith as being responsive to them? If you were the one taking these meetings with Mr. Peck, when the Corps had questions or Mr. Smith had questions, you generally communicated back to them or responded to them?

A Yes. I think the answer to that would be yes, but I will say this, that first of all, I want to make clear to the committee that the process that I used, I would meet sometimes with just EPA to get what EPA's thoughts and issues were without the Corps involvement. Likewise, I would sit down with the Corps in a teleconference or with them and I would listen to their input. And then typically, then, we would get back as a group, and we would have larger group settings, and then eventually, I would present the overall either lack of consensus or consensus of the Team of Eight to Ms. Darcy, and if she needed more input, then she would ask for a technical input discussion with the Corps.

And that happened several times, as I think you've already been

made aware, that we were at a very critical point with some critical policy decisions. The Corps was voicing some concerns, perhaps, over what the EPA concerns, or over what EPA's position was.

And any of those instances, to make sure that Ms. Darcy had the information she needed, I never resisted once having the Corps come in and having the Corps' regulatory council, as well as Ms. Moyer, or whoever they wanted, and many times they brought Stacey Jensen, David Olson, Meg Gaffney-Smith; they brought the whole team in, including the chief counsel of the Corps of Engineers. And they would brief Ms. Darcy, and I would sit back. I wouldn't try to manage Ms. Darcy's expectation. I let the Corps brief them. I let the Corps say what they had on their mind, and then a decision was made.

Ms. Aizcorbe. Thank you I believe we're at an hour, so we're going to switch.

Mr. Hambleton. Go off the record.

[Discussion off the record.]

BY MRS. BAMIDURO:

Q It is 10:21, and we can go back on the record. Good morning, Mr. Schmauder. My name is Portia Bamiduro, and for the next hour or so, I will be asking you some questions, although I can't promise that my colleagues won't jump in from time to time. I would just ask for the sake of the record that you try and let me finish my question before you respond, and I'll try and let you finish your response before I ask a follow-up question. Is that okay?

A That's fine.

Q Great. So you talked in the last hour about your involvement in the rulemaking process with regard to Waters of the United States. Can you tell us what period of time you were involved?

A Again, in 2008 timeframe, after the Rapanos decision, which I think was in 2006, I became involved with the previous administration's desire to put out a guidance document that implemented the Rapanos decision. There was certainly not time left within that administration to do a full rulemaking effort, so we did a guidance document, a joint guidance document with EPA. I served in pretty much the same capacity that I served in -- on the drafting of the proposed final rule and the rulemaking effort in this administration, I served back in 2008 timeframe. So from 2008 through 2015, one way or another, I was involved in helping develop guidance and rulemaking with respect to the Waters of the United States.

Q During that time period from 2008 through the completion of the rule in 2015, did you analyze the legal propriety of the rule?

A Well, we certainly had many, many, many discussions on the legal underpinnings for both the guidance and the rules; the guidance that was formulated under the early days of the Obama administration, as well as the waning days of the Bush administration. And then the proposed rule and then the final rule.

Q So I'm hoping to get a sense of the roles that you took during that time period. Was part of your responsibility to filter up concerns to your chief client, Assistant Secretary Darcy?

A Yeah. My responsibility was to help formulate the policy

discussion, make sure that Ms. Darcy had the legal and technical input that she needed in order to make the policy decision, and, you know, focusing on just the legal component for a while, or for a minute, and that is, there were many, many discussions. We always, right from the early start of the guidance document in the Obama administration, and then the proposed rulemaking, the guidance that we were given from our principals was to formulate a rule or guidance document that was consistent with the science, compliant with the law, that would provide clear and consistent regulatory guidance to the regulated public. That was our charge. And so my focus was always on those three general tenets.

Q And who gave that charge?

A That was the charge that was given to me by Ms. Darcy.

Q And was part of your responsibility throughout that period to provide advice and counsel to Assistant Secretary Darcy on the rule?

A Yes.

Q Was it also to coordinate with the EPA on the rulemaking process?

A Yes.

Q Did you, at any point in the rulemaking process, produce or analyze or interpret data underlying the rule?

A Myself?

Q Yes.

A No.

Q Did you gather background information?

A No, that more would have been left to the technical support.

Q And you spoke in the last hour that Mr. Peck from the EPA and folks at the EPA initially took pen to paper and started drafting?

A Uh-huh.

Q At a certain point in the rule, did you draft portions of the rule?

A No. Let me, again, just to be abundantly clear, I never had a responsibility for a section of the rule. That's not to say that I didn't, you know, redline or provide a comment or something on a particular portion of it, but it was not broken down where you take this section. I'll take that section. That was done primarily by EPA.

Q Mr. Smith was interviewed by the committee, and he was asked if it was, quote, "common for an attorney with the Office of General Counsel to draft a major rulemaking such as this," end quote. And his response was no, it has never been done before. But you're saying you did not draft the rule. Is that correct?

A If defining the word "draft," if you're meaning to sit down and write large sections of the rule, I did not.

Q Can you tell us why you think you were tasked with having responsibility in this rulemaking process?

A Yes. Again, in the history of the Clean Water Act and the relationship between the EPA and the Corps of Engineers, they frequently have different views on aspects of implementing the Clean Water Act. And even though I wasn't personally involved in other rulemakings, other than to a peripheral extent the 2008 mitigation

rule, there was a lot of negotiation that had to go back and forth. Chip's comment about it's unusual, I think I would add one considerable point, and that is, this rulemaking is rather unique.

Q How so?

A In that this rule is basically interpreting a U.S. Supreme Court decision that was laid down to us in the Rapanos case primarily from Justice Kennedy, where he defined a standard significant nexus without a whole lot of guidance. So in large measure, this is a rulemaking effort that is not highly technical in nature.

This rulemaking is primarily a rule that deals with definitions of words and phrases and concepts as they are to be applied in law. So if there's ever a rule that would be more appropriate for lawyers to have a much more active role versus something that was ultra technical, such as the standard for wetland mitigation, if you want to compare the 2008 to the Waters of the United States rule, one was highly technical dealing with, you know, the implications of mitigation with respect to wetlands and one was really basically legal standards. I think they're significantly different.

Q So the comments or the edits that you provided on this rule, were they legal in nature, or were they technical in nature?

A Well, certainly legal in nature, and I would say policy in nature as well. A good portion of the rule itself didn't make significant changes to the '86 regulations. So the definition of an ordinary high water mark didn't change for example. We still use the ordinary high water mark in defining tributaries. The question was

was that going to be the only standard?

Q Is it somewhat unordinary or uncommon for a rule to be interpreting Supreme Court opinions?

A I'm sure it's not out of the ordinary for those things. It's just that this one in particular, I think, given the whole history of the Clean Water Act, right from day one, the agencies struggled with what is meant by Waters of the United States. Congress left that term to be defined by the agencies. It's been a source of back and forth, at least three times to the Supreme Court, two of which the regulations were struck down or significantly challenged.

Ms. Berroya. Is this rulemaking more focused on legal interpretations than other rulemakings that you have been a part of or seen occur since your time at the Army?

Mr. Schmauder. Yes, this is the most legally focused rule that I have been involved in.

BY MRS. BAMIDURO:

Q In the last hour, you were asked about meetings that took place among the Team of Eight?

A Uh-huh.

Q And that those meetings stopped for a period of time around the holidays, I think you said, is that right?

A November to mid, early January was a lull.

Q Did the participants in the Team of Eight ask to meet during the period where there was a lull, as you described it?

A I don't recall them asking. I recall them sometimes asking

are we going to meet, but I don't recall them saying can we meet. It was more like we were meeting fairly regularly, and then those regular meetings kind of feathered out.

Q Did you or Mr. Peck, at any point during that period in particular, ignore requests from members of the team to meet?

A No, not to my knowledge.

Ms. Berroya. When folks in the Team of Eight asked whether meetings would occur during the lull, did you respond?

Mr. Schmauder. I responded to the maximum extent that I was able to at that time. I do know there was some criticisms of my communications back during that timeframe, but, you know, as I testified just a little earlier, I wasn't off doing things with respect to the rule, and, therefore, were trying to hide things. It came to a lull, and I, myself, was not involved during that period of time with a lot of stuff that was going on with drafting the initial draft of the rule, so I had nothing to report to them. And so I suspect I didn't communicate with them what was going on.

Ms. Berroya. Because not much was actually going on?

Mr. Schmauder. Because not much was going on, at least that I was aware of. I had nothing to really add. I know we kept saying we were going to meet after the holidays. We'll meet after the holidays.

BY MRS. BAMIDURO:

Q Who kept saying we'll meet after the holidays? You did?

A I was saying that to myself. Okay. We're not getting these strategic meetings back up. People are busy. This person is

off from vacation. Again, it's not unusual, at least in the Pentagon, during that period of time from Thanksgiving until January, a lot of people are off and away doing other things, and it's just hard to get meetings scheduled and other things get done during that period of time. So it didn't come as a surprise to me that things tended to wane during that holiday period.

Q I want to shift your attention and now focus on who at the Army has final policymaking decision. Can you tell us who has that role on behalf of the Army for the Corps Civil Works Program?

A The Assistant Secretary of the Army has been charged with executing the Secretary of the Army's policy responsibilities for the Clean Water Act.

Q And does that responsibility include rulemaking decisions?

A It does.

Q Was Assistant Secretary Darcy the final decisionmaker on the WOTUS rule?

A She was.

Q Mr. Smith was asked in his interview, quote, "whether it was appropriate that Ms. Darcy was the final decisionmaker on this rule," end quote, and he responded, quote, "Yes, ma'am," end quote. Do you agree with that? Was it appropriate for Ms. Darcy to be the final decisionmaker on the Waters rule?

A Absolutely. I believe that a senior administration official being responsible for a rule of this magnitude.

Q Do you know what information Assistant Secretary Darcy

relied upon in formulating the policy decisions concerning WOTUS for the Army?

A Yes. I believe she had technical, legal, and policy input from both the Corps and myself, and her staff as well. I mean, she has people on her staff.

Q And were you a part of the team of folks who would present Corps opinions and recommendations to her?

A No. When the Corps came in to brief, I overtly tried not to, in any way, filter the information for Ms. Darcy. I let the Corps come in. It was their briefing. They led the briefing. They led the discussion, and I would answer any questions if Ms. Darcy asked me a question, but it was not, I wanted her to have their judgment unfiltered from me. So they typically went in and would brief her. Give her their technical and their legal input.

Q Are you familiar with the Peabody Memos?

A Yes.

Q How and when did you become aware of the memos?

A When they were delivered to Ms. Darcy, she shared them with me.

Q And when was that?

A The dates of the two Peabody Memos. One was what, April, and the other one was May, I think. April 2015 and May 2015, I think.

Q Do you know how Ms. Darcy became aware of the memos?

A Ms. Darcy became aware of Peabody 1 memo, I believe it was on a Monday. She frequently has meetings almost every Monday

with -- the Deputy Commanding General at that time was General Peabody, as well as the Director of Civil Works, which is senior executive service member, Steve Stockton. They typically would meet on Monday afternoons for an hour in a closed-door session. I did not -- I don't attend those meetings. And I believe at the end of one meeting, whatever the April date was, 7th, date of the Peabody Memo, he on his way out the door, he gave her a binder, a red binder, that contained his memo, and then the two attached memos and attachments.

BY MS. BERROYA:

Q I want to make sure that I understand this correctly. So Assistant Secretary Darcy met every Monday with General Peabody?

A Correct.

Q For about an hour in the afternoon?

A Generally speaking, yes.

Q And what was typically the topic of the meeting?

A Issues du jour, issues of the week, issues that are, you know, a broad array of civil works matters.

Q If General Peabody had a matter that he felt was worthy of discussion with Assistant Secretary Darcy, would he be free, if you know, to raise the matter with her during this weekly Monday meeting?

A That would be my opinion is, yes, he would be free and that that's kind of the expectations of those meetings, is to kind of get issues that are -- I mean, General Peabody being the senior military official over at the Corps having primary responsibilities for Civil Works, as well as Ms. Darcy, they would meet and discuss any and all

issues that were on each other's minds.

BY MRS. BAMIDURO:

Q You stated in the last hour that folks in the Corps met with Assistant Secretary Darcy, and you allowed them to talk in unfiltered. You didn't manage that process. Were the focus of those meetings an opportunity for the Corps staff to present their concerns to Ms. Darcy?

A Yes.

Q And did the concerns that they raised get addressed to Assistant Secretary Darcy's satisfaction prior to promulgating the rule?

A That's my understanding, yes. I think she has indicated that she had the requisite technical and legal input that she felt she needed in order to make the decision that she made.

Q Were you aware that Assistant Secretary Darcy testified before the House Transportation and Infrastructure Committee on June 10, 2015, about this rule?

A Yes.

Q Assistant Secretary Darcy was asked the following about the Peabody Memo, quote, "What steps did you take? Did you hold meetings? Did you respond to the Corps, had some serious concerns about the process of the Clean Water rule, and what is in the Clean Water rule?" End quote. And Assistant Secretary Darcy responded, quote, "We took those concerns and talked through them and walked through them with the Environmental Protection Agency before finalizing the rule," end quote.

Do you have any reason to believe that Assistant Secretary Darcy was being untruthful in that statement?

A No.

Q She was asked at that same hearing who she took her concerns to, and she responded, quote, "Our colleagues at the Environmental Protection Agency because we were jointly developing the rule," end quote. Do you have any reason to believe that Ms. Darcy was being untruthful in that statement?

A No.

Q Going into the final interagency process, if you are aware, what considerations from the Corps did Assistant Secretary Darcy take to the table to discuss with Ms. McCarthy?

A At the time -- this would be in the April timeframe, right, when the rule was being ready to be sent out to the interagency review.

Q Just so I'm clear, April 2015?

A April 2015, correct. Again, there was a meeting that the Corps had with Ms. Darcy, very close, I believe it was the day before the rule was actually uploaded, or the day before -- actually if my memory serves me, there was a meeting with Ms. Darcy followed by a meeting the next day with the Administrator, and I believe the rule was uploaded that following Friday. That general timeframe, again, all in that April 2015 timeframe.

Based on the discussion that Ms. Darcy had with the Corps, the Corps technical and legal people, she had presented to Ms. McCarthy that there were three areas of concern that she had, that, in her mind,

were not resolved to her satisfaction. And, again, my recollection was that Ms. McCarthy understood the concerns, understood the issues, and then collectively they both decided to advance the rule to interagency, and to continue having discussions at the principal level to resolve those issues to Ms. Darcy's satisfaction prior to the rule being published in the Federal Register.

Q Were you privy to those conversations that took place between Ms. Darcy and Ms. McCarthy when the rule was in review?

A I was privy to maybe not all of them, but I was privy to some of those discussions.

Q Did you have an understanding that during that process, Ms. Darcy's concerns were, in fact, satisfied through her conversations with Administrator McCarthy?

A I am aware that through the discussions that ensued between the Corps, Army, and EPA, that several adjustments were made to the final rule that satisfied Ms. Darcy's concern, but did not fully satisfy the Corps of Engineers' concern.

Q And you stated earlier that the final decision-making authority rested with Assistant Secretary Darcy. Is that right?

A The final Army position rested with Ms. Darcy.

Q Thank you for that clarification.

A Yeah, this probably is a good point to at least make the committee aware, if they're not already, that this rule was being promulgated under the Administrator's rulemaking authority.

Q We'll get to that.

BY MS. BERROYA:

Q Was Mr. Smith involved in the conversations between Assistant Secretary Darcy and Ms. McCarthy?

A I don't believe so.

Q Would you have expected him to be involved in those conversations?

A No. It's usually principal plus one at that type of level, and Ms. Darcy frequently had me because of my involvement in the rulemaking.

Q Are you aware of other Army Corps staff being involved in the communications between Ms. Darcy and Ms. McCarthy?

A No.

Q Would you have expected other Army Corps staff to be participating in those communications?

A I would not.

BY MRS. BAMIDURO:

Q Were you aware that Administrator McCarthy testified before the full Oversight and Government Reform Committee on July 29, 2015, and was asked about the Peabody Memos?

A Yes, I'm aware of that.

Q At that hearing, Ms. McCarthy was asked if it was her understanding whether Assistant Secretary Darcy took the concerns in the memos, in the Peabody Memos and, quote, "walked through them with the EPA before finalizing the rule," end quote. And Administrator McCarthy responded, quote, "That is my understanding, yes," end quote.

Is that your understanding as well?

A Yes, that is.

Q Any reason to believe that Ms. McCarthy was not being truthful in her testimony?

A No.

Q Administrator McCarthy was also asked to confirm whether the EPA knew of the concerns before finalizing the rule and she responded, quote, "In working with Jo-Ellen Darcy on this rule, she indicated that all of the concerns of the Army Corps had been satisfied. In moving forward with the final, I individually had conversations with her about the changes that the Army Corps was interested in making as the proposed moved through the interagency process, and I understood that everything had finally been fully satisfied," end quote. Is that consistent with your understanding?

A It is.

Q Any reason to believe Administrator McCarthy's testimony was untruthful?

A No.

Q Were you aware that after that July hearing in 2015, the committee submitted written questions for the record to Administrator McCarthy?

A That's my understanding, yes.

Q In response to those questions for the record, where Administrator McCarthy was asked, quote, "Whether each of the issues and recommendations raised by the Corps in these documents were, in

fact, adopted or otherwise addressed in the final rule," she responded, quote, "The final Clean Water rule reflects consideration of and decisions on each of the issues raised by the Corps and EPA staff. The rulemaking process represents years of interagency discussion, coordination, and decision-making consistently involving technical, policy, and legal input from staff, managers, and senior policy executives. The final rule represents conclusions based on the best available science, agency experience, and the law. These conclusions were accepted by both EPA and the Army Corps and reviewed through an interagency process coordinated by the Office of Management and Budget," end quote.

Is it your experience in being involved in this rule that the rulemaking process did, in fact, represent years of interagency discussion, coordination, and decision-making?

A Yes.

Q And did it involve technical, policy, and legal input from staff, managers and senior policy executives?

A It most certainly did.

Q And did it represent conclusions based on the best available science, agency experience, and the law?

A Yes.

Q And were those conclusions accepted by both EPA and the Army Corps?

A They were accepted by EPA and the Department of the Army.

Q And they were vetted through an interagency process that

was coordinated by OMB?

A Correct.

Q Do you have any reason to believe that Ms. McCarthy's statement is inaccurate?

A I do not.

Q Administrator McCarthy further stated in her responses to the question for the record, quote, "All final decisions made by the Department of the Army and the EPA reflect careful consideration of input from Corps and EPA staff, and represent the best science, agency experience with administration of the Clean Water Act and the law," end quote. Do you have any reason to believe Administrator McCarthy's statement is inaccurate?

A I do not.

Q She also responded in her response to the questions for the record, quote, "Discussions involved experts from other agencies on legal, technical, and policy issues to ensure the final rule represents the best science, agency experience, and the law," end quote.

From what other agencies did EPA and Army solicit expert advice, if you're aware?

A I'm not aware of any specific, other than the general reference to the discussions we had with the sister agencies to include the Department of Agriculture, the Department of Transportation and others relative to the policy and the draft policies that were in the rules, how they would affect those agencies' works and projects.

Q Would you necessarily be aware if the EPA had engaged other

experts involved in this process?

A I would not generally be aware if they reached out to some other agency. I don't believe you're referencing now the Science Advisory Board.

Q I'm not.

A There was significant SAB review that went on, so.

Q You spoke about, in the last hour, prior rulemaking experience that you participated in. In your prior rulemaking experience, were there internal differences of opinion among the team?

A Yes, I think it's generally, it's not uncommon, as a rule, to develop to have differences of opinion, various levels of the organization.

Q And would that include differences of opinion both internally within an agency and among the various agencies if it's a joint rulemaking?

A Yes.

Q Would that include differences of opinion between staff and senior management within the Army and the Corps?

A Yes.

BY MS. BERROYA:

Q In your opinion, why is it not uncommon to have differences of opinion during courses of rulemaking?

A Well, in the development of policy and in the development of a rule, you have -- and this played out probably as clear as in any rulemaking I've been in -- you have technical people who have, who are

probably focused on the implementation type of issues. You've got lawyers who are concerned about liability and compliance with the law, and then you have policy people who are trying to balance the two. And so everybody kind of has a little bit of their little piece of the pie that they want to focus on and have different views.

And then, certainly, when you get to the policy, you know, you probably have people who, some people may want to push the policy further than others that may not want to push it as far, different agendas, different ideologies, and I'm talking generally now. I'm not talking about specifically.

So it's not uncommon, I think, as you try to solicit a broad array of interests and views that you're going to get differences of opinion. It would be very rare, in my view, to be able to have a group of 10 or 20 people sit down on an issue of this level of complexity, policy complexity, to sit around and everybody come to nirvana right off the bat.

Q Can the differences be magnified when it is a joint rulemaking?

