

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

INTERVIEW OF: DOMINIC JOSEPH MANCINI, JR.

Friday, April 15, 2016

Washington, D.C.

The interview in the above matter was held in Room 6480, O'Neill

House Office Building, commencing at 10:00 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

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CHARLES LUFTIG, DEPUTY GENERAL COUNSEL

CRYSTAL BROWN, STAFF

Ms. Rother. Good morning. Thank you all for coming. This is a transcribed interview of Dominic Mancini. Chairman Chaffetz requested this interview as part of the committee's investigation of the Waters of the U.S. rulemaking.

Would the witness please state your name for the record?

Mr. Mancini. Dominic Joseph Mancini, Jr.

Ms. Rother. On behalf of the chairman, I want to thank Mr. Mancini for appearing here today. We appreciate your willingness to appear voluntarily.

My name is Katy Rother. I'm with the committee's majority staff. And I will now ask everybody else from the committee who is here at the table to introduce themselves.

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

Mr. Longani. I'm Kapil Longani with the minority staff.

Mr. Burns. Sean Burns with the minority staff.

Ms. Rother. The Federal Rules of Civil Procedure do not apply to the committee's investigative activities, including transcribed interviews. But there are some guidelines that we follow. And I'll go over those now.

Our questioning will proceed in rounds. The majority will ask questions for 1 hour, and then the minority will have an opportunity to ask questions for an equal period of time, if they choose. 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. We can also discuss taking a break for lunch whenever you're ready to do that.

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?

Mr. Mancini. Yes.

Ms. Rother. 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, so just those people on 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. And that goes for everyone present at today's interview.

We encourage witnesses who appear before the committee to freely consult with counsel if they so choose. And you are appearing today with counsel.

Could counsel please state your name for the record?

Mr. Luftig. I'm Charles Luftig, Office of Management and Budget.

Ms. Brown. I'm Crystal Brown, Office of Management and Budget.

Ms. Rother. And are you counsel as well?

Mr. Luftig. Ms. Brown is appearing as a notetaker.

Ms. Rother. So thank you.

We want to answer -- we want you to answer our questions in the most complete and truthful manner possible. So we will take our time.

If you have any questions or if you do not understand one of our questions, please let us know. If you honestly don't know the answer to a question or do not remember it, it is best not to guess. Please give us your best recollection, and it's okay to tell us if you learned information from someone else. Just indicate how you came to know the information. 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 answer to the question.

This interview is unclassified. So if a question calls for any information that you know to be classified, please state this for the record.

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. Mancini. Yes.

Ms. Rother. This also applies to questions posed by congressional staff in an interview.

Do you understand this?

Mr. Mancini. Could you explain a little bit more?

Ms. Rother. So, under oath, you're required to answer questions from Congress truthfully.

Mr. Mancini. Yes.

Ms. Rother. This requirement to answer questions truthfully also applies to questions posed by congressional staff.

Mr. Mancini. Okay.

Ms. Rother. Do you understand that?

Mr. Mancini. Yes. I thought you meant it was putting constraint on your questions. Thank you.

Ms. Rother. Witnesses that knowingly provide false information could be subject to criminal prosecution for perjury or for making false statements.

Do you understand this?

Mr. Mancini. Yes.

Ms. Rother. Is there any reason you're unable to provide truthful answers to today's questions?

Mr. Mancini. No. There is not.

Ms. Rother. Finally, I'd like to note that the content of what we've discussed here today is confidential. We ask that you not speak about what we discussed in this interview to any outside individuals to preserve the integrity of our investigation. We also ask that you not remove any exhibits or other committee documents from the interview.

That's the end of my preamble. Is there anything that my colleagues from the minority would like to add?

Mr. Longani. No.

Ms. Rother. The clock now reads 10:09, and we'll get started with our first hour of questions.

Mr. Luftig. Before the questioning starts, can I just say at the top, as you said, Mr. Mancini is participating today voluntarily. He's

prepared to answer questions based on his personal knowledge about the topics of the interview today. And if at all possible, we'd like to be able to end by 5 p.m., which I understand is the accommodation that's been provided to prior witnesses, understanding that we'll see how fast we can get through the questions.

Ms. Aizcorbe. Thank you.

Mr. Mancini, did you have any other questions before we begin?

Mr. Mancini. No, I did not.

Ms. Aizcorbe. Okay. Thank for joining us today. We'll get started.

EXAMINATION

BY MS. AIZCORBE:

Q What is your current role in OIRA?