A Yes. And perhaps, we'll get there sometime during the day. Particularly with respect to the Clean Water Act, let me just throw it on the table. This is a rule that EPA and the Corps of Engineers have sets of responsibilities under the Clean Water Act. The EPA's responsibilities, as they've been interpreted by the Attorney General of the United States, have a more predominant role than what the Corps of Engineers has. I remind everybody that the Clean Water Act rule

implements, like, five or six sections of the Clean Water Act, one of which the Corps of Engineers has responsibilities for. The others, EPA and the States have responsibilities for.

Ms. Bamiduro. And so we will get to that.

BY MS. BERROYA:

Q When you're dealing with a joint rulemaking, more than one agency is involved in negotiating and drafting the rule. Correct?

A Correct.

Q So that's more cooks in the kitchen, more people with opinions about what the final rule should look like. Correct?

A Correct.

Q So is there an opportunity for greater difference of opinion about what the final rule should look like?

A Sure. Absolutely.

Q In your experience, does a joint rulemaking offer the possibility of greater degree of differences amongst the parties?

A Sure. Yes, with two agencies, one being essentially a regulator and one being an enforcement activity, you have essentially two, or I should say not enforcement, but a protection agency, one being focused on a rather limited slice of the regulatory pie, shall we say, you're going to have differences of opinions that could very well play out in the formulation of policy in a rulemaking. I would expect it to happen.

Q And the fully airing of differences, is that critical part of the rulemaking and development process?

A Well, if you allow the process to play out and to try to get some synergy in the input, a broad array of input, and then be able to channel that into a decision-making responsibility as opposed to just letting it run amuck and never be able to make a decision, and that was my primary, as I said this morning, that's my primary responsibility, was to bring in all of that diverse thought, channel it into a way that is presented to the Secretary, Assistant Secretary of the Army, so that she could make the call, make the policy decision.

BY MS. FRASER:

Q And speaking of agency, Mr. Schmauder, you mentioned two agencies a few minutes ago, the Department of Transportation and the Department of Agriculture. Is it usual, outside of the EPA's job requiring waters rulemaking, to involve other agencies that may be affected by the implementation of this rule?

A Yes. That's what the interagency vetting process is to do. Every agency, every stakeholder agency, has to sign off on the rule before OMB would allow it to go forward.

Q And that's a normal process with any rulemaking?

A Absolutely normal process.

Q The agencies bring their concerns to you, the two core, in this case where the Army and the EPA raise concerns so that the agencies can respond. Could you explain how that works?

A Yeah. There are two different portions of the rulemaking process. When the rule was out for public comment, I think it's been out in the public that there were over 400 stakeholder meetings. I

did not attend obviously all 400, but I attended many, many, many stakeholder meetings, both up on the Hill for various Members of Congress and various constituency groups, as well as the stakeholder interests where we actually -- and went to other agencies. Went to the Department of Transportation, went to Agriculture, and briefed them on the proposed rule and solicited their views and their thoughts.

That's one that's kind of the informal type. And then once the rule is put out into interagency review, I'll call that the formal interagency review process -- there's another round of sessions where the agencies get to voice their concerns, their comments, their support, whatever it is, for the proposed rule until it's all signed off and cleared, and then it goes out into the Federal Register.

Q And some of those comments are ultimately considered and/or incorporated in the rule. Is that what goes on?

A Correct, yes.

BY MRS. BAMIDURO:

Q Going back to your experience in prior rulemakings, did you ever participate in a joint rulemaking where there was unanimous agreement amongst all of the parties involved at the onset?

A Not to the ones I've been involved in, no.

Q Did you ever participate in rulemaking where every team member's recommendations concerning the rule were adopted into the final rule?

A No.

Q You mentioned in the last hour that you had some involvement

with the 2008 mitigation rule. Is that correct?

A Yes. I'm sorry. Yes, I'm sorry.

Q Mr. Smith, in his interview, made reference to how the rulemaking process for WOTUS did not unfold like it did for the 2008 mitigation rulemaking process. Specifically, he called the 2008 mitigation rule, quote, "an outstanding model of collaborative rulemaking," end quote. Are the WOTUS rulemaking and the 2008 rulemaking sufficiently similar to make a valid comparison?

A No, I wouldn't say that they are similar enough to make broad statements like that. The 2008 mitigation rule, again, my involvement was not nearly as extensive as it was in the WOTUS rule. But the 2008 mitigation rule, I think first and foremost, one of the most significant differences is that the requirement to do a rulemaking for the 2008 mitigation rule came from Congress itself.

The Corps of Engineers was directed, the Congress gave them 2 years to issue standards, standard criteria or standards and criteria, for when mitigation and what types of mitigation would satisfy the requirements for mitigation of when a wetland is destroyed or taken or whatever.

So, one, unlike the Clean Water Act where the authority is the Administrator's authority, the 2008 mitigation rule was done at the direction of Congress under the Army's authority. Notwithstanding that, the agencies agreed, as I understand it, voluntarily agreed, to do a joint rulemaking on this and to make the rule broader than just what Congress had directed them to do.

So, you know, so there is a very significant difference between the 2008 mitigation rule and the Clean Water Act rule, as well as being both from an authority standpoint and who had the lead responsibility, as well as, I think, the compensatory rule, mitigation rule, was much more technical than a definitional rule like the Waters of the United States rule, where we were essentially defining key terms. We did not change any kind of, anything in the regulation itself.

Q So because the 2008 mitigation rule was done with the Army at the lead, how did that impact the process? How did that impact the role?

A Obviously, the Army felt it was a model that -- at least one person in the Army felt it was a model of success. I don't know if everybody shares that same perception, but the other thing I would say is that, you know, I recall on the mitigation rule, that there was still significant interest and involvement from the senior leadership and the Assistant Secretary's Office, but the rule was handled much more on a day-in-and-day-out basis by the Corps of Engineers themselves. I think David Olson at the Corps, who currently works for Jen Moyer, was the lead regulator to develop the rule.

Q Do you have the opinion that the joint rulemaking effort and WOTUS failed in any way in collaboration between the Army and the EPA?

A No. Given the overarching importance of this rule, the difficulty of making it compliant with the vague standards that the Supreme Court had gave us, and the overall, and I would say "overall"

implications for the economy, the environment, all of the macro policies, and using small P here, macro politics of what is at stake in a rule that has, since its inception, has been controversial, the extent of the jurisdiction of the Clean Water Act, I would say that we met with great success in putting out a rule that, again, met those three tenets that I kept talking about earlier, a rule that was grounded in science, consistent with the law, and provided clear, consistent, and unambiguous guidance to the regulated public.

BY MS. BERROYA:

Q I just want to make sure that I understand. I have a couple quick questions about the 2008 mitigation rule. So the 2008 mitigation rule was a joint rulemaking, correct?

A It was a joint rulemaking, yes.

Q And the Army was the lead agency in the 2008 mitigation rulemaking, correct?

A That's my understanding, yes.

Q So to the extent that anyone is of the opinion that the 2008 rule was an outstanding model of collaborative rulemaking, and that individual is from the Army, that may be because the Army set the tone and tenor of the collaboration for the 2008 mitigation rule. Is that fair?

A I think that's one explanation of why one individual would think that's a model of success, yes.

Q You mentioned that for the 2008 mitigation rule, more of the work was done at the Army Corps level. Is that correct?

A My general recollection was that the rule was basically written, drafted at the Corps of Engineers level.

Q Why was more of the work for the 2008 mitigation rule done at the Army Corps level than in the WOTUS?

A Again, because of the technical nature of the subject of the rulemaking.

Q As opposed to a more legal analysis involved in WOTUS?

A Legal and policy implications, yes.

Q And in WOTUS, the Army, or the Army Corps, were not the initial drafters of the rule. Is that correct? In the Waters of the United States rule, EPA was the initial drafters of the rule. Is that correct?

A Of the final rule, yes.

Q And in the 2008 mitigation rule, as the lead agency, Army was doing the initial drafting. Is that correct?

A Yes.

Q So that may also be partially one of the reasons that the Army Corps was more involved?

A Yes.

BY MRS. BAMIDURO:

Q So I want to now focus on an area where I think you were hinting at earlier, and that is the EPA's role as the lead in this rulemaking. Is it fair to say that the EPA took the lead in this rulemaking?

A I probably wouldn't use exactly that terminology. I would

say that EPA carried the greatest burden of preparing the documents, but I would say that Ms. Darcy and the Army were a co-joint and equal partner in the formulation of the policy.

Q Sure. And I did not mean to suggest otherwise. You mentioned an Attorney General ruling earlier, so you're familiar with the Civiletti opinion?

A I am.

[Schmauder Exhibit No. 1

Was marked for identification.]

BY MRS. BAMIDURO:

Q I will hand you that document. And I will mark this as exhibit 1. Here you go. Take a second to familiarize yourself with that.

A Yeah, I'm generally familiar with this document.

Q Okay. The first two paragraphs of this document, right underneath the title read, quote, "The Administrator of the Environmental Protection Agency, rather than the Secretary of the Army, has ultimate administrative authority to construe the jurisdictional term 'navigable' waters" under Section 404 of the Federal Water Pollution Control Act as amended in 33 U.S.C. Section 1344. Similarly, the Administrator of the Environmental Protection Agency, rather than the Secretary of the Army, has ultimate administrative authority to construe Section 404(f) of the Act, 33 U.S.C. Section 1344(f)." Is the Federal Water Pollution Control Act what we now refer to as the Clean Water Act?

A Yes.

Q If you turn the page, the next page, and it's page 201, which is on the top right. Do you see that?

A 201, yes.

Q It says, "It is therefore logical to conclude that Congress intended that there be only a single judgment as to whether and to what extent any particular water body comes within the jurisdictional reach of the Federal Government's pollution control authority. Ultimately, former Attorney General Civiletti determined that it is the Administrator who has overall responsibility for administering the Act's provisions," end quote. And, quote, "It is the Administrator as well who interprets the term 'navigable waters,'" end quote.

Mr. Schmauder, what impact does the Civiletti opinion have on the EPA's role in joint rulemaking on Clean Water Act issues?

A Well, at the end of the day, if there was a difference of opinion, or difference of view that at the end of the day, if EPA wanted to exercise, shall we call it the trump card, that they could have said this is the direction that we're going. I would say in a joint rulemaking, the principals try to avoid that, and I think have avoided that in this rule. But at the end of the day, the Administrator has the authority, as defined as the statute provides and as the Attorney General has interpreted the provisions of the Clean Water Act, that at the end of the day, there is one person that has been given the authority, by Congress, for the Clean Water Act, and that's the Administrator, not the Corps of Engineers or the Secretary of the Army.

[11:11 a.m.]

Mrs. Bamiduro. Are you familiar with the 1989 memorandum of understanding between EPA and the Army, entitled "Exemptions Under Section 404(F) of the Clean Water Act"?

Mr. Schmauder. Correct. Yes, I am.

Mrs. Bamiduro. I will give you that and mark it as exhibit 2. There you go.

[Schmauder Exhibit No. 2

Was marked for identification.]

Mr. Schmauder. This may be -- can I just take a -- off the record. Can I take a 2-second break and run down the hall?

Mrs. Bamiduro. Sure, absolutely. Are we off the record?

[Recess.]

BY MRS. BAMIDURO:

Q Okay. It's 11:15. And we are back on the record?

So before the break, I had handed you exhibit No. 2, which is the 1989 memorandum of agreement between EPA and Army. And, on the first page, second paragraph, it reads: The Attorney General of the United States issued an opinion on September 5 of 1979 that the Administrator of EPA, paren, Administrator, closed paren, has the ultimate authority under the CWA to determine the geographic jurisdictional scope of section 404 Waters of the United States and the application of 404(f) exemptions, end quote. Is that consistent with the findings in the Civiletti opinion?

A Yes.

Q The MOA further states, on page 2, second paragraph, quote: "All future programmatic guidance, interpretations, and exemptions shall be developed by EPA with input from the Corps. However, EPA will be considered the lead agency and will make the final decisions if the agencies disagree," end quote.

Is that consistent with your understanding?

A That is my -- that is consistent with my understanding of what the Civiletti opinion requires.

Q And, as far as you're aware, is this memorandum of agreement still in force today?

A Yes, I believe it is.

Q And so, today, is the EPA still the lead agency on all determinations under section 404 of the Clean Water Act?

A Yes.

BY MS. BERROYA:

Q When was this memorandum of agreement entered into?

A I think it was 1989, I believe. Yeah. Signed by Robert Page, Assistant Secretary of the Army for Civil Works, January 19, 1989.

Q So this has been in effect for more than 20 years?

A Correct.

BY MRS. BAMIDURO:

Q And so, according to the MOA, the EPA is responsible for programmatic guidance interpretations and exemptions regarding the Clean Water Act. So would it be appropriate for the EPA to decide how

certain parts of this rulemaking with consultation from the Corps will take place?

A That will be well within the authority of the Administrator, yes.

Q Yeah, let's go off the record. We will go off the record for now.

[Discussion off the record.]

BY MS. AIZCORBE:

Q We will go on the record. I would like to discuss a bit of the science underlying the rule with you. We have heard that without this new Clean Water rule, 117 million Americans will not have or will not -- did not have or will not have clean water. Are you aware of this statistic?

A I am aware that there was a reference to that number in the press statement for the Clean Water rule.

Q Do you know where the number came from?

A I had no involvement with that number.

Q Okay. In the December briefing with this committee, you informed committee staff that the 2008 guidance implementing Rapanos was rewritten in 2010 to reflect new science from other reports.

Can you identify or name these other reports?

A Basically, that reference was, I believe, to the connectivity report that EPA published.

Q When did EPA publish the connectivity report?

A They did it at the same time that -- well, they had a report

that came out and was out for public comment or at the same time that the proposed rule came out. And it was being reviewed by the EPA's Science Evaluation Board. And it was out for public comment at the same time, and that's the basic, the basic science -- when people refer to, "it is supported by the science," they are referring to the connectivity report.

Q But that connectivity report was not finalized until well after the 2010 guidance had been drafted. Correct? I'm just trying to get a sense of the timeline here.

A Yeah, I mean, there were other connectivity studies. I remember seeing an earlier connectivity study, but the connectivity report is a compilation of all of the, you know, it's like a thorough research project of all of the science that supports the concept of connectivity.

Q So these other connectivity studies that you're aware of, who conducted those?

A The ones that are cited in the connectivity report?

Q Sure. That's what you were referring to?

A Well, you'd have to look at the connectivity report is a compendium of an analysis of the various studies that scientists throughout the country have done in the area of connectivity.

Q So if we were to look for the scientific basis for that 2010 guidance and the reason it being rewritten again was to reflect this new science, we would look to those reports that are cited in the connectivity report?

A Some are -- yeah, some of them -- I know there was one. I don't have the name of it, but I know there was one early connectivity report that was done that was being cited and used as the general basis for the 2010 guidance.

Q Is that cited in the guidance itself? You said it was cited.

A I don't know if it's cited in the -- you are asking me if it was cited in the connectivity report?

Q I'm just saying, you don't recall what the name was of this study so if we wanted to track it down, where would we find it?

A You'd have to do a search on connectivity in the scientific literature.

Q Okay. So what you're saying is you cannot identify what these other reports are that was the reason for redrafting the 2008 guidance?

A Well, the reason for redrafting the 2008 guidance was that we had a new administration. We had a Republican administration. We now have a Democratic administration. The report, the 2008 guidance document, was essentially a Bush administration interpretation of the Rapanos guidance. The new administration coming in wanted to revisit the 2008 guidance and determine for itself whether the interpretations of 2008 was what the young Obama administration wanted to keep. And at that point in time, we decided to rewrite the interpretations that were made at the end of the Bush administration.

Q When did you first start playing a role with respect to that

guidance? Right at the beginning of the administration?

A Which guidance are you referring to? The 2008?

Q Either.

A Or the 2010?

Q Either.

A I was involved with, much again in the same capacity that I served with the rulemaking, I was very involved in the negotiations of the 2008 policy, input into the 2008, as well as the beginning part of the 2010 guidance document.

Q And during the time --

A Excuse me, let me just make sure I don't mislead the committee. It wasn't my direct involvement. It was because my client, the Assistant Secretary of the Army for Civil Works, was involved and I was asked to participate to the extent that I participated.

Q And, at that time, you were with the Army Corps, correct, not the Army?

A No, I was with the Army.

Q You were with the Army.

A Again, I was with the Army since 2004. I have been at the Pentagon since 2004. In 2008 and 2010, I was with the General Counsel's Office for the Army.

Q In briefing materials you provided to the committee back in December, the Army states it began preparing joint guidance on the Clean Water Act jurisdiction in 2010. We understand that the Army took

its first meetings with the EPA on this guidance in 2009, and by that point, the guidance had already been drafted by the EPA.

Were you aware that that guidance had already been drafted by the EPA?

A No, I'm not. I don't know if that's -- that sentence, that's not a sentence that I put out.

Q We have the briefing materials here if you'd like to take a look. Would it be helpful?

A I may have said in the briefing materials, I thought you were telling me that I -- were you telling me that I said that the guidance was already there -- drafted?

Q No. The committee has been informed --

A Well, that's what I'm saying. I'm not aware that that's a correct statement. It could be, but I'm just not aware that it is.

Q Were you involved in all meetings regarding the guidance with EPA as it was being developed around the 2009 timeframe?

A I was involved in many. I don't know if all. I don't know if I can say all, but I was involved in many of the meetings.

Q So you were unaware that the Administrator Jackson and Mr. Sussman had produced a draft of the guidance at those meetings?

A At some point in time, I was aware that they had some guidance that was being -- again, they took the lead in coming up with the first draft of it, but I don't want to give the impression that I went to a meeting with my client, with the EPA, and they gave us a fait accompli: here is the guidance that we are going to issue. That's

not my recollection of the events.

Q You said the same process was engaged in for producing the guidance as was the WOTUS rule itself. Does that mean that the Army and Army Corps did not then draft any part of the guidance, or what did you mean by that?

A Well, you know, generally, the EPA came up with the straw man of the guidance and then we negotiated back and forth changes to the guidance. And I do believe the Corps was involved with those discussions.

Q Do you know who in the Corps was a part of these meetings regarding the guidance?

A Probably Meg Gaffney-Smith was probably the lead regulator for the Corps, along with Lance Wood, and you asked me the Corps, right?

Q Uh-huh.

A I would say those two plus Jen Moyer probably was involved too.

Q At any point was it expressed to you that the guidance needed to be developed quickly?

A The guidance -- I just want to make sure you're referencing the 2010 guidance?

Q Correct.

A There was an element of time concern, but not to the point where anybody -- my recollection -- where anybody said we had to have this guidance out by such and such a time.

Q You had no deadline?

A No deadline. I mean, I think there was a general -- a general idea that they wanted to change the 2008 guidance as quickly as possible.

Q We understand OIRA was involved in the development of this guidance. Is that correct?

A If it went into the Federal Register, which it did, it definitely would have had OIRA involved with it.

Q You did not take any calls with OIRA during that time?

A I'm not saying that I didn't. I'm saying -- you asked me, was OIRA involved in the development of the 2010 guidance? And I'm telling you or suggesting that, since the guidance document was published out in the Federal Register, that to get to the Federal Register, you have to go through OIRA. So OIRA was involved in the 2010 guidance.

Q Did you ever discuss uninviting OIRA for meetings regarding the guidance?

A No.

Q You never had any conversations with the EPA about OIRA's involvement with the guidance?

A I can't say that I did or didn't. I don't recall anything specific, and I certainly don't recall excluding them.

Q Getting back to the connectivity report, did the Army request or initiate this report in any way?

A Not to my knowledge, no.

Q Did the Army play any role in the report's development?

A Other than commenting on it, I don't believe so.

Q When were those comments provided, as the report was being drafted, or after a draft was produced to you?

A I think it was -- the report, again, it being a compilation report, I believe it was drafted and then provided for interagency review, and it was during that time that the Corps provided its comments.

Q Did you see the report before it was submitted to OMB?

A No, no.

Q Were you aware that the Corps --

A Let me put -- let me say if I saw it, I saw it contemporaneously when the Corps saw it. So I don't recall seeing it before anybody else had an opportunity to see it.

Q So you're unaware of whether Ms. Darcy would have seen it before it entered interagency review as well?

A Yeah. I'm not aware that she did.

Q Were you aware that the Corps' Engineering, Research and Development Center made technical comments that different or additional science was necessary to support the policy sources it reflected in the WOTUS rulemaking?

A Yeah, you moved off of the connectivity report to a more generalized statement, so I just want to make sure that I'm following you.

Q Well, the comments I'm referring to are the comments on the connectivity report, generally, because that's the scientific basis

for the rulemaking. So we can discuss ERDC's comments generally?

A Well, yeah, I'm aware generally that the Corps had provided various, whether it's the connectivity report, and/or portions of the rule that the rulemaking that ERDC, the Engineering, Research and Development Center had provided comments to the Corps headquarters on various aspects of the report.

Q And were you aware specifically of the technical nature of those comments and that they said that additional science was necessary to support the rule?

A Yeah, I'm aware that that was generally their conclusion.

Q Did you share those comments with the EPA?

A I believe -- I believe I have -- I believe I have shared all comments that I received from the Corps with the EPA.

Q Specifically?

A I certainly don't recall holding back any comments from EPA.

Q Despite recommendations from the Corps that part of the report did not support the rule, no new science was conducted on several aspects, including significant nexus, how to determine impacts to the integrity of waters, the five types of water bodies that the EPA determined to be similarly situated under the rule.

Do you know why this science was not conducted or pursued?

A I do not.

Q Were you aware at that time that that science specifically does not exist in the EPA's report?

A Not aware of, no.

Q We understand that, in response to concerns from the Team of Eight that the report was lacking in this regard, that you suggested that the report quote "covers everything you wanted to do in the rule."

Can you explain that comment or that sentiment?

A I don't know whose comment -- whose comment are you saying that is?

Q It came from a participant of the Team of Eight. We are trying to understand what your sentiment was about the coverage of the report at that time.

A Well, first, I'm not aware of that statement, but assuming that somebody made that statement, I would assume what it meant is that the connectivity report adequately provides a scientific basis for what was in the report -- I mean in the rule.

Q And that question gets to the technical aspects of the rule, so you were providing your opinion about the technical sufficiency of the report, or do you construe that sentiment as a more policy-based? Because what I asked you was about certain technical decisions that ERDC had expressed were not scientifically justified. And I'm curious just to know if you were providing only policy-level input here, how your role was with respect to reviewing or inputting input into the connectivity report?

A Well, I would not have provided -- I would not have provided technical input into the merit or lack of merit of a scientific principle or principles. I was generally, and again, technical information would have gone from technical people at the Corps to

technical people at EPA. I'm generally aware, though, that the Science Advisory Board looked at and specifically opined on whether the proposed rule was adequately based in the science contained in the connectivity report. And this is a group of 27, I think, Ph.D.s from across the country that looked at that very specific question of whether the proposed rule was consistent with and based on the science, as contained in the connectivity report. And that report concluded that everything in the proposed rule was supported by the connectivity report. In fact, it suggested that we could have gone further, and we could, you know, chose as policy matters, chose not to go as far as the connectivity report would have taken us. So I had that general knowledge.

I'm trying to draw a distinction. If you're trying to pin me down on whether I made decisions on technical -- on technical issues, I did not. Okay. I made sure that those issues were shared with the policymakers. That's all.

Q It's our understanding that the team was not given the opportunity to weigh in on the report, which is why I was asking. So if those concerns were raised --

A The Team of Eight?

Q Correct. How did those concerns --

A So just to make it clear, the Team of Eight, you're not commenting that EPA felt that they didn't. You're talking about half of the team felt that they didn't have a chance to weigh in on the report. Is that correct?

Q Well, the Corps made a set of recommendations and those included ERDC's recommendations or comments on the report, and then we understand that these recommendations and concerns were discussed in the Team of Eight as well. And so I'm trying to understand how those concerns and comments were shared with or considered by the EPA before the report was finalized.

A Okay. That's clearer to me. I don't believe there was much discussion in the Team of Eight relative to the comments of the science, the comments of the Corps scientists relative to the connectivity report. I do know that the Corps provided its comments to EPA on the connectivity report, and I assume that that went to whatever technical people in EPA that were responsible for the connectivity report.

Q And you said the SAB or the board who conducted the review of the connectivity report analysis came to the conclusion that the decisions in the rule were justified scientifically. But you were speaking in regards to the proposed rule. Did the board then weigh in on the final rule as well?

A I don't believe so, no.

Q We spoke a bit about the Peabody Memoranda in the last hour. You mentioned you were familiar with the memoranda. Did you read through all of them?

A All of the memoranda?

Q Correct.

A Many times, yes.

Q Did you ever discuss the memoranda with Ms. Darcy?

A Yes.

Q And what were the nature of those conversations?

A They were general, whether -- well, first of all, let me say that the Peabody memos -- and I think you are aware of this, but I will just underscore for the record -- the Peabody memos were delivered to Ms. Darcy 3 weeks after the rule was already at OMB for interagency discussion.

Q And I apologize, but we are running short on time. I want to make sure that we get --

A But this is important. I just want to make sure you understand --

Ms. Aizcorbe. We understand that, though.

Ms. Weis. Can you just let him answer?

Mr. Schmauder. Yeah, I'm going to get to your question. I'm just trying to make sure that everybody has a reference to timing. The Peabody memos do not contain, did not contain, nor do I believe was intended to contain, anything that wasn't previously discussed with Ms. Darcy. Okay?

So when Ms. Darcy let the rule go to the interagency review, everything that's contained in the Peabody memos had already been discussed, brought forth, and in many cases decided upon by the Assistant Secretary.

BY MS. AIZCORBE:

Q Did you have discussions with Ms. Darcy about not -- the

nature of the complaints, or concerns within the memos, but about the memos themselves and how they would be treated?

A Yes, I told Ms. Darcy that, in my view, that they were -- that there was nothing new in there, that these were all matters I think she probably could have just, you know, determined that herself too, but -- and I also determined that these were deliberative materials, and that they should stay part of the Army internal deliberations. And, therefore, they were not released outside of the Army until the committee got them up on the Hill.

Q Did you discuss whether they would be included in the administrative record for the rule?

A Not at the time that they were delivered.

Q At any time?

A Well, at any time, it became a broader focus of discussion after they were leaked as to what the implications of those documents now were relative to the administrative record that was in litigation.

Q Were changes made to the rule after or during interagency review?

A Yes.

Q And the Army decided, correct me if I'm wrong, the Army decided not to then include those memoranda in the administrative record?

A I don't know if I would draw such a parallel to the changes that were made. We already -- I answered earlier, I think, to somebody's question that at the time the rule went forward, that Ms.

Darcy had a commitment from the Administrator that there were three issues that she was bringing forward into the interagency review. So, again, everything that was in the Peabody Memorandums that either was decided upon or agreed to by Ms. Darcy to move into the interagency review, so those issues played out until they reached Ms. Darcy's satisfaction and then a decision was made.

Q Whose decision is it about what was included in the administrative record for a rulemaking?

A I would answer that the proponent of the administrative record; in this case, it's EPA.

Q Okay. So the Army did not have any discussions about what Army or Army Corps documents would be included?

A In the administrative record?

Q Correct.

A Yeah, we -- I would say that that's not a correct statement. I think we did discuss the implications of the Peabody Memorandum as they were leaked to the public or became leaked to the Hill, I should say, and then made public. As to whether or not those documents were internal deliberations and therefore not part of the administrative record, and we are relying on EPA's manual since EPA had -- this is their -- essentially, their rule under their authority, we are using their process and determinations for what is in the administrative record. And their process, as I understand it, excludes internal deliberations of the type that were represented by the Peabody Memorandum.

Q When you say "we," who are you referring to at the Army about who made the decision that these documents were deliberative and would not be included?

A Myself, the General Counsel, acting General Counsel of the Army.

Q And so are you all for -- traditionally, for any rulemaking, the people who decide what does or does not make it into a rulemaking's record?

A Well, again, I think that, ultimately, the call would be EPA's to make. We provided Army's best judgment and thoughts on the matter to EPA and the Department of Justice as well at the time since by the time these documents came out, we were already in litigation.

Q I understand that. My question really is, when there is, even if it's a joint rulemaking, or if the Army Corps' own rulemaking, who at Army decides what is or is not included in an administrative record? Is that your office, or is that a different office within the Army? Who physically provides the documents for your review to decide whether they are included or not?

A Well, first of all, it would be -- well, even like -- let's just -- I'm trying to answer your question truthfully here. But like the 2008 mitigation, which we talked about, even in that rule, when you look at the record of that, the administrative record is what is published out on the EPA Web site that governs the docket for that rulemaking. So, in both cases, the 2008 mitigation rule and this rule, the docket was the EPA docket.

Q Excuse me, who at the Army shares their recommendation of what is or is not included in that docket with respect to Army or Army Corps records?

A Most of it is stuff that is rather routine in nature, you know.

Q I'm not asking about the character or the type of document. I'm asking who is involved with that decision at the Army or Army Corps?

A Well, it would be the people who were, the proponent of the rulemaking; in this case, the Assistant Secretary of the Army's Office, as well as getting input from the General Counsel's Office.

Q Okay. Did you provide input on the administrative record besides these memoranda for this rulemaking?

A Yes.

Q Did you discuss the Peabody Memoranda with anyone at the Corps?

A Yes.

Q Who, and on what occasions?

A The chief counsel of the Corps of Engineers.

Q Do you recall when?

A Generally, around the time that they were provided to Ms. Darcy.

Q And what was your discussion about?

A Discussion was relative to the -- why those documents were sent over, why they were delivered in the way they were delivered, the timing of it, what their intent was behind the memos.

Q And how did Ms. Moyer respond?

A Who?

Q Did you say -- oh, you didn't speak with Ms. Moyer; you said "chief counsel." Who was that?

A I did not, David Cooper.

Q How did Mr. Cooper respond?

A He told me that their intent was to make sure that Ms. Darcy had a complete record of the Corps' concerns and issues with the rule as it was currently formed.

Q Did you have any discussions about the Peabody Memoranda with the EPA?

A Yes.

Q With who?

A It's existence, with the General Counsel's Office, and then some of the specifics with Greg Peck.

Q What was Mr. Peck's reaction or input?

A His general reaction was, again, much like the rest of ours, is that there was really nothing new in there, and when I reference that, I'm really talking about Jenn Moyer's memorandum in the sense that she provided, you know, technical issues relative to Lance Wood's portion of the memo. It was conclusions of law that he was drawing. I treated those essentially as his views. I did not agree with them personally, nor did the Department of the Army General Counsel's Office agree with those legal conclusions.

Q Which conclusions are you referring to?

A Conclusions in the Lance Wood's legal memorandum.

Q You did not agree with all of the conclusions in his memorandum?

A As a lawyer, as part of the General Counsel's Office, and as the legal advisor to the Assistant Secretary of the Army, I did not agree with the legal conclusions that Lance Wood made in his legal memorandum.

Q So, in an effort to define specifically what you are referring to, Mr. Wood speaks about compensatory mitigations, of costs being characterized as benefits instead of the way they usually are, which is as costs. Is that an example of something that you would disagree with, Mr. Wood's characterization?

A I'm talking about his statements that the rule is arbitrary and capricious and without science, that it moved away from the science, was arbitrary and capricious. Those are the conclusions I'm saying I disagree with.

Q Did you take any meetings on the economic analysis or the technical support document before they were finalized?

A There was some general discussions on the economic analysis. I did not take any direct meetings on either of those two documents.

Q You did not discuss either with OIRA?

A No, not -- no, I did not. I don't recall having discussions on those specific documents with OIRA. I think, generally, I had a few conversations with Greg on the economic analysis, mostly dealing

with the time since that came in late and that Chip was arguing or concerned that he needed to have the economic analysis in order to complete the environmental analysis. So my conversations weren't of a substantive nature. They were more of a process orientation.

Q Did you discuss the EPA's efforts to conduct a cost and benefits analysis for the rule?

A I did not.

Q Did you discuss or are you aware of the efforts to show that the rule's benefits outweigh the costs?

A I did not.

Q In the Peabody Memoranda, the Corps expressed concerns regarding the rule's distance limits for adjacent waters. Are you aware of these limits?

A I am.

Q How are these distance limits determined?

A How were they arrived at? Is that what you're asking?

Q Sure.

A They were proposed by -- well, first of all, I should say that the notion of having specific bright lines or distance limitations was raised in many of the outreach stakeholder-type discussions when we had the proposed rule out there, and we used a different concept all together for defining the outer limits of certain jurisdictional water bodies. And there were people concerned with concepts, such as flood plain and riparian area, and we had talked, even in the proposed rule that we wanted to take comment on whether or not that we could

go with broader concepts or whether we should have specific distance limitations, since the proximity, at least in some areas, was an element of the concepts that we were studying. When you talk about a 100-year flood plain, well, 100 years is a delineation, you know.

So the point I'm trying to make is that we were getting pretty good feedback in the outreach of stakeholders that people were uncomfortable with the concepts in the proposed rule. And many times they suggested clear bright lines. So we had that in mind. EPA proposed the bright lines that we had. They were initially raised, I think, as a straw man like 5,000-foot, and then we -- I think EPA did some analysis and came up with the 4,000 foot bright line; while it would give everybody a bright line, we felt captured the bulk of the jurisdictional water bodies that that particular category wanted to regulate.

Q So you are aware that the EPA conducted some analysis?

A Yeah, it was -- it was, yes. It was some analysis. I was informed of the analysis. I don't recall any of the details of the analysis, but it was some analytical by the technical people at EPA that the 4,000-foot mark had some practical basis. It wasn't just pulling a number out of the air.

Q Were the Army or Corps consulted in the development when EPA conducted their analysis?

A I don't know if they were. Again, that would have been part of that discussion going back and forth between Jenn Moyer and Russ Kaiser at EPA.

Q When were these limits developed?

A Well, it was during the -- it was during the leading up to the drafting of, if my memory serves me, leading up to the final rule, like in around the March, April timeframe, 2015.

Q So that would have been after one or both of Ms. Darcy's memos about communications with the EPA between the Corps, so would it be a fair characterization to say that she likely knew whether there was any communication going on between the Corps and EPA?

A Again -- again, that -- we know that there were communications going on directly on a technical nature between EPA and the Corps that would not have -- of concern to Ms. Darcy that they were violating her directive. That wasn't what she was -- she didn't want to stymie the technical discussions. She was more approaching the concept of providing comments or statements. But the technical discussion that was going back and forth was understood was happening and was certainly not objected to.

Q Did you speak with anyone in the Corps about their concerns about the limits?

A Well, yeah, we had several discussions leading up to what the bright-line delineations were. The Corps had initially expressed some support for it, then some concern for it, wanted a slightly different number. On the 4,000 foot, their central view was that at the 4,000 foot, we were going to exclude some jurisdictional water bodies that the Corps felt that they had been regulating in the past.

Q Did you speak to Ms. Darcy about the limits or the Corps'

concerns about the limits?

A Yes.

Q On what occasions?

A Leading up to the meeting, the meetings that we had with the Corps. Again, it was my responsibility to get her ready to have that discussion with the Corps. I didn't send her in cold to a meeting. I prepped her and told her generally what the issues were, where the Corps was, where EPA was, what the central implications were, and then let her take the Corps briefing.

Q What was Ms. Darcy's reaction to the Corps' concerns?

A Recognizing that it was a policy, a policy judgment based on both the science and the implications for the, you know, for the regulators. You know, it was a bit of a tradeoff of having a bright line. Any time you have a bright line, someone is going to make the argument that 1 foot over the bright line is arbitrary and capricious. We knew that. We discussed the general nature of the bright line, what the implications were, but at the end of the day, given the comments we were getting from the stakeholders in the outreach, we thought we were being responsive to the comments that were clearly calling for bright lines as opposed to more generalized concepts of flood plain management.

Q Were those comments about bright lines specifically asking for distance limits?

A Not specifically, no. We certainly didn't provide any specific numbers in the proposed rule.

Q Did you discuss implementation concerns about a distance limit with Ms. Darcy?

A The Corps did.

Q And what was her reaction to the implementation concerns?

A Well, again, it -- the implementation was how -- how difficult would it be to identify where 4,000 foot comes in. It was at that kind of level of implementation. In other words, how do you know? Does that mean field regulators have to literally go out for every jurisdictional determination and walk the field, go 4,000 feet out, and put a marker down; or whether that could be done through mapping and other type of GeoTools --

Q We have spoken a lot about the EPA's authority with respect to the Clean Water Act jurisdiction and section 404, and the Army Corps is still responsible for conducting a lot of that science in the field and implementing the 404 process as you spoke about with the permitting --

A Uh-huh.

Q -- and lot of these decisions that are made on the ground, and my question is, when these concerns were shared with Ms. Darcy about the difficulties in implementing a distance limit, what was her reaction?

A Well, it was balanced. I think she understood what the Corps regulators were telling her. She also heard, you know, what the EPA position was. She heard what, you know, the basic underlying policy was. And, at the end of the day, I believe she, much like the

administrator, felt that having a bright line would be more responsive to the public comments and, again, to the extent that some jurisdiction would be lost. And I would say: Remember, that this was one of those that she carried forward into the interagency review, and we did make a change at the Corps' direction, or at the Corps' suggestion. We went from 4,000 foot to 4,000 foot or to the other edge of the 100-year flood plain, whichever was greater so that was a specific concession that we made to address the Corps' concern.

Q Were you aware that the guidebook that accompanied the Rapanos guidance states that it is not appropriate to determine significant nexus based solely on any specific threshold or distance?

A A guidebook, you say it was in a guidebook, a Rapanos guidebook?

Q Yes.

A I was not made aware of that.

Q Were you made aware of or did you discuss the EPA's own connectivity report recommends against using line and distance limitations?

A Yeah, I am aware that there was a statement in I think it was the SAB report on the connectivity study that suggested that we not use or that there could be problems with using distance limiters as -- because that would be inconsistent with the whole notion of the connectivity report, which essentially suggests that you have to look at connectivity as a gradient. And it is a sliding scale, so as you move from one portion of the gradient, you have much greater

connectivity, and, therefore, you could have a bright line; whereas the further out you go on the gradient, you may have less connectivity, and it may be inappropriate to have out of boundaries where the science is not as clear as where you are where the science is just abundantly clear.

Q In the Peabody Memoranda, the chief of the regulatory program states that affected tribes were not consulted as a part of the economic analysis, which appears to conflict with the EPA and Army's characterization in their final summary of tribal consultation for the Clean Water rule. Are you aware of --

A I'm aware of that document.

Q -- of that document?

Ms. Aizcorbe. We would like to introduce it into the record as exhibit 3.

[Schmauder Exhibit No. 3

Was marked for identification.]

BY MS. AIZCORBE:

Q Were any tribal consultations conducted in the course of this rulemaking, to your knowledge?

A I believe that there were several consultations with the tribes during the period from 2011 to 2014.

Q Who normally engages in tribal consultation in a Corps rulemaking?

A For Corps rulemaking only?

Q Yes.

A The Corps has a tribal -- a liaison as well as Chip Smith from Ms. Darcy's office would be the technical person.

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 this consultation processing."

Do you know who in the Army they consulted with?

Ms. Weis. Ms. Aizcorbe, can you just tell us where you are reading from so we can keep track?

Ms. Aizcorbe. I'm sorry. Sure.

Ms. Weis. I think Craig found it. Thank you.

Ms. Aizcorbe. We can find the reference.

Mr. Schmauder. Yeah, I was aware of that statement.

BY MS. AIZCORBE:

Q The question is, who in the Army was conducting that consultation?

A Well, again, I -- that sentence generally refers, I think, back to consultations in the 2011 timeframe. And I know Chip was involved in certain briefings for tribes back in the 2011 timeframe. So if --

Q Mr. Smith informed this committee that he did not conduct any tribal consultations that would have been consistent with this statement.

A Well, that's fine.

Q But that's the extent of your knowledge, right, is what you're saying?

A I just know that he participated in briefings -- in a briefing for some tribes back in the 2011 timeframe. Now, whether -- whether his comment has a time parameter on it, I don't know. But I was well aware that he was engaged in some activities in the 2011 timeframe that EPA is characterizing them as consultation efforts.

Q So, to your knowledge, those are the aspects that this document is referring to?

A I'm speculating a little bit here because I wasn't the author of these statements. I'm just saying I -- when you look at this document and it talks about the various phases of consultation efforts, it says right here: The proposed rule was under development from 2011 to 2012.

You know, so, again, I'm generally aware that there were several -- a couple of consultation meetings and stuff, at least one of which I have reason to believe that Chip was engaged in. Now, whether Chip recalls that or doesn't consider that part of consultations over the rulemaking, that I don't know.

Q You mentioned you were not the author of this document. Do you know who is?

A EPA.

Q Army is also listed on that document.

A I realize that. And a lot of the documents supporting the rule, I think you will find that as a joint rule, it was common for the agencies to refer to it as a collective document, but --

Q But nobody in Army took part in reviewing or editing or

drafting this document?

A I was not involved in it. I don't know -- if Chip says he wasn't, then I believe Chip. But I was not involved in drafting this document.

Q The chief of the regulatory program with the Corps says that the statement in the economic analysis for the rule that this action does not have tribal implications as specified in Executive Order 13175 is patently inaccurate and that the effects have not been identified and evaluated.

Do you know who decided that the rule does not have tribal implications under this executive order?

A I believe that's the conclusion of this consultation effort.

Q So you're saying that EPA made that decision?

A That would be my guess, yes.

Q And you did not weigh in on this decision?

Ms. Berroya. Can you answer audibly? Can you just respond to --

Mr. Schmauder. Yeah, I'm sorry, I realized that as you were saying it. I did not.

BY MS. AIZCORBE:

Q Did the Army or Corps conduct outreach with all 50 States in the course of this rulemaking?

A Repeat that question, please.

Q Did the Army or Corps conduct outreach with all 50 States in the course of this rulemaking?

A Did the Army or the Corps? I would have to probably answer that question: I don't know the answer to that question.

Q Did you conduct any State outreach?