A My current role is I am the Deputy Administrator of the Office of Information and Regulatory Affairs.

Q And how long have you been in this role?

A I've been in this role -- I was first in this role in an acting capacity, to be precise, at the beginning of 2013. I believe it may have been the first workday of the year of 2013. And then I was promoted into the position permanently in March of 2013.

Q And what are your primary duties in this role?

A I am the senior career official in the Office of Information and Regulatory Affairs. So a lot of the administrative functions of the office, such as managing the Senior Executive Service branch chiefs in the branch and training and travel, things of an administrative

nature, I'm the one who will sign off and has the day-to-day lead on those. I also provide advice to the Administrator on both administrative and policy issues.

Q Have you held any other positions while at OIRA?

A Yes. From August of 2009 until March of 2013, I was the branch chief for natural -- the Natural Resources and Environment Branch. And before that, I was an economist in what was the then-called the Health, Transportation and General Government Branch, which has since been reorganized a bit.

Q While you were an economist with that branch, what issues did you work on?

A The branch covered -- in addition to the ones that are obvious, health and transportation issues, which is the Department of Health and Human Services, the Department of Transportation -- general government, to the best of my recollection, included the Department of Education, Department of Homeland Security, when that was set up, agencies such as the Social Security Administration and other related agencies. Department of Labor was another large agency that we oversaw in that branch.

Q And while you were branch chief for the Natural Resources Branch, did you participate substantively in those policy issues?

A Yes. So the Natural Resources and Environment Branch covers primarily the Environmental Protection Agency, the Departments of Interior; the natural resource functions of the Department of Commerce, primarily NOAA issues; the Department of Energy; and related

departments and agencies.

Q And just to clarify, when you said earlier that you were acting in your capacity in the beginning of 2013, were you Acting Deputy or Acting Administrator?

A I was Acting Deputy Administrator as the -- in -- starting in January of 2013 through March of 2013. When I was promoted to Deputy Administrator in March of 2013, I was also -- became Acting Administrator for approximately 3 months until Howard Shelanski was confirmed as Administrator.

Q And during that period of 3 months, who did you report to during that time?

A I reported to the Director of the Office of Management and Budget.

Q What is your background or expertise in environmental policy?

A I have a Ph.D. in economics. And it was with a concentration in econometrics, industrial organization. I have more of a health background. I worked in a population center when I was in graduate school, and that includes the issues that the -- that type of center looks at are very similar to the issues that are in the environmental world. I don't have a formal background in environmental law or policy.

Q We understand that the responsibilities within OIRA are divided up by agency or sub agency. Are you aware of how many staff handled the EPA portfolio?

A I can provide with confidence a general average answer. But at any one time, this answer could differ. But it's -- traditionally, the responsibilities for the Environmental Protection Agency are separated by subject area. And so within -- there will be one or more desk officers that handle air issues, typically more than one that -- and those are traditionally separated into stationary sources and mobile sources, both of which are very large regulatory programs. There is traditionally a desk officer that is assigned for a waste -- it's the -- I forget what their name is now, but it used to be OSWER. The definition is the old name for the office in the EPA, Office of Solid Waste and Emergency Response, but they've recently changed their name. There's typically a desk officer that covers chemical and pesticides issues, because that's another office in the EPA. And there's traditionally a desk officer who covers primarily water issues. But over the course of the management, there could be one desk officer who covers multiple parts of those issues, or those could be split. It's based on the demands and the expertise of the individuals available.

Q Does anybody cover the Army Corps within the portfolios in the Natural Resources Branch?

A The Army Corps is traditionally -- it is not unusual for the Army Corps to be covered by the same person who covers other water issues. It could be the case that the Army Corps also considers issues that are similar to Department of Interior, in which case, there could be desk officers. But there also could be desk officers that cover

those separately.

Q Mr. Laity informed the committee that OIRA staff collaborate quite a bit, and often more than one person would work on a rule if it is a larger rule. Is that correct?

A Yes. As a general matter, that's correct.

Q Are you aware of who worked on the Waters of the United States review, or as I'll refer to it, WOTUS review, for OIRA?

A That -- could you be more specific about which stage of the review you're talking about?

Q We're looking at the rulemaking in its entirety. So if it's not possible for you to name everybody who touched it, that's fine. But if you have a sense of who primarily was responsible or had primary duties with respect to OIRA's review, that would be helpful as well.