A Well, EPA conducted, we collectively did a lot of outreach, and I know there are people who have indicated that they are not aware of any outreach in their State. We had an extensive outreach, as I said, 400 meetings. A lot of times we met with groups that represented various States. And so we believed that we -- our outreach effort covered the issues of any -- of all States. But if you're asking whether we spoke to every individual State, I'm not aware that we did or didn't.

Q When you say "groups that represented States," what do you mean by that?

A There are associations, you know, that we talked to that represented a general area of States that -- and other associations that represented States' interests and the like, and so I don't recall us making any effort to say: Well, we didn't speak to North Dakota. We didn't speak to Georgia, or, you know, that it was -- we spoke to pretty much everybody that wanted to speak to us and then some. And so we believed that we are -- our outreach relative to States' issues was adequately addressed.

Q So when you say that you spoke to people who wanted to speak to you about the rulemaking, are you saying that you didn't proactively reach out to specific groups, or did that also occur?

A Well, that occurred first and foremost through the

rulemaking and the public comment. I mean, we take public comment, any and everybody. A lot of times people would call in, and they would say: We want to voice our concern or our support of them. And we told them: Please put that on -- in the record.

You know, we had a finite amount of resources. We certainly tried to reach out to everybody, either in person, through webinars, through conference calls. I remember one conference call; there was almost 5,000 people on the conference call.

Q Did you receive any instruction from anybody about groups you needed to reach out to or needed to speak to in the course of this rulemaking?

A I didn't take any such direction, no.

Q You were not aware that any such direction was given?

A No, I pretty much -- when I was asked that a meeting was being set up, could I participate on behalf of the Army, is how most of my involvement was.

Q Who set up the outreach meetings?

A A lot of times they came in through EPA, though, again, the docket represented that they were, you know, it was their rule, even though I think there were two points of contacts: one for the Army and one for EPA.

Q Had you participated in other outreach meetings with respect to other rulemakings you worked on?

A Well, certainly, the earlier versions of the Waters of the United States rule, yes.

Q But not WOTUS?

A I don't understand the question.

Q Did you participate in any outreach for any other rulemakings that you worked on, not WOTUS?

A Other than WOTUS?

Q Correct.

A No, probably not.

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'm aware that there is that certification, and I'm aware that the rule, the preamble indicated that the conclusion that there was not an impact to the small-business community.

Q Were you involved in any discussions about that?

A Not substantively, no.

Q Do you know who made the decision to certify the rule?

A I believe that was the EPA decision as well.

Q So, to your knowledge, Army and the Corps did not weigh in on this decision?

A I'm not aware of any -- my involvement, I can only, I don't know if Jo-Ellen had any conversations with anybody about it -- Jo-Ellen Darcy, excuse me -- had any conversations. I'm just saying -- there was some early discussion very, very early on relative to SBREFA, and what the implications were. Those were done at high

levels within EPA, and I think, even back then, I think Ms. Darcy's principal deputy at that time, a gentleman Terrence Salt, may have participated in a meeting or so very early on, certainly not anything dealing with the certification, but just the process for the SBREFA process.

Q Are you aware that the U.S. Small Business Administration Office of Advocacy submitted comments to the Corps about that certification and said that it was improper in their view?

A I am aware that SBA opined. I was not aware that SBA opined directly to the Corps, but I believe that SBA is on the record as having made that statement, yes.

Q So when that letter was sent to Advocacy, you did not review those comments?

A The comments back to Small Business?

Q The SBA's comments from the Office of Advocacy, did you review those?

A They were part of a broader review or reply to the comments. I did not review that.

Q Okay. Did you engage in any discussions about how to satisfy small-business outreach on this rule?

A One more time, I'm sorry.

Q Did you engage in any discussions about how to satisfy small-business outreach with respect to this rule?

A Not specifically to small business as a subset, but I knew when we were out, we were having outreach efforts and having discussions

with folks that I would have considered to be small businesses, farmers, particularly farmers and the farming and agriculture industry.

Q Are you aware of EPA suggesting that they would use informal outreach to satisfy their requirement to obtain input from the small-business community?

A I'm not aware. No.

Q Did you receive or review comments from the small-business community in response to outreach efforts?

A I did not personally, no.

Q Are you aware of the EPA's proposal to include WOTUS language in the nationwide permit program for this cycle?

A There's a lot there. I'm sorry. Break that down.

Q It refers to the nationwide permit program. Are you aware of EPA's proposal to include WOTUS language in this cycle's nationwide permit program?

A I'm sorry, I don't understand what WOTUS -- what you mean by "WOTUS language."

Q Sure. Language from the Waters of the United States rule has been proposed to be included in the nationwide permit program for the 2017 cycle. I was just asking if you were aware of that.

A Well, it wouldn't surprise me. It wouldn't surprise me, assuming we get through some litigation, you know, whatever status that in the new cycle of the nationwide permit program, that given that -- assuming we can go forward with some of the what is in and what is out, that it would be appropriate to have a follow-on with

those -- what that means for the nationwide permit program. So it doesn't strike me as something that's out of the ordinary.

Q But you haven't had any discussions about a proposal?

A I haven't, no. I have had very little discussions to date on the starting up of the nationwide permit program.

Q Shifting gears --

A Yeah.

Q -- we understand that the Army and EPA implemented an interpretive rule --

A The 404(f)?

Q -- but it was subsequently withdrawn?

A Correct.

Q Do you know why it was withdrawn?

A Congress directed us to withdraw it.

Q What were your discussions about its withdrawal at the Army? Did you engage in any discussions about its withdrawal?

A Well, yeah. I reviewed and participated in the withdrawal announcement, if that's what you're referring to.

Q Were you involved in its development?

A I was.

Q Why did you decide to pursue an interpretive rule while this rulemaking was ongoing?

A We knew that there was -- that there probably would be significant concerns by the farming industry relative -- or the agriculture industry -- with regard to any rule that comes out. I

think the Farm Bureau are pretty strong advocates for themselves as to what they would like to see in a Clean Water rule. And we believed that when we were issuing the interpretive rule, that we were actually benefiting the farming industry by saying that if you are exempt under 404(f), we want to enhance your ability to understand that you're exempt; if you comply with the NRCS conservation standards that affect waters of the United States, as long as you comply with those standards, we are going to consider those to be, quote, "normal" farming operations. We truly believed that we were incentivizing the understanding and use of the exemption, which would have benefitted the farmers because they would have been exempt.

Unfortunately, they reacted completely opposite of what we were trying to do. They thought that we were actually putting limits on the statutory language by requiring them to be complying with the NRCS standards. And so it's kind of, my personal view, it backfired. It was intended to be something positive as a show of support for the farming and agriculture industry. But it just -- perhaps we failed in our communications of our intent. But it hooked on, and they didn't let go. And, eventually, they got support in Congress, and we were directed to withdraw the rule by statute, and that's what we did.

Q Had you completed similar interpretive --

Mr. Skladany. This is an hour.

Ms. Aizcorbe. I have like 10 seconds. One more question.

Have you completed similar -- interpreted rules or efforts to appease a stakeholder group in the course of a rulemaking, in your

experience?

Mr. Schmauder. I don't -- I have not. I don't know if that's been done before. I know we had issued interpretive rules before, but I don't know if it's in conjunction with a rulemaking.

Ms. Aizcorbe. Okay. Thank you.

Mr. Hambleton. We will go off the record.

[Discussion off the record.]

[1:20 p.m.]

Mrs. Bamiduro. It's 1:20. And we will go back on the record.

BY MRS. BAMIDURO:

Q Mr. Schmauder, we talked about, in our first round, that Administrator McCarthy submitted written responses to questions for the record after she testified here in 2015. And in one of her responses, she wrote, quote, "Following completion of the final rulemaking, the General Accountability Office conducted an independent review of the agencies' compliance with all relevant administrative requirements, including the economic analysis and the Administrative Procedures Act, and concluded that the agencies met every requirement," end quote. Are you familiar with that finding by GAO?

A I am.

Mrs. Bamiduro. I'm going to enter that into the record. And I think we are on Exhibit 4.

[Schmauder Exhibit No. 4

Was marked for identification.]

BY MRS. BAMIDURO:

Q Here you go. Do you need to take a minute to familiarize yourself with it?

A No. I'm familiar with this type of report.

Q Can you read -- and I apologize, the font is very small -- but can you read aloud for the record the very top paragraph right under the title, beginning with GAO reviewed?

A "GAO reviewed the Department of Defense, Department of the

Army Corps of Engineers, and Environmental Protection Agency, parentheses, (collectively the agencies) closed parentheses, new rule on the Clean Water rule and the definition of waters of the United States. GAO found that, one, the final rule does not establish regulatory requirements but, instead, defines the scope of waters protected under the Clean Water Act, parentheses (CWA) closed parentheses, in light of the statute, science, Supreme Court decisions, and the agencies' experience and technical expertise. And, two, the agencies complied with the applicable requirements in promulgating the rule."

Q Thank you. Do you stand behind GAO's, or do you have any reason to doubt GAO's findings with agencies compliance with the requirements in promulgating the rule?

A No.

Q And then the report goes on to list several regulatory requirements that the agencies complied with, them being the cost-benefit analysis. Do you agree with GAO's findings of compliance on that?

A I have no reason to dispute GAO's findings. I'm not sure what they used to make those findings. But I certainly have no reason to dispute their findings.

Q Similarly, they made a finding of compliance with the regulatory flexibility analysis. Do you have any reason to dispute GAO's finding on that?

A I have no reason to dispute their finding.

Q They also made a finding of compliance on the Administrative Procedure Act. Do you have any reason to disagree with their finding of compliance on that?

A I have no reason to disagree.

Q Similarly, they made findings of compliance with executive orders 12866 and 13563, which requires prior submission to OMB. Do you have any reason to doubt GAO's findings of compliance on those two executive orders?

A I do not.

Q So then speaking to GAO's findings individually, the first one being that the rule does not establish regulatory requirements, but rather, defines the scope of the protected waters, why is that finding -- is that finding significant?

A Well, yes, I believe it's significant in that it defines the scope of the rule and the various compliance with all of the requirements that are laid out here. The rule does not -- does not make any requirements or put any regulatory burdens on the regulatory industry, regulatory, regulated public. However, it just defines key statutory terms. And the statute itself is what creates the burden on the regulated public in the sense of requiring a permit.

Q There were comments made to the committee that question whether the agencies complied with regulatory requirements in promulgating this rule. In light of GAO's findings, what weight should we give those criticisms?

A Well, assuming that they're talking about the same, the same

requirements that GAO reported, I would not give them much weight.

BY MS. BERROYA:

Q Why?

A Well, it depends on who is making those statements, whether they have the expertise to know, whether they have full knowledge of the complete record, whether it's just their opinion as to whether or not they believe something has or has not been complied with.

Q Do you believe that GAO's analysis should be given significant weight?

A Yes. Because I believe they reviewed the administrative record in making this determination. I mean, plus, and they are -- this report is typically done in a major rule, rulemaking effort. This is not an unusual report, this is something that GAO typically does. So I assume they have particular expertise and know what they're looking for. And, therefore, when they make this statement to the chairman of the committee, that they have the factual basis for their statement.

Q Is GAO a neutral party in respect to this analysis?

A Well, one would hope so.

Q Do you have any reason to believe that GAO was not a neutral party in making this analysis?

A No. No.

BY MRS. BAMIDURO:

Q You can put that document aside. In the last hour, you were asked questions about the economic analysis that went into the rule.

A Uh-huh.

Q Do you stand behind the conclusions that were reached in the economic analysis?

A The Army stands behind the economic analysis, yes, as a document that was prepared on behalf of the rulemaking effort, yes.

Q Do you have any reason to doubt the methodology that was used in completing the economic analysis?

A No. I'm not an economist. I'll be the first to admit that. I do know that our economists looked at it. I know that EPA's economists looked at it. I know that they have a -- EPA has a, I think it's the environmental economic analysis board or something, they have an independent board that looks at economic analyses. I believe they certified that the economic analysis, as well as the document was reviewed at OMB and OIRA as well. So a lot of people have looked at the economic analysis and, you know, gave their support for its conclusions.

Q I want to turn back to the topic of tribal consultations, which also came up during the last hour.

A Uh-huh.

Q Are you familiar with executive order 13175, which is entitled Consultation and Coordination with Indian Tribal Governments?

A I am generally aware of that, yes.

Q That executive order, subsection 5(b) states that to the extent practicable, agencies should not promulgate regulations that have tribal implications, quote, "that impose substantial direct

compliance costs on Indian tribal governments." Are you familiar with that language?

A Uh-huh.

Q Unless the funds that cover those costs are going to be provided by the Federal Government or the agency has prior, to the promulgation, consultation with the tribes. Is that your understanding?

A Yes.

Q As far as you are aware, does executive order 13175 have additional requirements regarding when the tribal consultations must take place?

A Not that I'm aware of. I think it's a broad-based requirement to consult. It doesn't have definitive plans as to when it starts and when it needs to end.

Q In the rule, it states, quote, "the agencies began consultation with federally recognized Indian tribes on the Clean Water rule defining waters of the United States in October 2011," end quote. And that consultation, according to the rule, quote, "continued in stages over a 4-year period until the close of the public comment period on November 14th, 2014," end quote. Now, do you have any reason to doubt the representation of the timing of the tribal consultation as put forward in the rule?

A No. I think it's accurate.

Q As the lead agency with CWA authority, was it appropriate for the EPA to define the period of consultation with the tribes for

this rulemaking?

A Yes.

Q The rule further states, quote, "in 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation progress, which included multiple webinars and national teleconferences and face-to-face meetings," end quote. Do you have any reason to believe that that is not an accurate statement?

A I do not.

Q Are you familiar with the EPA policy on consultation and coordination with Indian tribes?

A Generally, yes, I'm aware that they have a policy. I think it was written in response to the 2009 White House directive.

Q I will show you that document after I mark it as exhibit 5.

[Schmauder Exhibit No. 5

Was marked for identification.]

BY MRS. BAMIDURO:

Q We will show you a copy of that document in just a second. But I'll read from it in the interim. Under section 1, policy statement, it reads, quote, "Consultation includes several methods of interaction that may occur at different levels," end quote. The policy further states, quote, "There is no single formula for what constitutes appropriate consultation," end quote. Is it appropriate for the EPA that they would conduct their tribal consultations pursuant to their own policy on tribal consultations?

A I believe so, yes.

Q Would webinars and teleconferences and face-to-face meetings constitute appropriate forms of tribal consultation under EPA's own policy?

A I believe that's a correct statement.

Q As far as you're aware that the period has been defined by EPA from 2011 through 2014, is it your opinion that tribal consultations did, in fact, take place?

A Yes.

Q Is it your understanding that Mr. Smith participated in tribal consultations during that 4-year period?

A It's my understanding that he participated in at least one of those briefings, or meetings, or webinars, whatever it was that he attended, and that he participated in at least one of those.

Mr. Składany. Can I just interrupt for one second? Can you, we're not totally clear on what the document is that you were reading from and whether or not it's a committee document or something that we have.

Mrs. Bamiduro. It's a publicly available document.

Ms. Aizcorbe. What is it?

Mrs. Bamiduro. I will read the title to you. It's called "EPA's Policy on Consultation and Coordination with Indian Tribes."

Mr. Składany. And it's from the EPA Web site?

Mrs. Bamiduro. Yes. Can we go off the record.

[Discussion off the record.]

Mrs. Bamiduro. We'll go back on the record.

BY MRS. BAMIDURO:

Q In Mr. Smith's interview, he testified that there was no tribal consultation, quote, "with the tribes the way I teach it," end quote. Do you know what he means by teaching in the context of tribal consultations?

A I think I know what he means. But Chip is the, part of his portfolio in the Assistant Secretary's Office, he's responsible for tribal affairs. And I believe he, along with the Corps' tribal liaison, teach various aspects of consultation out with the field regulators, and the field staff as to what they have to do in order to comply with tribal consultation requirements and laws and regulations. So he frequently goes out at the request of districts to teach the requirements of consultation and other tribal, you know, tribal relations issues. So I suspect that's what he's talking about.

Q Does the way that Mr. Smith teaches tribal consultation, in fact, govern how agencies are required to conduct consultations?

A I do not know what he means by "the way I teach it," first of all. There are requirements and then there are not requirements. So I don't know how he teaches it. I've never attended any of his sessions. So I don't know what he means by that. But, certainly, you know, tribal consultations for purposes of the Waters of the United States rule was managed by EPA and their tribal liaison folks.

Q And was that appropriate for the EPA to take the role of managing the tribal consultations as their role in having final

regulatory authority under the CWA?

A Yes. The EPA, as I testified earlier this morning, EPA carried the lion's share of the responsibilities for developing the record for this rule. I think that's appropriate with their responsibilities under the Clean Water Act. They were responsible for the economic analysis. They were responsible for drafting the small business compliance requirements and the tribal consultation requirements. So, I mean, they did, in fact, carry that responsibility. And it's not to say they did it at the exclusion of the Army and the Corps of Engineers.

Q Did they, in fact, do it to the exclusion of the Army Corps of Engineers?

A I'm not aware they did. There's a record that reflects the various consultation requirements. I don't know whether there's much that needs to be coordinated if it's an accurate reflection of consultation meetings that occurred.

Mr. Składany. This is exhibit 5, is that right?

Mrs. Bamiduro. Yes. Yes. Here you go.

Mr. Schmauder. Thank you.

BY MRS. BAMIDURO:

Q And just to go back to the language that I was reading from, on page 1, section 1, policy statement, paragraph 1, sort of in the middle of that paragraph, it reads "As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current

practices, adjustments made through this policy, the continuing dialogue between EPA and tribal governments, and program and regional office consultation procedures and plans." Do you have any reason to believe that the EPA did not carry out tribal consultations in accordance with their policy?

A No. I do not.

Mrs. Bamiduro. Let me just put on the record that the document I handed you was exhibit 5 and not my copy.

Ms. Berroya. And the markings contained in the copy that you received of exhibit 5 has markings. And those markings come from Mrs. Bamiduro, counsel, and not the witness.

BY MRS. BAMIDURO:

Q And then the second portion of this document that I referenced is on page 7, under subsection D, how consultation occurs. And it reads "There is no single formula for what constitutes appropriate consultation. And the analysis, planning, and implementation of consultation should consider all aspects of the action under consideration." So according to EPA's document, there's flexibility in how tribal consultation can be conducted. Is that your understanding?

A It is. And I would just say that I think the theory behind these two statements, as well as many other type of consultation requirements, is that I think they reflect the notion that whenever you have a requirement for consultation, you do not want cookie-cutter approaches to consultation. In other words, just check the boxes.

It's supposed to be meaningful consultations. And let the consultation or the, what you're consulting on generate the process. That's the way I read these two statements.

Q And do you have any reason to believe that meaningful tribal consultation did not occur in context with the WOTUS rule?

A I have no reason to believe that appropriate consultation did not take place.

Q Are you familiar with the Regulatory Flexibility Act of 1980?

A Generally.

Q Is it your understanding that the Act requires Federal agencies to assess economic impact of forthcoming regulations unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities?

A Correct.

Q As far as you understand it, does the Regulatory Flexibility Act define what significant economic impact or significant number of small entities means within the context of this statute?

A I'm not sure whether it defines it or not.

Q Is it your understanding that agencies who are tasked with complying with the Regulatory Flexibility Act have some flexibility in making their determinations? Is judgment required?

A Yes. I know for a fact judgment is required.

Q Do you have any reason to question the validity that was made here that there was no significant economic impact on a significant

number of small entities?

A I do not have any reason to challenge that conclusion.

Q And so under the Act, once that certification is made, no further analysis is required. Is that your understanding of the statute?

A Yes.

Q But here, were you aware that the agencies proactively sought input from the representatives of small entities while going through the process of developing the proposed and final rules?

A I am aware that we reached out to many small businesses.

Q And in the process of reaching out to small businesses, is it your understanding that the agency sought comments from the small entities?

A Correct.

Q And is it your understanding that the comments that the agencies received were considered in the development of the final rule?

A Yes. They were.

Q Were you involved in that process?

A Not directly. But I know when, I may have participated in one or more of the outreach efforts in giving the briefing. Typically, as a joint rule, we try to do most of the briefings jointly. But I don't recall having any responsibility for drafting any responses to any kind of small business comments or concerns.

Q Is it your understanding, according to the GAO report, that the agencies complied with the requirements under the Regulatory

Flexibility Act?

A That is my understanding of what GAO concluded.

Q Are you familiar with the process of the public comment in a rulemaking procedure?

A Yes, I am.

Q As far as you understand it, what is the purpose of an agency giving the public an opportunity to comment on a rulemaking?

A The general, general purpose is to have those that are being affected by the rule, or have particular interest in the subject of the rule provide their comments, both for or against the rule, and that the agencies then have a responsibility to consider those comments in developing the final rule.

Q Are you familiar with executive order 12866?

A I am.

Q Is it your understanding that that executive order suggests that agencies should afford -- and I'll read it. Let me just pass it out. We'll make this an exhibit.

[Schmauder Exhibit No. 6

Was marked for identification.]

BY MRS. BAMIDURO:

Q I think we're up to number 6 now. We can just read from it. So executive order 12866, issued on September 30th, 1993, under section 1(a) -- sorry, under section 6(a), reads "Each agency should afford the public a meaningful opportunity to comment on any proposed regulation which, in most cases, should include a comment period of

not less than 60 days." Are you aware of that?

A I am.

Q Are you aware that the notice of proposed rulemaking in WOTUS was issued in, on March 25th, 2014?

A I believe that's the correct date, yes.

Q Are you aware that the comment period closed on November 14th, 2014?

A Yes. That was after, I think, an extension of time was granted. But, yes, I believe that was the closing date as extended.

Q So executive order 12866 suggests 60 days. But here, it was just under 8 months for the comment period. Is that right?

A It was about 200 days public comment period.

Q Approximately how many comments were received by the agencies in that time, in response to the WOTUS rulemaking?

A I believe the number is somewhere between 1.2 and 1.3 million comments.

Q And of those, approximately how many were unique or substantive comments as opposed to form letters?

A I want to say somewhere in the 250,000 area.

Q Is it, is it -- we understood from Chip Smith it was approximately 20,000 that were substantive.

A I don't know. I would have to go back and double-check. I know there was, it was a significantly different number than the 1.2, the 1.3.

Q According to Mr. Smith, in his interview, he said there

were, he said, quote, "There were about 3,000 or 4,000 that we thought were really critical," end quote. Is that consistent with your understanding?

A I made no -- I was not involved in any process that made that kind of distinction between what was really meaningful versus what was not really meaningful. I do not know what he's referring to as really meaningful.

Q Is it fair to say that the number of comments that required a response was substantially smaller than the number of comments that were received?

A One more time?

Q Sure. Is it fair to say that the number of comments that the agencies responded to is substantially smaller than the number of comments that were received?

A Probably. I'm not sure of the exact number. I didn't pay much attention to the numbers. I know that there's a response to comment document, that all of the comments that were submitted on the record were addressed. And I believe that that document is close to 7,000, over 7,000 pages long.

Q But they were not responded to individually, correct? They were responded to by topic. Is that your understanding?

A Many, some of them were. But I believe all of the comments were addressed, either directly or through, you know, where there's numerous comments on the same subject or on the same issue --

Q In your experience with rulemaking, in a rule where there

were a million comments, would you expect that all 1 million comments would be responded to individually?

A No.

Q Were there common themes among the comments that were received?

A There were.

Q Was one of those common themes the desire for more clarity?

A Yes. That's a fair statement.

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

A Yes. We did.

Q If you are aware, do you know over what period of time that process took place that the agencies considered the comments?

A We considered the comments at the, at the close, certainly at the close of the comment period. Typically, you get comments that are feeding in on the, from, while the comment period is open. And so we looked at some of those that were coming in. But it's also not unusual that the bulk of the comments, the bulk of the substantive comments come in at the very end of the public comment period. So from November all the way through to the time that the rule was finalized, the agencies considered the public comments that it was reading and the constant feedback that it was getting on the rule and the consultations and the interagency reviews and the process that OIRA uses during the interagency review process.

Q As far as you're aware, does the Administrative Procedure Act, or executive order 12866, prescribe how long agencies must consider comments?

A I don't believe so.

Q Did the comments that were received play any role in the shape of the final rule? Were those comments used to address the final rule?

A Yes. I believe others have testified to this extent too, that we believed that the changes that we made to the final rule, particularly the additional clarity and the bright lines that were put in the rule, were in direct response to the public comments.

BY MS. BERROYA:

Q What is the purpose of soliciting comments when drafting rules?

A Well, there's several reasons. One is, obviously, the most important thing is to see where the folks that are going to be affected by the regulation will come down on a particular issue. In the proposed rule, in one or more areas, we specifically said, particularly in the area that covers the other waters significant nexus section, we knew that going in that the, having a large amount of undefined waters that may or may not be subject to the Clean Water Act, subject only to a significant nexus determination, was probably going to be problematic, because it was problematic in that's basically the status quo.

So we asked for -- specifically we asked for comments on what

other alternatives there may be out there. And I know when we were drafting the rule, in the proposed rule, that we had one or more of these alternatives. And instead of putting out alternatives, we just said that, well, I think we generalized what the concerns were, what the agencies were hearing, and that we wanted to take public comment to see how best to formulate the final rule.

Q So the purpose of soliciting comments is, in part, to receive feedback from stakeholders to help shape the format of the final rule. Is that fair?

A Yes. Absolutely. Yes.

Q And in the case of the Waters of the United States input from the public about the rule was, in fact, incorporated into the final rule?

A Correct. I mean, you know, the whole purpose of public comment rulemaking, formal public comment rulemaking is to have the public participate and have a say in what the regulation ultimately comes down to. And you have to do that through some form of comment period.

BY MRS. BAMIDURO:

Q Was that objective met with regard to the rulemaking process in WOTUS?

A I absolutely believe that it was met in this regard.

Q And, again, is it your understanding that GAO made a finding of compliance by the agencies with respect to the Administrative Procedure Act?

A Their report suggests that we've complied fully with the APA to include taking, receiving, and commenting on the comments that were received.

Q I want to switch gears now. Mr. Smith, in his previous interview, contended that this rulemaking was political. He indicated that the timeline on the rule was driven by politics. How do you respond to that?

A Well, certainly, Mr. Smith's opinion is his opinion. So I'll start off by saying that he's entitled to his opinion. Secondly, I would say I'm not sure how he would know whether it was political or not political. I don't believe he was privy to all of those conversations that existed at the principal level.

However, that said, this was an administration initiative, one of the President's, you know, key environmental initiatives, which was to issue rules, rulemaking under the Clean Water Act. Now, you say why do rulemaking? You know, after the SWANCC decision, the then administration tried to do rulemaking. And it received such blowback on its rulemaking that an update of the Clean Water Act rule, which are 1986 circa, was abandoned. Okay. Then we had the Rapanos case.

And in the Supreme Court, Justice Roberts, in his opinion, specifically chastised the Corps of Engineers for not having done rulemaking after the SWANCC case. And I think his quotes go something like if you had done the rulemaking like you should have, you wouldn't be suffering another loss here today. We heard from Congress, from the Supreme Court, from the regulated public that everybody was calling

for an update of the rules.

There had been at least two significant Supreme Court cases, a significant update in science supporting the Clean Water rule, and what have you. So everybody was saying do a rule, do a rule, do a rule. So we embarked on a rule. It was an administration initiative. It was the President, you know, charged the Administrator and the Assistant Secretary to clean up the rule and to bring regulatory clarity, consistency, and predictability to the Clean Water Act implementation. And with that mandate from the President, the Administrator and the Assistant Secretary, two senior people in the administration, did what the President asked them to do, which was to go through a rulemaking.

So when he says it was political, it was political just like every initiative in the administration is political. Was it ideologically driven? I've already said no. I've already said, and I briefed the committee here before, and I said our only charge was to do a rule that was science-based, consistent with the law, and that would bring predictability and commonsense rules to the public.

Now, if that's considered political, I'll sign up and say yeah, that was political, you know. But in terms of being a directive as to the outcome of how we would arrive at a rule, all the meetings that I ever attended, I never once heard any directives coming from anybody within the administration as to how the rule should and shouldn't come out at the end of the final hour.

So, you know, in terms of timing, every rulemaking has its timing

aspects. You know, I testified earlier this morning, when we first started the rule concept, or thinking we were going to go the rule as opposed to the guidance. And then we published the rule. It was out there for 200 days, which was longer than we had anticipated. We were informed that we were going to try to finalize the rule by the summertime.

That got truncated a little bit by a couple of months. We responded accordingly. We did the best job that the two civilians, the two careerists, Greg Peck and I, had the responsibility to do on behalf of our principals. And we carried that out to the best of our abilities.

Q One of the concerns that has been voiced to the committee is that the process was rushed. But you testified earlier that this rulemaking started in 2008. Is that right? The guidance leading up to the rulemaking.

A There were, I want to be clear. We -- in 2008, the previous administration issued guidance to the field. The guidance is not rulemaking, as we all know. You can't do certain things because if you have a rule, you can change the rule, but you have to do it through rulemaking. So guidance could only interpret the current rules that are in place or provide an interpretive support to the rules. Once we decided to go rulemaking, which was probably in the 2011 timeframe, by that time, we had already had an Obama era, Obama administration guidance document that was out in the Federal Register. We decided to go rulemaking in around the 2011 timeframe.

Q And the rule was final and promulgated in 2015?

A Correct.

Q Would you consider that to be a rushed timetable?

A I would not, no.

Q Did Ms. Darcy ever express concerns to you that she did not have ample time to analyze the data or the science or the legal aspects underpinning this rule in this 4-year period?

A She did not.

Ms. Berroya. I just want to be sure that I'm clear. So you are not aware of a directive being given by the President or anyone else from the executive office of the President about the -- how the final rule should be drafted?

Mr. Schmauder. Correct.

BY MRS. BAMIDURO:

Q One of the other concerns that we have heard with regard to the rule was that the decisions were not science-based, they were political-based. Did you ever instruct the members of the team to disregard science in their process of undertaking the rulemaking?

A I did not.

Q Do you know if Ms. Darcy gave that instruction to disregard science in the rulemaking process?

A I will just say that every meeting that I attended that she was there, she never said anything remotely close to that.

Q Do you know whether the administration charged the agencies to disregard science in their undertaking of this rulemaking?

A I am not aware of any such statement by the administration. Plus, it would be totally inconsistent with testimony that both Ms. Darcy and Gina McCarthy have testified to, that this rule is based on science.

Q Do you believe that it is based on science?

A I do.

Q Mr. Smith also raised concerns that USDA and Department of Transportation interests in the rule were political, to use his words. And you've spoken about this earlier. But do you agree with Mr. Smith's characterizations of what USDA and DOT's concerns were, that they were, quote, "broadening jurisdiction over ag ditches, or roadside ditches, which means more permits, more costs, delays for highway projects, and the same for farmers," end quote?

A Let me answer that this way: You know, when you're putting out a rule and you go through interagency review, part of the process is to see if you can get a consensus-based rule. Whenever you do consensus-based rulemaking, at least internal to the executive branch of the government, it opens up the opportunity for some give and take. You're trying -- you know, the Agriculture Department has their responsibility to deal with agriculture issues, and Transportation, their issues, and Interior, their issues.

So when you put out a major rule effort like this, it's only natural that you're going to have some interests that are going to need to be compensated or paid attention to, or reflected upon or informed in the final decision-making. And some of that played out in this rule.

Agriculture had some concerns about the implications, as did Department of Transportation, with respect to linear ditches and runs of streams or projects that are linear in nature, and how many times a road project crosses over a particular water body.

So they fed into the drafters of the rule and the policymakers of the rule their concerns. And to the greatest extent that we could adjust and compensate or adjust and, what's the word I'm looking for, it's not "compensate," but to involve their participation and take care of their issues and their concerns, that was what we were supposed to do. That is, I believe, the charge of doing interagency review.

Q And in your opinion, is there anything inappropriate about taking into consideration other agencies' concerns as you go about the rulemaking process?

A It's done, it's done with every rule that I've ever participated in, as well as every, you know, every, every type of MOU or any kind of other document. That's the nature of trying to have a unified executive.

Q Were those concerns in this particular rule appropriately considered and addressed by the agencies prior to promulgating the rule?

A I believe they were.

Mrs. Bamiduro. We can actually go off the record for now.

[Discussion off the record.]

BY MS. AIZCORBE:

Q We spoke in the last period about the public comment period.

And I just have some follow-up questions for you. Did you review comments received during this public comment record?

A I received briefings and reports of the public comments. And I saw some of the responses to the public comments. I did not look at every, whether it's 20,000 or 200,000 comments, I did not review individually one personally.

Q Did you meet with the EPA to discuss the public comments or those summaries that you referred to?

A Yes.

Q How frequently?

A Well, during the timeframe that we were drafting the final rules, I would say several times we met specifically on the topic of comments.

Q And who was in those meetings?

A It was Greg Peck, myself, and the lawyers, usually.

Q Lawyers from both --

A Lawyers from both agencies, yeah.

Q Did anybody from the Corps participate?

A I'm not aware, you know, there were several meetings. I'm not sure they were in meetings. They were reviewing comments themselves. They had people in from the field. And so they were busy kind of doing their own review of the comments.

Q Did you and Mr. Peck --

A Excuse me, I am aware of one meeting, at least one meeting that we discussed the roll-up of some of the comments that I believe

Jenn Moyer was at.

Q In these meetings, did you discuss what changes would be made to the final rule to address those comments?

A Categorically, yes, I think we knew, based on the comments, where certain, where we were headed in the final rule changes.

Q Did the EPA ever indicate to you that they disagreed with or would not adopt any of the Corps's comments about the public comments?

A I never heard that.

Q Okay. Did you ever make recommendations to the EPA not to follow or address the Corps's comments or concerns with respect to the following items, with respect to the economic analysis and technical support document?

A No.

Q On the distance limits?

A No.

Q On tribal consultations?

A No.

Q So with respect to distance limits, you never indicated that you would not adopt the Corps's recommendations to alter them or abandon them?

A Your question was did I ever tell that to EPA?

Q Uh-huh.

A I never said anything like that to EPA.

Q To anybody else?

A No.

Q We understand that the final rule was drafted before the Corps concluded its review of the public comments. Did you ever ask for more time to complete your review before the EPA submitted the final rule to OMB?

A No. I'm not aware of any requests for additional time.

Q We understand that the EPA finalized the rule before completing their own review of the public comments. Did you ever discuss this with the EPA?

A Could you ask the question again? I know we're trying to squeeze time here.

Q Sure. We understand that the EPA finalized the rule before completing their own review of the public comments. Did you ever discuss this with the EPA?

A There's an assumption in that question that I just won't -- am not necessarily sure I agree with. And that is that the rule was finalized before the final comments. We were working on a final rule while we were still reviewing comments. At the end of the day, the final, final rule that went to OMB, I believe we had seen most of the comments by that point and took them into consideration.

Q So you would disagree with the statement that EPA was still addressing public comments at the time the rule was promulgated, which is our understanding?

A Well, again, I don't know what EPA was still doing. But I'm just saying that from our perspective, I think, we had fully

considered the comments. Now, we were probably still addressing the comments in the response to comment document, you know, actually coming up with answers. But in terms of having considered the comment and taking those comments into consideration in the final rule, I think those are two different things. That's all I'm trying to say.

Ms. Berroya. And I would just like to clarify for the record that I'm not, to the respect that you're saying it's our understanding, that is not necessarily the minority's understanding.

Ms. Aizcorbe. That's fair.

Ms. Berroya. So I'm not sure what you're basing that statement on.

Ms. Aizcorbe. That's the majority's understanding. Thank you for your comment.

BY MS. AIZCORBE:

Q So when you were discussing your review then, versus the addressing, we'll speak to the review portion, you believe that the review that the Corps was conducting was complete before the final rule was promulgated?

A No. I don't believe their review of it was completed. I think they were still reviewing as we were finalizing up the rule.

Q And the same for the EPA?

A I don't know what EPA was doing. Again, I just, I want to emphasize that we had, we had all the rules, the comment period was over, the contractor had categorized them, we knew what the general thrust of the comments were, and we were addressing them in the final

rule.

Q We understand that you and Mr. Peck communicated to the Team of Eight that comments could be addressed after submitting the rule to OMB for interagency review. Can you explain how you came to this decision?

A Again, that's a statement that's being attributed to me. And I don't recall necessarily saying that. Again, I'll react to it this way, though, until the rule is, the pen is down, and the rule is out for review and into the Federal Register, changes can be made at any time.

Q Were you aware that that's not the Corps' standard process for acknowledging or addressing comments received in the public comment period?

A I was not aware of the Corps' standard procedures.

Q Did you discuss --

Ms. Berroya. Are you speaking about your --

Ms. Aizcorbe. Excuse me, can you address the comment in your hour?

Ms. Berroya. We didn't make statements about --

Mr. Skladany. We disagree. It's a question for the witness?

Ms. Berroya. She's not asking him about the standard process. She's making a statement on the record about the Corps' standard process?

Mr. Skladany. He's perfectly capable of explaining he disagrees with that. He's disagreed with a number of the assertions.

BY MS. AIZCORBE:

Q We understand these discussions took place in the Team of Eight, this came from prior transcribed interviews that the committee conducted, that you and Mr. Greg Peck made comments that these public comments could be addressed in the interagency review process, or during that time. You're saying you don't recall having those discussions?

A I'm saying I do not recall me saying that. I don't recall Greg saying that. It doesn't strike me as unusual that we, given the timeframes that we had, that we were going into interagency review and still driving, still making some last-minute adjustments to comments.

Q Were you aware that the Corps' standard process involves addressing these public comments in the rule's preamble and then including them in the final rule when it is sent to interagency review?

A Again, I'll say it again, I'm not aware of the Corps' standard practice. I don't know if they even have a document that defines what their standard practice is. If that's the Corps' standard practice according to Chip Smith, that's his view. I don't know what the Corps' standard practice is.

Q We heard this from both Chip Smith and Ms. Moyer.

A I'm sure they're both entitled to what their perspective of the Corps' standard practice is.

Q Did you discuss recirculating the draft rule for a second round of public comment after changes were made?

A No.

Q You never discussed that in Team of Eight meetings?

A It probably was raised. But I don't know if we discussed it in the sense of, you know, bringing that to a principal level discussion.

Q You had never discussed outside of the Team of Eight meetings the need or request to recirculate the draft?

A There may have been a comment from the Corps saying oh, you know, we've got all these comments, we ought to -- it kind of goes to the logical outgrowth issue that's of concern to some people, particularly as you define the bright lines and whether the rule, the proposed rule, I remember maybe somebody raised that in one of their concerns. But it wasn't much of a discussion. And it was just probably in a passing comment that maybe we ought to think of doing that or something.

Q The committee has been informed that you and the EPA communicated to the team that recirculating the draft would not comport with the schedule for the rule. I just wanted to clarify what schedule you had been referring to. But if you don't recall, that's fine.

A Look, I've already indicated here today that, what the general schedule was. Initially, it was to finalize the rule by the summertime. And then it was to finalize it by late spring or early spring, I should say, in the April, late April-May timeframe.

Q I didn't know if there was a separate schedule for concluding your review of the comments that might have been --

A No. Our job was that we tried to stay onto the schedule

that we were -- we were being, suggested when we finalize the rule, and that the comment period, the review of the comments would step up and meet that requirement.

Q We understand that the rule would not be cleared unless certain changes were made to address the concerns of the USDA and DOT, which were discussed earlier, and that those changes were adopted in the last month or so over the objection of the Corps. Can you explain how those changes were adopted?

[2:31 p.m.]

Mr. Schmauder. Well, during the interagency discussions with the various agencies, some recommendations had come forth, and to the extent that I and Greg were involved with them, we debated back and forth and made recommendations for some changes that were presented to the principals.

BY MS. AIZCORBE:

Q And who decided what changes to make in that final rule to address their concerns?

A It would be the two principals.

Q When you refer to principals, just to be clear, are you --

A Ms. Darcy, Secretary Darcy and Administrator McCarthy.

Q To your knowledge, did the Corps or the EPA study those changes?

A I don't know if the Corps did. I don't know if EPA studied. I don't mean to pick words, but I don't know what "study" means. Conduct analysis or --

Q Correct. Did they evaluate options or alternatives before the changes were made to the final rule with respect to those proposals?

A I'm not aware of any such study.

Q The chief of the Corps' regulatory program made several recommendations in the Peabody Memoranda -- and that without implementing these changes, the final draft rule cannot be promulgated as a final rule without an environmental impact statement. We understand that her recommendations were not all adopted, and the Army

did not complete an EIS. Were you aware of the Corps' concerns that the rule contained an inadequate analysis without the completion of an EIS?

A Well, I was aware that Lance had raised that in the context of the 4,000-foot bright line, and we disagreed. The Army's position was that the EA was sufficient. Lance thought it wasn't sufficient, and you read his memorandum, so I don't need to call out all his arguments, but that is not the position of the Department of the Army.

Q Who made the determination not to complete an EIS?

A Well, the EA FONSI makes that determination. You go through the analysis of the environmental assessment and that leads to the conclusion of whether or not an EIS is required.

Q The Army's regulatory specialist, as you identified, Chip Smith, conducted an environmental assessment recommending an EIS for the rule, but another environmental assessment was later conducted, which made a FONSI. Who made the decision to complete a second environmental assessment?

A Well, first of all, your statement is incorrect. Okay. Chip Smith did not complete an EA that resulted in a determination that an EIS was required.

Q Correct the statement then, to your knowledge.

A He drafted an early draft of an EA, and he handed that to his boss when we were calling for the results of his work product. And, contemporaneously or almost coincidentally with the Peabody Memoranda, Chip Smith came in and informed his leadership that he no longer

supported the approach of going with an EA.

Q With going with an EA? He was already drafting an EIS. Do you mean --

A No, he was not drafting an EIS. He was drafting an EA.

Q I meant -- I said EA.

A No, you said EIS.