A Okay. So for OIRA's review of the proposed rule, that was -- I was Deputy Administrator during the entirety of the review of the proposed and final version of the rule. I can't speak -- I actually don't recall when Jim Laity was promoted to permanent branch chief as opposed to acting branch chief. But he was involved in the review of both the proposed and the final rule. And at the proposed rule stage, the desk officer that was assigned to the rule was Courtney Higgins. And at the final rule stage, the desk officer assigned to the rule was Vlad Dorjets.

Q And can you elaborate on what role Stuart Levenbach may have played in the review of the rulemaking?

A I actually don't recall the precise role that Stuart played

in the rulemaking.

Q Is it typical for more than one OIRA staffer to work on the review for a large rule?

A It is. I'll try to be precise here. It is -- it would not be unusual for rules of sufficient impact or magnitude or interest for more than one OIRA staff person to be involved in the review of the rule. There is typically, however, one desk officer assigned to the rule as the desk officer that's assigned in the system for managing review of the rule.

Q Can you explain the process of how an agency engages with OIRA before a proposed rule is submitted for formal review?

A As a general matter, before a proposed rule is submitted for a formal review under Executive Orders 12866 and 13563, there is no one predominant process by which the agencies interact with OIRA. One of the things that most of the -- well, I would say -- I'll never say never, but it is absolutely normal practice and very common, and I can't think of a time when a rulemaking would have come in that wasn't as part of a previous agenda or plan. So the first time that OIRA often interacts with a rule that the -- we'll first become aware of the agency's desire to proceed with the rulemaking as part of the agenda planning process. So under the executive order we receive a draft list of items that the agencies intend to do over the next 12 months and for the longer term. And the desk officers review those items. Then twice per year, under the executive order, those lists are released. And once per year, the list will include a list of higher priority subset

of agencies on that. The longer list is called the unified agenda, and the shorter list is called the plan. So that is often the first time. It's not -- doesn't have to be the first time, but it's often -- that's the major way that OIRA will learn of an agency's desire to do a rulemaking.

Once -- if an agency is prepared to initiate the rulemaking review process under the executive order, there are usually, I'll say, two primary ways. One is for rulemakings that are of perhaps less of a priority or impact, or there are a lot of rulemakings that actually have a kind of a rhythm in a year among the agencies. They will submit them. The rulemakings in which either the agency or OIRA or both would feel that it is more efficient to provide us with a prebriefing of the rule, then that is not an unusual circumstance that we would receive prior to receiving a rule for review, a prebriefing from the agencies, that would give the not -- we wouldn't get the actual rulemaking itself. But we would get a summary: Here are the major parts of rule; here might be the impacts. So those are the two major ways.

Q You mentioned that agencies send over a list in their submissions for the unified agenda and plan. What information is contained in these lists?

A Those lists are available to the public. So -- but --

Q So what you see in the public is what you get in OIRA?

A Yes. We will get -- and I will summarize it. But I will defer to the public submissions if I miss anything. We'd get a summary of the information, which is a paragraph that tries to provide the

public a general overview of the goal and the components of the regulation. But it's still a -- doesn't give the gory details of everything. There would be an estimated date about when estimated next regulatory step, for instance, what the next step in this process is. If it's a proposed rule, they will provide perhaps accurate to the month -- I mean, accurate, but I mean they will provide a month and then the prior month, and it might say, zero, zero. Sometimes they'll provide a day. They will talk about -- there's a -- several boxes that they check, including preliminary discussions of whether --

Q I won't make you go on. I'm sorry to interrupt. Because we know -- I'm going to do this several times probably today, but just to save time, because I don't want to keep your here too late.

A Okay.

Q Let's --

Ms. Rother. Does OIRA receive anything that is not released to the public?

Mr. Mancini. We review the submissions that will be eventually released to the public. So, as a rule, I -- as part of this process, it would not be normal for us to see something that's not released to the public.

Ms. Aizcorbe. Does OIRA weigh in on the substance of any of the summaries that are submitted?

Mr. Mancini. During the review, it is possible. I can't give you a frequency. But it is possible that we will weigh in on either dates or summaries or other information in the agenda entries.

Mr. Mancini. Some reports indicate that the review or the time for review of these submissions can take up to 6 months. Is that at all accurate, in your experience?

Mr. Mancini. So there --

Mr. Luftig. Can you clarify what reports you're referring to?

Mr. Mancini. The agenda?