Q Excuse me. So you said that he was drafting an EA but that that did not recommend an EIS. Could you explain?

A He was drafting an EA with the expectation that once you complete the EA, you determine whether you have to go EIS or whether you have a finding of no significant impact. He never reached a conclusion because he never finished his analysis.

Q Did he tell you why?

A No. I assume he adopted the position of the Corps of Engineers as stated in the Peabody Memorandums because it was almost on the same day that the Peabody Memorandums came out that he decided that he could no longer and would no longer support doing an EA FONSI.

Q Did he tell you why or what his justification was for changing his mind at that moment?

A He did not talk to me at all about that. He talked to his own leadership about it.

Q Are you aware that that decision was made because the economic analysis was just then at that moment shared by the EPA?

A I'm aware that the economic analysis came in late -- I testified that earlier today -- and that we were all waiting for it

and that he was waiting for the economic analysis piece. But at the end of the day -- and it was around 27 April -- that he was supposed to have completed his EA, he walked into his supervisor, as I understand it -- I was not present -- but he walked into his supervisor and said: I agree with the Corps; this can no longer be supported by an EA.

Q What do you mean by "it can no longer be supported by an EA"?

A You've read Lance and -- I mean, Moyer's analysis. They were saying that because of the 4,000-foot bright line, that there would be a loss of jurisdiction that was too significant to support an EA for this rule.

Q And, like you said, when an EA is drafted, it comes up with one of two conclusions. It recommends an EIS, or it recommends a FONSI. Mr. Smith informed the committee that he could not make a FONSI and that he was recommending that you pursue an EIS. But instead of the Army pursuing an EIS, the Army, instead, engaged in a new draft of an EA?

A That's mostly correct. The only thing I want to make it abundantly clear to the committee is that Chip never finished an EA. Okay. He didn't have the analysis. When he gave us the work product that was supposed to be 85 percent complete -- I think, is, you know, what he had told us, that he at some point in time was where his EA was -- it was nothing there. There was no analysis there. So he had no basis to conclude that an EIS because he hadn't finished the EA.

Q So when Mr. Smith came to you and asked to return his draft

to the Corps, who typically conducts these NEPA analyses, and you advised him -- according to Mr. Smith, you advised him -- that instead of returning it to Major General Peabody, that he should retain it, why did you make that decision?

A I am not at all familiar with what you're even talking about. So if Chip -- I don't know what he's talking about. I had had no conversation with him about the EA FONSI.

Q You had no conversation with him about the EA? I'm not talking about the EA that made the FONSI.

A My last -- I recall my last communication with him regarding the EA FONSI was something to the effect of: Are you going to have your EA FONSI completed by 27 April? And, at that point in time, he said yes.

Q And let me make a clarification: Why are you referring to it as an EA FONSI?

A It's an EA FONSI. That's what it's referred to. If it's not an EA FONSI, it's an EIS. I'm not saying he prejudged it. I'm saying, I was asking for the completion of his EA. Okay. I am not aware, as I sit here today, that he ever completed an analysis that would allow anybody to conclude whether an EA FONSI was okay or an EIS. My opinion is, is that he jumped on the bandwagon of the Corps of Engineers at the same time that General Peabody came in with his memorandum, and he abandoned his efforts to do and finalize the EA.

Q Who made the decision to execute a second EA or begin drafting a second EA?

A It was the Assistant Secretary's Office.

Q Was the Assistant Secretary also the one who decided who would draft the second EA?

A Well, it was all her people. It was all her staff for the most part that drafted it. The EA, the Corps, the Army Secretary's Office, Chip Smith, agreed to do the EA, way back even during the early start of the proposed rule, so it was always contemplated that the Assistant Secretary's Office would have responsibility for the EA.

Q My question is, who appointed Mr. Owen to draft the second EA?

A I assume it was Let Mon Lee, Chip and Gib's boss.

Q So you took no part in that decision?

A Took no part in assigning somebody else's staff to a decision? No. I don't have that authority.

Q Did you take any part in deciding to execute a second EA?

A Well, I had some role in deciding that we were going to need -- we still needed an analysis. Okay. We had a completely inadequate analysis, so we had to first start an EA analysis, so Let Mon assigned Gib Smith -- I mean Gib Owen, excuse me, Gib Owen the responsibility. Gib, as I understand it, garnered support from two Corps regulators down in New Orleans that were given the responsibility to help compare, as well as other staff on the Assistant Secretary's Office, and I assigned an attorney from my office who doesn't do Civil Works but is my NEPA expert, I assigned her the responsibility of working with the team to draft an EA.

Q Did you ever discuss with Mr. Smith finishing his EA?

A No.

Q Why not?

A I didn't have any discussions with him after he said he wasn't going to do an EA.

Q So, just so I understand, you're saying that Mr. Smith began drafting an EA but then did not produce an analysis by the April date that you had agreed upon or that was agreed upon, and so you engaged in discussions to have a second EA executed. Is that correct?

A Let me go back again.

Q It's fine. We can move on. We don't need to belabor this.

Mrs. Bamiduro. Can he answer the question?

Mr. Schmauder. I didn't understand the question. The questions come with subtle statements, and I just want to make sure that I am understanding what she's saying and who they're attributable to, so that's why I'm just being careful.

BY MS. AIZCORBE:

Q My question was why you didn't engage in a discussion with Mr. Smith about finishing his EA?

A That was not my responsibility.

Q Then the decision to execute a second EA was made by whom?

A The Assistant Secretary's Office, who had accepted responsibility for the first EA.

Q Do you know why Mr. Smith was not asked to draft the second EA? If it was a matter of timing of Mr. Smith not finishing his analysis

by a certain date, why wasn't he given more time?

A It was not my understanding that he said he needed more time. It was my understanding that he said that he no longer could support an EA to support this rulemaking.

Q So, by "this rulemaking," you mean he was no longer able to support making an EA FONSI. Is that correct?

A Completing an EA that would lead to a FONSI, probably yes.

Q Was that decision to have an EA FONSI drafted predetermined based on the rule?

A The proposed rule went out and said that -- the proposed rule said that we believed that the rule changes would be supported by an EA FONSI in the proposed rule.

Q That was drafted text in the proposed rule saying that the rule itself would be supported by an EA FONSI?

A Correct.

Q Mr. Smith informed this committee that he was taken off the Clean Water Act implementation in mid-July of 2015 and that, prior to this time, he served as Ms. Darcy's senior policy adviser. Is that accurate, to your knowledge?

A Yes.

Q Did you discuss Mr. Smith's change in duties with Ms. Darcy before his removal?

A Yes.

Q What did you discuss with Ms. Darcy?

A Well, first of all, your statement, there's subtleties

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

Q Did you make any recommendations in your discussions with Ms. Darcy about Mr. Smith's duties?

A No.

Q Did you discuss Mr. Smith's removal with anyone after the action was taken?

A I'm sorry. Did I discuss that with --

Q Did you discuss Mr. Smith's removal off of the Clean Water Act implementation with anyone after the action was taken?

A I believe I informed my colleagues at EPA of Ms. Darcy's decision.

Q Anyone within the Corps who you spoke to about his removal?

A I don't recall. Maybe. I may have talked with David Cooper about it, the chief counsel.

Q Are you aware of any personnel changes made of other staff involved in this rulemaking?

A Other than Gib having taken on responsibilities that were reassigned from Chip, no.

Q Had Mr. Owen been participating in the WOTUS rulemaking before this time?

A No.

Q Do you know why he was brought on instead of somebody who had been involved in this process?

A There were no other people involved in this process, other than their supervisor and Ms. Darcy. It's such a small office; you're only talking like a handful of people over there.

Q Which office are you talking about?

A The Assistant Secretary's Office.

Q Approximately how many people are in that office?

A Maybe 15.

Q To your knowledge, did Mr. Owen have any background in the Corps' regulatory program?

A As I understand it, he was the senior adviser to Ms. Darcy on water resources. I'm not privy to his extensive background. I believe he had regulatory experience.

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

A Any other?

Q Personnel.

A No.

Q Have you discussed Mr. Smith's participation in the committee's transcribed interviews?

A No.

Q Were you ever directed to not include or distance staff from the rulemaking in any way through its development?

A Distance staff? You mean keep things from staff? Is that what you're --

Q Affect their level of participation in any way?

A No.

Q Did you ever discuss or hear that the Corps was hindering, slowing down, or otherwise obstructing the rulemaking with its concerns?

A Yes.

Q From whom?

A I believe there were -- when the Peabody Memoranda came in and various people within the administration were informed of it, I believe there were some people who questioned Ms. Darcy of what the Corps' intent was in drafting that memo, whether the Corps was actually actively trying to sabotage the rule.

Q How did you learn about those?

A Ms. Darcy.

Q Did you ever respond to staff inquiries that decisions had been made without justifying why recommendations were not adopted? For example, if one of the Corps staff or Army staff came to you and asked why something was or not being changed in the rule or whether their recommendations had been adopted, how did you respond?

A I tried to respond to as many of those types of questions as I could, but it was -- this was a very busy time, and we were trying to accomplish a lot of things, and I probably didn't have a whole lot of time to address questions, like why didn't you -- you know, I informed them if a decision was made by Ms. Darcy and Ms. McCarthy and moved on. I didn't have a whole lot of time to kind of go back and say why their position wasn't adopted.

Q Did the Corps, to your knowledge, have deadlines to produce the environmental assessment?

A Did the Corps have a deadline to produce the environmental assessment?

Q Typically those NEPA documents are produced with the Corps.

I was just wondering if there was a deadline associated with its production.

A No. There was discussion based on the sequencing of the various documents to include the economic analysis and what was needed to finish the EA. And we kind of got stacked up there a little bit, and the discussion was made that we didn't need the EA to be completed while it was still an interagency review, that we could -- so as long as it was completed by the time the rule went out to the public as a final rule. But it was -- like I think I told you, we needed it by -- we had asked Chip to complete it by 27 April. That was because OMB OIRA was asking for, where is the EA? They were starting to collect the various documents that they needed to review and participate, and that was what generated the pressing of Chip to complete his EA by 27 April.

Q Were both of the EAs submitted to OMB for their review?

A The economic analysis and the environmental analysis?

Q The environmental assessment. Let me clarify.

A One environmental assessment was sent, and that was the one that Ms. Darcy signed. Again, Chip did not complete an EA.

Q Was it concerning to you -- you know, you've come here today and discussed that you had these goals about the rulemaking that had been communicated to you to respond to public comments and to make sure that the rule was grounded in science. Was it concerning at all that the Corps, who conducts science on these rulemakings, was recommending that an EIS was necessary to move forward, yet that's not what the Army intended from as early as the proposed rule?

A My recollection was that the issue of EA versus EIS was really not an issue until the 4,000-foot bright line difference of opinion surfaced, which was admittedly very late in the process of developing the final rule. So up until that time, there was not a whole lot of concern or angst or even much discussion over whether an EIS was going to be required. It was as a result of the 4,000-foot delineation that the Corps' opinion was that if you're going to cut off jurisdiction, you can't cut off jurisdiction without doing the complete analysis.

Q So the Corps' recommendation or concern about the EIS had nothing to do with the other areas where they said additional science was necessary? For example, the impact on the water bodies and the significant nexus determinations and all of the JDs that had apparently been used by EPA in an incongruent manner than the way the Corps established them, you're saying all of those concerns were separate than Ms. Moyer's and the Corps' recommendations to conclude or complete an EIS?

A Yes. The main concern, from a standpoint of the environmental documentation, in my opinion, was the issue over the 4,000-foot bright line. The concerns about the economic analysis and all those changes, while there is a portion of the environmental assessment that deals with socioeconomic implications, which would have come from the economic analysis, doesn't really drive the environmental assessment like environmental considerations would. So the big driver, from my perspective, was not the issues that the Corps

had with the economic analysis, but it was rather this issue with respect to the 4,000-foot bright line.

Q The economic analysis was necessary for the environmental assessment to be completed?

A To be completed, yes.

Q Correct. So I'm a little confused, I guess, when you say that that was not part of the Corps' concerns about moving forward to complete an EIS.

A Well, it wasn't the driver, in my view. It was not driving the EIS discussion.

Q I'm going to go back to some of our cleanup questions to try to move forward in the next half hour. You mentioned earlier that you had some involvement in other Army and Corps rulemakings besides WOTUS and the WOTUS guidance documents. How many rulemakings would you say?

A Two.

Q And could you name those two?

A One of them is definitely the Arlington National Cemetery regulation.

Q And the other I believe we have already spoken a about a little bit?

A Mitigation, the mitigation rule.

Q And were either one of those a joint rule?

A The mitigation in 2008 was the Arlington regulation. It's not EPA. It has nothing to do with the ANC rule.

Q You mentioned earlier that your primary point of contact at the EPA was Greg Peck. How frequently did you meet with Mr. Peck?

A On the rule, over the long period of time, during the height of it, probably weekly, maybe twice a week and, at other times, you know, a couple of times a month, three, four times a month maybe, on and off, depending upon what the pressing issue was at the time. Sometimes we met more frequently. Sometimes we didn't.

Q We understand that you met with Mr. Peck to work on the rule over the weekends. When did you begin to hold those meetings?

A Throughout the whole drafting of the final rule, we frequently met Saturday mornings at Einstein's Bagel to have a bagel and a cup of coffee to kind of summarize where we were during the week, what the next week looked like, that kind of stuff.

Q What did you discuss at these meetings besides just your status in that time? Did you discuss the substance of certain decisions that needed to be made?

A No. We really didn't discuss much in the substance. It was more about the process and our Harley-Davidson's as well.

Q Was anyone else invited to these meetings?

A No. They were just weekend gatherings -- that's all -- for an hour or so.

Q We understand that and we were told that key policy decisions had been locked in prior to the Team of Eight reconvening at certain times, so you wouldn't say that any of these key decisions had been hashed out at these meetings, so we're clear?

A The weekend meetings? Absolutely not, no -- I will say just emphatically: I made no policy decisions. Ms. Darcy made the policy decisions.

Q You mentioned that the EPA and Army conducted over 400 outreach meetings during this rulemaking. Was any part of the Executive Office of the President besides OIRA invited to attend these meetings?

A I don't know the answer to that question. CEQ may have been, but I'm not privy to any specific invitations to the EOP on those outreach efforts.

Q Is that because of EPA?

A Well, EPA took -- most of those meetings were arranged through EPA.

Q Were the Corps invited to participate in all of these outreach meetings?

A I don't know if they were invited to all. I would have thought that they were invited to some. It would depend on who the stakeholder was. Typically, if it's a stakeholder that is looking at meeting with either administration officials or senior executives, the meeting would be designed accordingly. If they wanted to meet about technical issues, you would bring technical people to the meeting as well. So it would depend on who the person is, what the intended outcome was going to be, what the issues that were going to be discussed. But, generally, if it was just to give an overview of what we were doing with the proposed rule and where we were headed and what general kind

of sense, typically, Greg and I did most of those general meetings. Ken Kopocis did some as well.

Q Did any of these meetings take place before the proposed rule was published in the Federal Register?

A No. Most of those outreach meetings occurred either during the 200-day public comment period between the time the proposed rule went out for public comment and prior to our time that we were starting to work on the strategy. It probably carried through some of the period of time that we were actually drafting the proposed final rule. But, again, we would not have been privy -- during the drafting of the proposed final rule, we would not have discussed the proposed final rule. We would have discussed only the rule that was out for public comment.

Q You mentioned most of them happened after the proposed rule was published or the comment period began. Are you aware of any that happened before that period?

A That was a long time ago. I can't recall any before the proposed rule. I'm trying to remember the timing. Remember, we had the implementation -- not the implementation, excuse me -- the guidance document that was out for public comment as well. I do recall us having had stakeholder conversations with respect to the proposed guidance document, not necessarily with respect to the proposed rule.

Q To your knowledge, was anyone from the Army or Corps ever disinvited from outreach meetings?

A I think I've already answered. I'm not aware of any time

where the Corps was disinvited to any meetings. And I think I've said I'm aware of just a couple, a handful, two maybe, meetings where they were either principal plus one or attorney-onlys, where technical people were not encouraged to attend.

Q What did you mean by "not encouraged"?

A Well, they weren't invited to attend an attorney-only meeting if they weren't attorneys.

Q Okay. There were not requests by the Corps to participate in certain meetings that were met with --

A I don't know. Somebody may have said, "Hey, we're having a meeting" or "I heard there's a meeting," and we said, "Yeah, there's a meeting, but it's an attorney-only meeting," and they said, "Oh, okay," kind of thing, if that's what you're referring to.

Q To your knowledge, were all outreach meetings included in the administrative record for the rule?

A You mean how the outreach efforts were documented?

Q Correct.

A I'm not sure whether they were, if there's a document in there, in the administrative record. I believe there -- I'm just not sure at this point.

Q Are you aware of whether minutes of outreach meetings were ever recorded?

A Recorded, I'm not aware that they were recorded.

Q Did you ever take recommendations back to the Corps after these outreach meetings?

A Sometimes. Again, depending upon what the outreach effort involved, and I remember I went to one ECOS meeting, Environmental Conference of the States, and that's attended by fairly high-level environmental administrators for the States. And I think I remember having a conversation with some folks from the Corps about some of the concerns that were raised during that ECOS meeting. But, to be honest with you, I'm not certain they were necessarily specifically about the rule. It was more concern about the inconsistency of Corps jurisdictional determination, which was -- it's an underlying issue that the Corps has always had, which is part of the reason why we were drafting a rule for greater clarity, is that current rules are ambiguous and subjective and allow more than one district to come up with different results.

Q Getting back to our discussions about communications made during this rulemaking, did you ever discuss treating the Army or Corps' communications regarding the connectivity report in a certain manner?

A I don't recall that, no.

Q We discussed the process of building the administrative record for a rulemaking earlier. It is our understanding that the Corps was instructed to retain documents only from April of 2014 and after for purposes of compiling the administrative record. Do you know who would have set a document retention deadline for this rulemaking?

Mrs. Bamiduro. Sorry. Can you just clarify that's the majority's understanding?

BY MS. AIZCORBE:

Q Do you know who would have set document retention deadlines for this rulemaking?

A I'm not aware of any such deadline, so I don't know who would have set that.

Q Does your office ever instruct the Army or the Corps on these matters about document retention or building an administrative record for a rulemaking?

A I have never.

Q Did you ever suggest or direct staff to conduct or alter their work to achieve a specific result?

A No.

Q Besides our discussion about the FONSI, correct? You did engage in a discussion about how the EA was expected to find a FONSI. Is that correct?

A No, no, that's not correct. I wanted a complete EA. I wanted a complete and thorough analysis, and if it came down to where a complete and thorough analysis would have recommended or had not been able to reach a FONSI, we would have had to deal with that. But that's not what we ever got until we actually had the FONSI -- I mean, until we actually had the complete EA FONSI.

Q And just so I understand that point before we move on, you don't know why Mr. Smith was not given the opportunity to finish his EA, correct? Or do you know?

A I don't know. That was a conversation that he had with his immediate supervisor. But, again, what I was informed was that Chip

had come in and said to him that he could no longer support supporting the rule with an EA FONSI and that an EIS would be required. Again, that would be something if you had completed your analysis, and here's what my analysis is telling me, as opposed to my belief, and those are two different things.

Q Who is Mr. Smith's immediate supervisor?

A Let Mon Lee.

Q Did you ever direct staff to speed up the process of their work on this rulemaking?

A I don't recall ever directing any staff, to be fair, other than my own staff, to do anything relative to time. That's not to say that I didn't share with Corps employees the timelines that Ms. Darcy and Ms. McCarthy set.

Q We discussed a little bit about your determination and discussions about the Peabody Memoranda, that they were deliberative and should not be shared. Did you engage in any other discussions about any other documents or discussions throughout this rulemaking that should not be shared outside of the Army or Army Corps or EPA, whomever had the discussions?

A I'm not aware of any other documents that would have generated that discussion.

Q The committee understands that the Army requested that the Army Corps engage in social media promotion of the rule during its development. Are you aware of this communication or request?

A I'm sorry. I'm going to have to ask you to ask the question

again.

Q Sure. We understand that the Army requested that the Army Corps engage in a social media promotion of the rule during its development. Are you aware of this direction or request?

A From the Army?

Q Yes.

A No.

Q From anybody else?

A No. I personally had no involvement or knowledge of anything whatsoever to do with the social media aspect.

Q Did you ever discuss the EPA's social media promotion with Mr. Peck?

A No.

Q When were you first contacted by the Army or Army Corps to appear before this committee for a transcribed interview? Do you recall?

A Did you ask when I was?

Q Correct.

A I don't know. Maybe a month or so ago.

Q Have you spoken to anyone before today about the other transcribed interviews this committee has conducted?

A Just my conversations with Ms. Weis.

Q About TIs besides your own?

A Just generally what the scope of the conversations were, what I should prepare myself for.

Q Did you discuss scheduling transcribed interviews that this committee has conducted?

A Did I discuss scheduling?

Q Correct.

A I don't know what that means.

Q When these interviews would take place.

A No, not specifically, no.

Q Have you spoken to anyone in the Army about how to communicate with or respond to the committee during its investigation?

A No.

Q Anybody from the EPA or the Executive Office of the President?

A No.

Q Have you been asked to produce records related to this rulemaking in response to the committee's request?

A Yes.

Q Have you completed your search and production in full?

A Yes.

Q We understand that the Army General Counsel reviews these documents before they are produced to the committee. Are you involved in that effort?

A I am not.

Q Do you know why the committee has not received a production from the Army since December 23rd of 2015?

A I do not know.

Q Okay. We discussed a little bit in one of the minority's hours how this rulemaking is unique in that it carries a lot more legal emphasis than other rulemakings that might be more substantive or policy-based. Does that, in your opinion, change the legal obligations of rulemaking agencies in the rulemaking process?

A No.

Q You made a comment when we were discussing public comments with the minority's hour that input was taken in and included in the final rule. To be clear, you did not mean that all input was adopted or included, correct?

A Certainly, not all input was adopted. I do believe that all of the input was considered in developing the final rule.

Ms. Aizcorbe. I think we can go off the record.

[Recess.]

[3:30 p.m.]

BY MRS. BAMIDURO:

Q So it's 3:30. We'll go back on the record.

Mr. Schmauder, I want to go back to the topic of tribal consultations for a moment. In our interview with Mr. Smith, he disagreed with the conclusion that the rule would not have an impact on the tribes. And the following exchange with him occurred with him during his interview. He stated, I'll quote, he was asked:

Question: So you would say based on your experience and 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 the tribes?

Answer: Both beneficial and adverse, yes.

Question: But an impact nonetheless?

Answer: An impact, yes.

Question: Which is inconsistent with the decision that was made or at least communicated that there would be no impact?

Answer: Correct.

According to the Executive Order 13175, which governs tribal consultations, which we have discussed earlier, the standard is that regulations cannot be passed that have tribal implications that impose, quote, "substantial direct compliance costs." Is that your understanding?

A That's my understanding, yes.

Q In your opinion, is having a, quote, "beneficial or

adverse," quote, "impact on the tribes," the standard that's laid out in Executive Order 13175, is that the same thing as a substantial direct compliance cost?

A I'd have to study that, to be honest with you, a little bit more. I'd like to --

Q Do you have an understanding of what "substantial direct compliance cost" means?

A Direct substantial compliance cost?

Q Yes.

A Generally, yeah, if you're going, if you're issuing a regulation where you're going to require a tribe or any, regulating an entity to have to do something -- or do something over and above that which they're doing -- and that taking that action would have a cost; or imposing a new requirement, say you're having to register your car after it has 75,000 miles on it or something that's -- that would have a direct cost on the regulated public. I think where this comes down is that we were simply defining through the rulemaking the terminology that's used in the Clean Water Act. The regulation itself doesn't require any actions to be taken. If you were required to have a permit, then it's the statute that's requiring the burden. It's not the regulation itself. This changes no regulatory requirements. It's just interpreting the terminology as it's used. So, again, not having been directly involved in the tribal consultation document or its conclusions, you know, I was not privy to them making that determination, that they made that determination.

Q But the standard, as far as you understand it, under the executive order is not whether the regulation has any impact on the tribes. Is that right?

A That's correct. That's correct. I mean, yes. I mean, my recollection is that the 2008 mitigation rule also reached the same conclusion, that it would not have a direct, substantial economic impact on the tribes.

Q As laid out by the executive order?

A As laid out by the executive order.

Q Do you have any reason to doubt that conclusion?

A I do not, no.

BY MS. BERROYA:

Q And so the rationale, if I understand it, is that the work that was done in the Waters of the United States was just to clarify requirements that were preexisting in the rule. Is that accurate?

A That's accurate, yes.

Q And that's why it would not have been imposing any new requirements on tribes or anyone else. Is that correct?

A I think that's correct, yes.

Q So rather it was just providing further clarification and understanding to the public?

A Correct.

BY MRS. BAMIDURO:

Q Switching topics, I want to talk about some of the objections that have already been discussed today that were raised by

some Corps employees to the WOTUS rule. Ms. Moyer in her April 24, 2015, memo noted that the Corps, prior to early February 2015, was unaware that the Army and the EPA were contemplating a bright-line cutoff to CWA jurisdiction either 5,000 or 4,000 linear feet, but those bright-line cutoffs were formulated in response to comments. Is that your testimony?

A Yes, that's correct.

Q And part of the notice and comment period is to take in and absorb and respond to the comments that you're getting from the public. Is that correct?

A That's correct. I want to just clarify that I don't believe there's any comment specifically that says draw the line at 4,000 or 5,000 or whatever. The comments were seeking greater clarity as to what's jurisdictional and what is not jurisdictional, so I don't want to misinform the committee to think that a comment came in and said "draw the line" where we ended up drawing it, but it was more the need for bright lines.

Q And so was it Ms. Darcy's position that, based upon the comments that were received, seeking more clarity from the regulated public, that distances would provide clarity to the public?

A Yes. I testified earlier, I believe, that when we were proposing or drafting the proposed draft rule, that there was discussion of having more than one alternative in the rule having to do with these other waters and how you come up with the concepts. And some was regulate some, regulate none, and then, you know, some concepts

in the middle. Ultimately, the proposed rule came out. It didn't have alternatives, but rather it had the proposed regulation, which was essentially the status quo, which was everything has a significant nexus determination. But we took specific comment, and I believe there was language in the preamble that suggested that one alternative approach would be to have distance limiters or distance limitations. So it's absolutely correct that, in the proposed rule, we didn't say: What do you think about 4,000 feet? We said: What about, in addition to what we have, what about some of these other alternatives and solicit comments on those?

So we got comments that basically said they did not like some of the concepts that we were doing. I testified earlier they didn't like flood plain. They didn't like riparian zone. They thought those were difficult to understand, that lay people wouldn't necessarily understand what they meant by flood plain management and riparian areas, and most of the comments suggested that we moved to having more established bright lines, and that's what we tried to do.

Q In the same April 24th, 2015, memorandum, it also states, quote: To verify what portion of the 10 percent of jurisdictional waters that would be lost to CWA jurisdiction under the final rule, the Corps would have to do the type of analysis that would be undertaken in completing an EIS. Without a detailed analysis to assess the impact of loss of 10 percent CWA jurisdiction would present the potential for significant adverse effects on human and natural environment, end quote.

I know that you've been asked about that statement earlier, so the Office of the Assistant Secretary did conduct an environmental assessment prior to the finalization of the rule that you testified to, correct?

A Correct.

Q And that was over 100 pages of analysis. Is that correct?

A I don't recall the actual page number, but it was analysis sufficient to reach the conclusion that she met.

Q There was talk in the last hour about Mr. Smith's role in the drafting of the economic -- I'm sorry -- of the environmental assessment, and there was a statement made that a second one was done. Was there, in fact, a second one done, or was there one that was completed?

A There was one that was completed.

Q And it's required by NEPA to be completed. Is that correct?

A That's correct.

Q Before you can make a decision as to whether there's a finding of no significant impact or that further assessment and an environmental impact assessment is required. Is that right?

A That's correct.

BY MS. BERROYA:

Q In other words, one cannot appropriately make a determination that an environmental impact statement is required until a full EA is completed. Is that fair to say?

A That's correct.

Q And that is a requirement by NEPA, correct?

A Yes. Sometimes in a variance project, you will decide to go right to an EIS, and that's not impermissible, but before you can make a determination of whether an EIS is required, the trigger is whether there's a significant environmental impact. So a finding of no significant environmental impact, once you can make that statement, that has to be backed up by a sufficient enough environmental analysis to support the FONSI or the finding of no significant environmental impact. So you just can't say no significant impact without the analysis. I think we're both saying the same thing.

Q So, at times, an EA is completed and a determination is made that there is a significant impact, and an environmental impact statement is then pursued?

A Correct.

BY MS. FRASER:

Q Just to clarify, you said that there was one environmental assessment done. When you say that, you're not referring to the one that was completed by Chip Smith. Is that correct?

A That's correct. Chip Smith submitted his work product to his supervisor, and it was deemed to not be sufficient enough to allow anybody to reach any kind of conclusions whatsoever, so the work was reassigned to Gib Owen, and he essentially started from scratch.

Q Mr. Smith testified in his interview that he worked on the environmental analysis over a period of 5 years. Would you agree?

A What Chip is referring to, I believe -- I think -- yes, the

answer, I think that's probably correct, but let me explain. The draft guidance document, the draft joint guidance document that was published in the Federal Register, proposed draft guidance, I believe he worked on an EA at that time, and so then the EA kind of just kept rolling as we started going from guidance document into the proposed rule and then into the final rule. So, over that period of time, from 2011 to 2015, Chip probably had in his mind or on paper or whatever some sort of analysis that would support the implementation or support the guidance document, support the proposed rule, and then support the draft final rule.

[3:42 p.m.]

BY MS. FRASER:

Q So do you think it would be reasonable for him to have completed his work over that period of time given the amount of time and changes in the rule?

A I would have thought that by the time he received the final -- the final preamble and rule text and the economic analysis, that he would have been able to have completed an analysis that would have allowed someone to make an assessment of whether there was a significant environmental impact. What we got from him on the 27th was less than a sufficient analysis. In fact, I believe he asked that he would need more time to complete that analysis. But based on what -- the analysis that he provided coupled with his statement to his supervisor, as I'm told, that he no longer would support any EA FONSI. Prejudging that, I think it was best that his supervisor reassign the work to someone that would take an independent look at the EA FONSI issue.

Q Would you agree that the length of time, and as well as his conclusion, after a 5-year period, could have contributed to Ms. Darcy's loss of confidence in Mr. Smith's work on this rule?

A I would think that that's a fair characterization. Certainly enough to allow him to proceed with the EA FONSI, I think, at that point. He just decided to just let somebody else do it.

Q Okay.

BY MRS. BAMIDURO:

Q And that somebody else we talked about was Gib Owen?

A Gib Owen.

Q But you also testified in the last hour that additional people were pulled in to support him in completing the assessment. Is that correct?

A That's correct.

Q Is it your view that Mr. Owen and the additional help that he had, combined between the three of them, had the necessary requirements and experience to complete a thorough assessment?

A It is.

BY MS. BERROYA:

Q Was Mr. Smith instructed to find that there was no significant impact in the course of his EA?

A Was he directed to find? No.

Q Was he instructed to find that there was no significant impact?

A I'm not aware of anybody that would have instructed him along those lines. I certainly did not.

Q In the course of conducting an environmental assessment, is the person in charge of that supposed to be neutral and reserve judgment until the completion of the analysis?

A Well, I would think that would be the ideal situation, certainly.

Q Was Mr. Owen directed to find no significant impact for the WOTUS rule when he was asked to conduct an environmental assessment?

A I'm not aware that he was directed to reach any conclusion. I think he was directed to do an analysis and see where the analysis came -- came up to. But again, I would remind everybody that in the proposed rule, the proposed rule went out based on Chip Smith's work that, and the analysis that he had performed along through this period of 4 years, that proposed rule went out with a finding of no significant environmental impact.

So if the proposed rule, but Chip certainly didn't object to that finding, or that posture that was stated in the proposed rule, then it would lead one to ask why did he have a change of heart? Why did he change his mind that the rule could no longer be supported by an EA FONSI.

And I testified here, it's my belief that he made that decision not based on a thorough and complete analysis, but he made that decision after the Corps of Engineers came in with the Peabody memos, and took the position that the rule could not be supported with an EA; that he had to do an EIS.

BY MS. FRASER:

Q Two of the members on Gib Owen's team that helped complete the environmental assessment came from the Mississippi Valley Division. Are the names Sandra Stiles and Elizabeth Barron familiar to you?

A I believe those are the names of the two people in the chart that is in back of the EA, part of the EA.

Q Correct. Are you familiar with their qualifications, just

if you know, to complete an environmental assessment?

A I am not familiar, nor have I ever met those two women.

Q Do you know whether or not -- do you know who selected them to participate in this environmental assessment?

A I would suspect it was Gib. I don't know for sure, but I believe Gib came out of the New Orleans District as well so these were probably people that he felt comfortable working with.

Q Okay.

BY MRS. BAMIDURO:

Q Mr. Schmauder, according to the text of the rule, it notes that section 511(c) of the Clean Water Act provides that except for certain actions not relevant here, that no action by the EPA constitutes quote, "a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA," end quote.

Is it your understanding, based upon section 511(c) of the Clean Water Act, that EPA was not required to submit an environmental assessment under NEPA?

A That's correct.

Q Do you have any reason to doubt the ultimate conclusion that was reached in the EA FONSI?

A No, I do not.

Q Despite that finding, we have learned through witness interviews that some Corps employees believed otherwise. And some of those concerns included recommendations to revise portions of the rule, for example, that significant nexus determinations be made on a

case-by-case basis to reduce the distance from the definition of, quote, "neighboring from 1,500 to 300 linear feet and others."

How do you respond to those concerns?

A Well, firstly, they are contradictory to the overall -- the overall kind of philosophy that we had in developing the rule. The status quo, where we are right now with the '86 regulations as implemented post-SWANCC and post-Rapanos, basically have significant amount of undefined water bodies that need to have a significant nexus determination. We kind of referred to that during the rulemaking as the gray matter, this large swath of grayness that is undefined. You don't know. You can't tell the regulated public whether or not something is or is not jurisdictional because it requires a case-by-case significant nexus determination.

We know for a fact that the regulated public was dissatisfied with that approach. It's resource-intensive to the Corps. It's subjective, and it's costly in both time and resources to the regulated public. One of the goals that we had from the start was to try to -- to the extent that science and the law would allow, would be to reduce the size of that -- of that amorphous gray matter that was subject to a significant nexus determination. And we did that through some of the bright lines and some of the rule changes that were done in the final rule to include the five categories of wetlands that are special geographic wetlands that we determined that, based on the science, that they were sufficiently similarly situated, again, as defined by the science, that for purposes of a significant nexus determination that

they meet the similarly situated part of the test.

So in a two-part test by regulation, we were determining that they met the first part of the test, which would greatly speed up the process of having a determination made.

So altogether, we were trying to reduce the size of the gray matter. When the Corps came in and said, you know, what we prefer is to leave this big gray area, leave it as is. And that's essentially what Lance Wood was advocating for in his legal analysis was he kept saying, we shouldn't, you know, we shouldn't be cutting jurisdictions. If we don't know, we just leave it open-ended and let the significant nexus determine it.

That was not a policy decision that either the administrator or Ms. Darcy wanted to make. They wanted to fulfill the mandate that they were given and try to bring clarity, consistency, and predictability to the rulemaking and so we moved in a path that wasn't linked to the status quo. So we rejected that portion of the Corps' recommendation to leave this large swath of significant nexus determinations.

Ms. Fraser. And just to clarify further, if that large swath of significant nexus determinations was left the way it was, then it would only be determined on a case-by-case basis by the Corps?

Mr. Schmauder. Correct.

Ms. Fraser. And that's what the rule was trying to eliminate, piecemeal interpretation of what the Clean Water Act meant?

Mr. Schmauder. Correct.

BY MS. BERROYA:

Q That wouldn't have necessarily meant that the scope of the jurisdiction of the rule would have been narrower. Would it have?

A No, it would have made it actually broader if. If it was left unchecked, then we would just say, okay, well, anything from this point, you know, infinitely out, could be subject to a significant nexus determination. There is theoretically no end to the jurisdiction, and we felt as we were writing it that that was exactly what Justice Kennedy was more or less complaining, and the other Justices, when they wrote the Rapanos decision with respect to the tributary system is that you have a test, but the test is endless. It has no end, and that's when they struck down the tributary portion of the rule, or struck down the tributary portion of the Corps' interpretation of the current '86 rules.

Q So are tributaries included in the definition of Waters of the United States?

A Well, they were always -- they were always -- they were always part of the Waters of the United States in terms of the tributaries have always been regulated. The question is, where does a tributary end? How far up, and how far out does the tributary stop becoming the tributary? So we defined in the rule for greater clarity as to where the tributary, what makes a tributary a tributary.

Q So by creating these bright line rules, the Secretary and Ms. McCarthy potentially limited the scope of the Waters of the United States rule, and they provided additional clarity. Is that true?

A Certainly with respect to the 4,000-foot -- 4,000-foot

limit. The impact, if it had stayed 4,000 foot, would have limited any jurisdiction beyond the 4,000 foot. So yes, it was -- that was, in essence, trying to reduce the scope, lawfully reduce the scope of jurisdiction. Again, I testified earlier that based on the Corps' concerns about the 4,000, we actually modified it to say 4,000 or the 100-year flood plain, whichever is greater.

Again, the Corps still thought there was jurisdiction that was being lost beyond the 100-year flood plain, but they did not quantify what that -- what that amount of jurisdiction was, and that's when I think the comment that was earlier referenced that said you would have to do this whole big analysis, much akin to an EIS to be able to quantify what jurisdiction would be lost when EPA's analysis suggested that there was very little jurisdiction that would be lost, and any jurisdiction that would be lost was balanced, again -- balanced against the greater clarity that would be gained by having a bright line.

BY MRS. BAMIDURO:

Q You mentioned that, ultimately, Assistant Secretary Darcy and Administrator McCarthy decided to go in a direction that was contrary to the recommendation of the Corps. Is that unusual? Are all of the Corps' recommendations often incorporated into a final rule?

A I think it would be unusual if in any agency if at working through a rule that somebody in the agency got their way 100 percent of the time. So if the Corps' expectations were that all of their changes would be met, I don't know where they came up with that expectation, because even in the proposed rule, there was a sufficient

amount of give and take.

I don't think the Corps was 100 percent happy with the proposed rule. Nevertheless, they supported it in going forward with its being published in the Federal Register. So I don't know where that expectation set would have come from.

Q And so is the process that the stakeholders sit down and talk about the rule, the science underlying the rule, where the rule is headed, concerns are vetted, and then an ultimate policy decision is made by the principals? I'm simplifying it, but is that an accurate assessment of how the process goes?

A Yes, that's how this one went.

Q And is that how it is supposed to go?

A I believe so, yes.

Q And the FONSI here, was it signed off on by both agencies?

A No.

Q Just signed off on by Army?

A Correct. Again, the FONSI is limited to just the 404 aspects of the rule, since all of the other portions of the rule are exempt. In fact, we believe, as a matter of litigation, we believe that the rule itself, the totality of the rule is exempt from NEPA.

Ms. Berroya. The EA had the finding of no significant impact. Correct?

Mr. Schmauder. Correct.

BY MRS. BAMIDURO:

Q I want to switch gears and ask if one of the purposes of

the Clean Water Act is to ensure that our drinking water is safe?

A The basis of the Clean Water Act is to provide that all of the Nation's waters are clean and safe. To the extent that streams and tributaries provide a source of drinking water to municipalities, certainly having clean tributaries and streams that feed municipal systems is certainly one of the goals of the Clean Water Act.

Q And I think you said earlier that WOTUS includes tributaries in its definition. Is that right?

A Correct.

Q I just want to read for you a sentence from an October 11, 2015 article entitled: "Chemical Testing Could Have Predicted Flint's Water Crisis." And this is taken from the Detroit Free Press. And that sentence reads, "The river has been marked by decades of industrial pollution. Its tributaries channel farmland runoff into it and its temperatures vary by season."

Is it your understanding of the Clean Water Act that it was trying to define "runoff"?

A No. Defining "runoff" would be a source of a pollutant, what was going into a water body. So a runoff meets the effluent categories of what EPA defines as a pollutant. If it goes into a Water of the United States, then it would need a permit from EPA to discharge that pollutant into a Waters of the United States. This regulation, or this rulemaking is simply not to define the effluent standards or affect the effluents. It is to define what waters become within the jurisdictional reach of the Clean Water Act such that if you are

depositing a pollutant, you would need either a NPDES permit, or.

Q I'm sorry a what permit?

A NPDES permit, or a 404 permit, if you were discharging dredged or disposal materials into a Waters of the United States.

BY MS. BERROYA:

Q So the Waters of the United States rule defines whether a tributary -- let me rephrase. The Waters of the United States rule defines tributaries. Correct?

A It defines the -- it defines what a tributary is for purposes of the Clean Water Act, yes.

Q And if water is a tributary, then it requires certain permits, it must satisfy particular standards. Is that correct?

A I want to be clear. If -- the Clean Water Act defines, and there are various programs, there's oil spill programs, there's the National Pollutant Discharge Abatement System, I think it is. All of those programs are governed by the underlying basis of whether a particular water is a Water of the United States. If it's not a Water of the United States, then under the Clean Water Act, you can essentially put anything in it that you want. If you want to put discharge from a farming operation or oil from your car, or you want to fill it, if it's a wetland, you know, that's not a Water of the United States, and you want to just plow over it and plant soy beans, that kind of stuff. If it is a Water of the United States, then you cannot put a pollutant into it because then you are affecting the chemical, physical and biological integrity of that water.

And so, for purposes of section 404, dredge and fill is defined by statute as a pollutant. So if you're going to fill a stream with dirt, even though it's fresh dirt, you know, and very clean dirt, it's still a pollutant for purposes of the Clean Water Act and you cannot fill that stream, that creek, that wetland without a 404 permit, nor can you discharge whatever the effluent is, if it's an effluent that is defined by EPA as a pollutant, you cannot discharge into a Water of the United States without having a permit.