BY MS. AIZCORBE:

Q This is coming from an ACUS report. It was a general statement that review of submissions can spend up to 6 months. But we're trying to get a sense of your experience in how long OIRA's review takes.

A It is -- it is typical that agencies will submit draft agenda entries to us as part of the process. I would say that 6 months would not be a typical time between when we would receive something for review and when we would finish review. The data calls that we give to the agencies are available to the public on our Web site. And so I would -- if I can get a look at the difference between the due date of the data call and the release of the plan, then that would be a good estimate of how long it usually takes us to review the plans and agenda entries.

Q What kind of information does OIRA consider when it's making its significance determination?

A So, to clarify this, the significance determination of a rulemaking under the executive order, that would -- basically the consequence of a significance determination is whether it comes in for

formal review under the executive order.

Q Correct.

A So there are -- there are criteria under the executive order that are -- that we follow when making those determinations, and those include -- I'll summarize since you probably know them --

Q It's okay.

A Okay.

Q Why don't we do it this way? If there's anything that is not -- if there's anything that OIRA considers outside of what's already written in the statute or publicly available, you can say there is not any additional criteria that we consider, or we just consider what is --

A Yes.

Q -- set forth in the executive order and other --

A We follow the criteria of the executive order when making significance determinations.

Q Mr. Laity informed us the agency briefings that you just referred to earlier before a rule is submitted for OIRA review can be fairly detailed, and OIRA often learns a lot about the rule through them. You mentioned that certain portions of the rule may be shared but not the text. I just want to clarify. Is that correct?

A To clarify, I didn't -- I did not mean to imply that portions of the rule were shared. I would actually say that, in general, portions of the rulemaking are not shared during those. That was what I meant to say.

Q So it would be more along the lines of a summarization?

A Yes. It would be a summary of the major provisions. And maybe -- and an estimate of impacts are two typical things that would be part of the subject of that.

Q Are communications before this period of formal review with agencies documented in any way?

A To clarify, OIRA does not docket the interactions of these briefings before formal review. I can't speak to whether or not agencies have different rules than we do and may place some of these materials in the docket. I just don't have an insight into that.

Q Can you explain how OIRA engages with an agency about when a rule should be submitted for review, especially in the case of a rulemaking that has undergone several different forms or iterations such as WOTUS?

A As a general matter, we will have discussions with the agencies about when they would like to submit a rule for review. That will -- those discussions will generate -- a typical discussion, as a general matter, will -- might revolve often around workload and potential review time and what other priorities the agencies have. For instance, we do have occasional discussions with the agencies for planning purposes. And as a general matter, many agencies do this and say: Here's our general cadence of rulemakings. And at that point, we would have a discussion about what might be a schedule for when they submit it for review.

Q When a rule comes in, Mr. Laity explained that it usually

contains three parts: the regulatory text, the rule's preamble, and the economic analysis. Is that generally your understanding as well?

A So, to clarify, under the executive order, economically significant rulemakings are required to have what's called a regulatory impact analysis. So, for a rulemaking that is not economically significant, it is not required. Now, it is often the case that an agency, if they're aware of certain economic impacts, then the executive order still applies. So a typical rulemaking will have the preamble and regulatory text. It's very common. But an analysis would depend more -- whether they provide a separate analysis would depend more on the circumstances of the rule.

Q In the case of WOTUS, it would have been economically significant. Is that accurate?

A Yes. OIRA designated this rulemaking as economically significant.

Q What happens if a rule is sent to OIRA without one of these three components or two components, depending on the circumstances, does OIRA proceed with its review, or does it wait until the agency submits a complete package?

A As a general matter, we like to get complete packages. If an agency is working on a rulemaking and has an analysis complete, we'd like that analysis to be submitted with the rulemaking for review.

Q But it doesn't necessarily stop your review at that point?

A We would -- it would depend on the circumstances under which the review needs to be commenced. We, as a policy, require regulatory

impact analyses to be produced for economically significant rules. So the fact that one analysis isn't available at the time we start review could potentially be a subject that we discuss with the agency.

Q Who at OIRA would make the decision whether to proceed or whether they have a sufficient amount of information to proceed?

A It would depend on the circumstances of the review.

Q At what point would you say -- let me put it this way: How far along in the drafting process do agencies typically contact OIRA to initiate their discussions? Do you find that agencies have typically begun drafting of rulemaking before they make their submissions for the agenda to OIRA, or can it be either case?