BY MS. FRASER:

Q And so following along on that thread, most or all of the rivers in the United States are considered jurisdictional waters. Is that right?

A Most of the --

Q Rivers of the United States?

A Most of the rivers, yes.

Q And the larger tributaries definitely are?

A Definitely are.

Q And there's some question as to whether or not some of the smaller bodies of water, like the smaller tributaries and streams and prairie potholes and other bodies of water are subject to the Clean Water Act, right?

A True. Correct.

Q And that is part of why this rule is being promulgated, right?

A Correct.

BY MRS. BAMIDURO:

Q Are you familiar with -- let me rephrase, the EPA issued a press release dated May 27, 2015, titled the "Clean Water Rule - Protect Streams and Wetlands Critical to Public Health, Communities, and Economy." And in that, Administrator McCarthy is quoted as saying, quote, "For the water in the rivers and lakes in our communities that flow to our drinking water to be clean, the streams and wetlands that feed them need to be clean too," end quote. Would you agree with that statement?

A I would.

Q She also said in that release quote, "Protecting our water sources is a critical component of adapting to climate change impacts like drought, sea level rise, stronger storms, and water temperatures, which is why the EPA and the Army have finalized the Clean Water rule to protect these important waters so that we can strengthen our economy and provide certainty to American businesses," end quote.

Do you agree that the Waters of the United States rule plays an important part in ensuring Americans have clean drinking water?

A I do.

Q The release also says, quote, "One in three people get drinking water from streams that lacked clear protection before the Clean Water rule," end quote.

Is it your opinion that the rule will have a positive impact on the clean drinking water for Americans?

A I believe that is correct.

BY MS. BERROYA:

Q The article that my colleague read earlier from says the river has been marked by decades of industrial pollution, its tributaries channel farmland runoff into it and its temperature varies by season, and it is speaking about the Flint River. To the extent that the Waters of the United States rule covers the tributaries referenced in this article, do you believe that the rule will have a positive impact on the Flint River?

A I'm assuming the Flint River probably is already jurisdictional and would have been jurisdictional under the current set of regulations. So there are two aspects: One is requiring a permit, and the other is to enforce against polluters. And, so, both of those are equally important for purposes of having clean water. But if you -- if you scale back the clean water, or scale back the jurisdiction of the Clean Water Act, ultimately, the concern is and has always been, nobody disagrees that the Potomac River needs to be clean, okay. But the problem is as you go -- as you go up into the second-, third-, and fourth-order tributaries which feed the Potomac River, which feeds the Chesapeake Bay, where do you draw the line that you don't have a downstream effect on an upstream pollutant?

And that's always been the issue because as you get upland with these second- and third- and fourth-order streams, you're no longer in channels or flood plains of a major river, you're probably on somebody's personal property, You know, you get up in the second, third, and fourth streams you are in somebody's farmland or somebody's

backyard that has a creek, or something like that, and people cannot just believe that a stream that's 200 miles from the nearest downstream traditionally navigable water, that that is a Water of the United States, because some people that still believe that by statute, the water should be limited to the navigable waters. And some of the streams that are affected all the way upstream are downstream navigable waters, but people think navigation means that they have to have barge traffic like the lower Mississippi.

So there is a lot of uncertainty out there, and to have the cleanest amount of water what we believe the scope of the clean water should be is that we need to, if it has a significant nexus determination, or a significant downstream effect, as defined by Justice Kennedy in his decision, that we in the rulemaking use that as a benchmark for saying that there was a basis for finding that particular water body to be jurisdictional. And we so wrote the rule to effect that.

Likewise, for the first time, this rule defines what is not jurisdictional, and previous rule, the '86 rule, didn't have a section in the rule that said what is not jurisdictional.

So for the first time, again, on the concept of trying to provide clarity and predictability, the rule -- we wrote the rule so that we would define out what is not jurisdictional.

And a lot of that came into -- we've talked a little bit about it earlier, but the ditches are a concern, roadside ditches. Roadside ditches that are part of a transportation system would be okay if a

roadside ditch drained only upland and only went to an upland. But when you take a run of a long transportation system, and at the end of the day, that all feeds down into a culvert that then goes into a stream, what difference does that roadside ditch -- why is that any different than a tributary? So those are the difficulties that we have when we write a rule of this magnitude as to where to draw the lines? Where does the science take you?

BY MS. BERROYA:

Q You mentioned that the Flint River is likely already covered by the Waters of the United States rule, correct?

A That would be my guess. I never looked at that, but I would assume that Flint River --

Q Itself?

A -- itself is a Water of the United States.

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

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

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

A It certainly could, yes.

BY MRS. BAMIDURO:

Q I wanted to switch your attention now and talk about some challenges to the technical support documents. Ms. Moyer's memo indicated that the Corps had no role in performing the technical analysis, or drafting the technical support document. How do you respond to that claim?

A As to the drafting of the technical support document itself, the one that is in the administrative record, I don't know whether -- I don't believe the Corps had any drafting responsibilities for that. I do know that the technical support document is a document, much like everything else that's been in this process, has been a compilation of things that have come from the guidance document, the proposed rule, and the final rule leading up to the technical support document that's now in place.

So what I don't know, and probably won't know, is to what extent previous Corps input in other types of documents that became part of the technical support document were used or not used. But I think it's a correct statement that the Corps was not a key drafter of the technical support document. I know they provided comments, and those comments would have gone directly to EPA.

Q And was there anything inappropriate about EPA owning the technical support document or taking -- drafting the technical support document?

A There's nothing wrong with EPA having taken all responsibility for drafting of this rule. Again, it's operating on

the basis this is the Administrator's authority, the Administrator's rule, even though it's jointly participated in by the Army.

EPA could have done this rule, essentially, themselves. And I would say, you know, just to -- because I know we have kind of talked around this like well, why EPA versus -- as I have said, Ms. Darcy's staff is -- probably, total, 15 to 20 people altogether. The Corps' regulatory office at the headquarters is probably six to eight people. I don't know what the total number is, but it's probably, for sure, less than 12 people.

EPA's Office of Water has over 600 people in the Office of Water; I think over 400 of which have sole responsibilities as the Clean Water Act. So they have the capability and the resources to put on -- and the expertise, I might say -- to prepare a rule and prepare the supporting documents that support a rule like this.

When we were talking about, early on, with the guidance and the rule, and the Corps' roles and stuff, frequently, we heard that the Corps lacked the resources and able to take on certain activities. That's why Chip decided that he, and along with Ms. Darcy, decided that they would offload the drafting of the EA, would be done at the ASA CW's office, or the Assistant Secretary's office, because there are resource implications. But the EPA had put the burden share, the lion's share of drafting most of the administrative documents for this rulemaking. And I don't find that the least bit unusual, given the authority that they have. We talked about the Civiletti opinion along with the capabilities, resources, and expertise that they have.

BY MS. BERROYA:

Q Was the Waters of the United States rulemaking the only matter that the Army Corps was dealing with between 2008 and 2015?

A No. Early on, there were several other key initiatives that the Corps was being asked to undertake. The rulemaking was one, guidance on implementation of the fill rule, I believe was another. We were talking about modifying the fill rule, I don't think we ever did pursue that. And guidance on mountaintop mining was another big initiative that the Corps was being asked to take on responsibilities for. So there was a lot going on in the regulatory office and they were -- they were stretched.

Ms. Fraser. And it would be the same 12 to 15 staff members that would have been responsible?

Mr. Schmauder. Sure, sure. No matter what it is in the regulatory program, it is going to be the same. The Nationwide Permit program is a 5-year program, so every 5 years, you are talking about a rulemaking effort to support the new Nationwide Permit program. That's just starting to get -- well, that has gotten underway. I think we're actually at the point where the rule, the Nationwide Permit program is over at OMB.

BY MRS. BAMIDURO:

Q Ms. Moyer's memo indicates that Corps data was used by the EPA when drafting the TSP. Do you know what other information formed the basis for that document?

A From the Corps, that was received from the Corps?

Q Outside of the Corps.

A No.

Q I believe that the technical support document said that it relied upon a series of other sources of information, including over 1,200 peer-reviewed scientific papers. Do you have any reason to doubt that that, in fact, happened?

A Oh -- no, I have no doubt that they involved significant research into other papers and stuff.

Q The technical support document also indicates that other data and information, including jurisdictional determinations, was also used to form the basis of the document. Do you have any reason to believe that that did not happen?

A No, I do not.

Q It also indicated that it relied upon relevant agency guidance and implementation manuals. Do you have any reason to doubt the veracity of that?

A No.

Q Federal and State reports that address connectivity of aquatic resources were also asserted to be a basis of the technical support document.

Do you have any reason to doubt the veracity of that?

A I do not.

Q The EPA's science report which is, I think as you described it earlier, a peer-reviewed synthesis of previously published scientific reviews were also the basis of a technical support document.

Do you have any reason to believe that those were not relied upon as well?

A No, I do not.

Q So it wasn't the case that just Corps data formed the basis for the EPA's technical support document. Is that right?

A That's correct, yes.

Q Do you know how the EPA obtained the data that it used in drafting the technical support document?

A I only know, certainly don't know how they acquired all of those other stuff. But I do know that, I believe that there was -- the analysis that looked at the, I think it was the '13 and '14 jurisdictional determinations and they were really looking at a random sample of '13 and '14 determinations, pulling them out, and then applying what is the draft final rule to those jurisdictional determinations to see whether that there would have been a change in the jurisdictional determination.

I believe that analysis, even though it was asked for by the Corps, I think, if my memory serves me correctly, EPA, they have access to the ORM database, which is a database of jurisdictional determinations and I think they went in and pulled that data from the ORM database.

Q O-R-M database?

A O-R-M database, yes.

Ms. Berroya. What does the ORM stand for?

Mr. Schmauder. No idea.

BY MRS. BAMIDURO:

Q There seems to be a suggestion in Ms. Moyer's memo that because the Corps' data was used without the Corps having a role in the drafting that that invalidates the accuracy of that information. How do you respond to that?

A Not well. I would say, you know, that's one of those things if it's accurate, it's accurate. The EPA was informed of all of the Corps' concern, and those concerns oftentimes were expressed by the Corps in meetings that we had, and what have you, along with the Peabody memos, and the technical support documents that Moyer and Wood submitted.

But, you know, the fact that EPA -- just because Corps didn't contribute or participate, it doesn't make it wrong. The Corps may not necessarily have agreed with the approach, or maybe would have done it differently, but my understanding is that the technical support document and the economic analysis were reviewed by a host of others, not just the people drafting it, but others that had particular expertise, and it was reviewed and cleared by several other independent kind of activities.

So I'm sorry the Corps feels that way, but I, you know, I don't know whether that's just their opinion or it is based in hard facts.

Q Is it logical to conclude that EPA scientists and those with other relevant expertise can evaluate data to support conclusions that would be different than those reached by Ms. Moyer or folks in the Corps?

A Sure. Sure. I don't -- wouldn't find that out of the ordinary.

Q Were the concerns that some Corps staff had about the technical support documents vetted up and presented to Ms. Darcy for her consideration?

A Repeat that one more time?

Q Sure. Were the concerns that were raised about the technical support document by some folks in the Corps raised up to Ms. Darcy for her consideration?

A I don't -- I don't know specifically whether they were identified as specific concerns about the technical support document. All that I know for sure is that before Ms. Darcy made decisions to include the ultimate decision of moving the rule to the interagency and approving the final rule, that she had ample opportunity to listen to the Corps' concerns. And if the Corps' concerns were with respect to the technical support document, then I would say she -- the answer to that question would have been yes.

But I just don't recall them specifically raising a question about the technical support document. Most of the times, the discussion was broader based than that. We certainly didn't have the Assistant Secretary's time to go over -- I think the technical support document is a 500-page document, so there's plenty of opportunity there to disagree with what's in a document of 500 pages.

Q Do you have any reason to doubt the conclusions that were reached in the technical support document?

A I do not.

Q Earlier, there was conversation in the last hour about the

decision made to -- the decision made about what would be included in the administrative record. And a decision was made that the Peabody memos would not be included.

Do you recall that conversation?

A I do.

Q And I think you said earlier, and correct me if I'm wrong, that that decision was made by you and the general counsel. Is that right?

A Well, the Army's view was made -- was made by the Army general counsel's office to include the Acting General Counsel of the Army. If you're talking if he's involved, then my recommendations or views are just staff-level views. But I believe, and it was also discussed, and that decision was since, again, by the date, again, the date that the rule was announced as being final and out -- not out for public comment, but in the Federal Register as a final rule, that afternoon, we had 12, I think 12 lawsuits, or 30 lawsuits within the first day or so.

So a litigation issue became foremost, and so I believe the issue of what is in the administrative record became litigation-centric, because we had to provide an administrative record to one or more of these courts. And we had to finalize up what was in the administrative record.

And a decision was made that we were following the EPA's rules, or guidance on the development of rules, and the EPA's guidance, I don't believe the Corps has any kind of guidance that touches on this. But

EPA's standard manual, if you would, on preparing an administrative record to support a challenged rulemaking effort, it specifically says that internal documents, internal documents are not part of the administrative record.

So that being EPA's position, the Army certainly went along and agreed with that.

Ms. Berroya. When is the administrative record for a rule created?

Mr. Schmauder. Well, it's created by the time the rule becomes a final rule, and the docket, the docket for the rule is prepared. So, I mean, part of it is kind of standard protocol, a response to comment, the response to comment document, the NEPA documentation, all of that kind of stuff. It's just kind of pro forma as to what goes in the rule -- in the administrative record, excuse me.

BY MRS. BAMIDURO:

Q I wanted to mark for you, and I think we are on exhibit 7 --

A 6.

Q 6, a printout from the EPA's Web site on EPA dockets. I will hand that document, marked exhibit No. 6, to you.

[Schmauder Exhibit No. 6

Was marked for identification.]

BY MRS. BAMIDURO:

Q And you indicated just a moment ago that according to the "EPA's manual," and let the record reflect, I'm using air quotes, that they do not include, in their docket, internal documents. Is that your

understanding?

A That is my understanding.

Q If you take a look at the bottom of page 1 of this document, exhibit No. 6, under the section of what is not in a docket, the first bullet reads, "Internal documents that capture predecisional internal discussions that were deliberative in nature and consist of materials generated prior to the making of a decision, such as day-to-day staff notes, briefing papers, action memos, and other staff advice and recommendations."

Would you consider the Peabody memo to fall within one of those categories?

A Clearly, yes.

Q And let me be clear. Is it your testimony that the -- that the Peabody memos were not included because they did not fall within EPA's instructions for what documents should be included in the docket?

A I think at this point, I need to answer the question this way: This is a matter that is getting close to litigation-sensitive material. I will tell the committee and share with the committee that as a matter of record, the Department of Justice, in defending the lawsuit, has determined and has taken the position with the support of the agencies, that the Peabody memos are internal Army documents that were not released outside of the Army, and therefore, are not part of the administrative record.

BY MS. BERROYA:

Q And that determination was made because you, the Army Corps,

followed EPA procedures for identifying what would be contained inside a docket, correct?

A I will say that the reason -- the reason why we deemed it as internal is because they were never released outside of the Army, that they were deemed to be part of the deliberative process of the Army and contained within the Army.

Q And the significance of that is that the Army Corps decided that it would follow the EPA rules for what would be included within a docket, and EPA rules indicate that internal documents that capture predecisional internal discussions are not contained within a docket, correct?

A Our determination and the EPA docket's guidance are consistent. I don't want to misinform the committee that we made our decision based on EPA guidance. We made our decision that the document is deliberative in nature, would not be released outside of the Army. When it came time to administering the record and we knew that the Peabody memos -- EPA informed us that they have -- that this is consistent with their procedures and manuals on defining the administrative record.

Ms. Fraser. And the status of your determination did not change once the document was leaked to the public?

Mr. Schmauder. Correct. As far as we are concerned, the documents that you all probably have if you have the Peabody memos, probably have a watermark on them that says "for internal committee use only." The only document that does not contain that watermark or

that disclaimer, are documents that are still residing with the Department of the Army.

Ms. Fraser. Okay.

BY MRS. BAMIDURO:

Q I believe you mentioned in the last hour that at a certain point, Ms. Darcy lost trust in Mr. Smith over a misleading statements that he made.

Can you explain what you mean by that?

A After the rule went to OMB and then issued into the Federal Register, which by that time, the EA had been signed by Ms. Darcy because it's now at a point where it's out officially in the Federal Register, after waiting the 60-day period to become effective. At that point, our focus immediately turned to starting -- starting a bunch of discussions on how we would implement this new rule. So the focus shifted from a rule that was essentially done at that point, to implementation of a new rule.

Even though Chip had been taken off, or taken the responsibility away for having to draft the EA, he believed that it was now time for him to reengage on the implementation issues.

It's my understanding that Ms. Darcy wasn't certain that she wanted to have Chip continue having any responsibilities for the Clean Water Act, implementation of a rule that essentially he had suggested -- he didn't support. Because he was -- had made it known that he was more or less supporting the Peabody position, or the positions of the Corps as explained in the Peabody memo.

So there were conversations that Ms. Darcy had with Chip, or Mr. Smith, that went along the line of what is my continued responsibility vis-à-vis the rule? And it was my understanding having talked subsequently with Ms. Darcy that she told him that she was still uncertain as to what his role would be going forward, and that she was expecting a new principal deputy to come into the office and she was going to ask the new principal deputy to reassess the work of distribution within the office, and that they would use more analysis to determine what, if any, responsibility Chip had with respect to the rule.

Notwithstanding that, he went out and sent emails to third parties, to include folks in EPA, that basically said Ms. Darcy said I'm the senior person. I'm responsible for implementation. Stop sending messages or stop involving Gib Owens on this. I'm the person. Send all of the information to me.

That seemed inconsistent with what Ms. Darcy's conversations were with me. And I brought this to her attention, and I think she confronted Chip about the accuracy of his emails, and I think at that point in time, at that point in time, I had made arrangements for a labor counselor to advise Ms. Darcy, since I was not a labor counselor, that if she had an issue with respect to a particular employee and his performance, his behavior, or his confidence, or his truthfulness, or his trustworthiness, that she needed to have that conversation with a labor counselor.

And that my understanding is that that discussion went on, and

it was my understanding that at the end of the day, Mr. Smith was informed that he did not have any responsibilities vis-à-vis implementing the rule; that those would continue to stay with Mr. Owen; that Chip would then otherwise work on simply permitting issues and other regulatory matters. Does that clear it up somewhat?

Q It does, that's helpful, thank you.

BY MS. FRASER:

Q And so, but Ms. Darcy still relies on Mr. Smith for other of his duties that he performs within the agency. Is that right?

A That's correct.

Q And the only thing that he doesn't work on with respect to her is the Waters of the United States rule?

A That's my understanding, yes.

BY MRS. BAMIDURO:

Q Do you understand that he had a title change in any way?

A I am not aware of any title change.

Q A pay change?

A I'm not aware of any pay change.

Q A grade change?

A I'm not aware of any grade change.

Ms. Fraser. Were you aware that Mr. Smith was traveling with Ms. Darcy several weeks ago in performance of his duties?

Mr. Schmauder. No. Nope. No, ma'am. Sorry, you can change the nope to no, ma'am. I'm getting tired, I apologize.

BY MRS. BAMIDURO:

Q And we're wrapping up. Just a few final questions, and I apologize if you already answered these earlier. But is it your testimony that Assistant Secretary Darcy considered the viewpoints and concerns of the Corps employees in making final policy decisions regarding the WOTUS rule?

A Yes.

Q Were the Corps' concerns about the draft final rule addressed to the satisfaction of Assistant Secretary Darcy prior to the final promulgation of the rule?

A Yes.

Q Is it uncommon for staff members to express disagreements on the process or the science underlying a rule?

A Probably not, no.

Q Is it your experience that every staff member's recommendation will be adopted and incorporated into a final rule?

A Certainly not.

Q Do you know whether Assistant Secretary Darcy ever felt as if the process for this rulemaking was rushed and did not allow for her to have ample time to review and assess the Corps' input and analysis?

A That is not my understanding.

Q Was this rule forced upon the Army by EPA?

A Absolutely not.

Q Was this rule inappropriately influenced by politics?

A No. Not at all.

Q Do you agree that Ms. Darcy was in a position to bind the Army when she entered into the joint rulemaking with the EPA?

A Absolutely.

Q Does EPA have final Clean Water Act rulemaking authority?

A Yes, they do.

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

A Yes, I do.

Q You mentioned in the last hour that from time to time, you would get together with Mr. Peck on the weekends. Was that done to exclude others from the process?

A No, not at all. It was just a way of having an informal discussion over a cup of coffee on a Saturday morning.

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

A No, I was not.

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

A No, I did not.

Q I think we can go off the record. And just in time. Thank you.

Mr. Składany. That's all we have. Thanks for coming. We appreciate your time.

[Whereupon, at 4:42 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.

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Witness Name

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Date