A As a general matter, I am -- I don't have much visibility into that process. As a general matter, agencies -- if there's an agenda entry with a date, as a general matter, I believe that most agencies will have begun producing that rulemaking. But if I can provide you -- I can't really provide you a frequency.

Q Who manages OIRA's review of the unified agenda submissions?

A The -- it is a partnership between OIRA and our General Services Administration, who actually does the back office support. But, in general, the branch chiefs manage the review of the twice yearly unified agenda with the -- what's typical is that we would assign a desk officer as a more what we call on the inside general contractor to do the administrative coordination across all of OIRA. And that would be -- they would probably do a few cycles, and then someone else

would be -- would do it.

Q Approximately how many rulemakings would you say you have reviewed or been involved with during your time at OIRA? I know that's a big question.

A I could provide a fairly precise answer. We do -- I would say very rough range is about 400 to 600 transactions. So that's -- rulemakings are typically a proposed and a final rule. So multiply that by the 13-1/2 years I believe I've been there, and that's a lot of rules.

Q And by "transactions," with proposed and final, you're saying -- when you say 400 to 600, that's for one rulemaking or for each proposal --

A No. That's for each transaction. So that would -- it's not quite -- because there are other circumstances that we'd review things -- so it's not -- you can't quite divide that by two to come up with the number of rules we review. But that's a rough rule. Each transaction is something that you can just pull right off of the Web site. So I would just -- more precise information about that versus rulemakings.

Q Have you reviewed or supervised review of other joint rulemakings besides the Waters of the United States?

A Yes.

Q Approximately how many of those?

A There are relatively few joint rulemakings. I can really only think of one other joint rulemaking that is of this nature. But

I am confident that there have been other joint rulemakings. I just can't -- but it is -- it is a relatively unusual circumstance.

Q What is the one joint rulemaking you can recall?

A Actually, it's a series of rulemakings, but the subject is the fuel economy standards that both the Department of Transportation's NHTSA, National Highway Traffic Safety Administration, and EPA's Mobile Sources have joint regulatory authority over those programs. So it actually has been several rulemakings, but for different model years and different types of vehicles. The major difference is heavy duty, which is just what you think -- trucks, busses, things, some of those big pickup trucks -- and then light duty, small cars.

Q Do you recall reviewing or having supervised the compensatory mitigation joint rulemaking?

A Could you be more precise?

Q Sure. That's another joint rulemaking between the Army Corps and EPA and during your time as branch chief of the national -- Natural Resources Branch. I was just curious if you recall supervising that rulemaking as well.

A Well, I recall the existence of the rulemaking. But I don't recall the details of the supervision of that rulemaking.

Q When did you first become involved with the development of the WOTUS guidance or rule?

A I became involved during my tenure as branch chief. You were asking about both the guidance and the rule -- with the development of the guidance. And some -- I can't be more precise than sometime

around 2010. I am confident that that's the general year that I became involved.

Q And you said, at that time, you recall the stage of the rulemaking process being when it was in guidance form. Is that correct?

A Yes. That was the development of the guidance.

Q When you were serving as Acting Deputy Administrator, do you recall the stage of the WOTUS rule at that time?

A When I was Acting Deputy Administrator at the beginning of 2013, I believe that the final guidance was under formal OIRA review at the time that I was -- became Acting Deputy Administrator.

Q Can you generally characterize the Administrator's involvement or role in OIRA's review of rulemakings?

A As a general matter, the OIRA Administrator will be informed of most rulemakings that are under review. Maybe it is best to go through a process example. I apologize if it's a little bit lengthy. The typical cadence of a rulemaking is the Administrator will be generally briefed on rulemakings every couple of weeks by a branch. It's that process by which it's -- the OIRA staff and management and political leadership will hone and ask questions and determine which rulemakings have to have further discussions under the executive order. And at that point, it's very issue specific. The OIRA Administrator will decide whether or not to become involved in a particular issue.

Q And for larger rulemakings, such as WOTUS, is it typical

for the Administrator to be more involved?

A It is case specific. It is more likely for the Administrator to be more involved in a rulemaking that is of the priority and the interest of this. But it really depends on whether there is an issue that is -- the Administrator decides. It's really up to the Administrator. We make recommendations whether or not to engage in a particular issue in a rulemaking.

Q After Administrator Shelanski came on board, did he make any changes to the rule review process to your recollection?

A By "changes," he did not change any procedure by which we review rules under the executive order.

Q No informal practices that you recognize in your rule review?

A Not that I can recall.

Q Who in OIRA communicates with other offices within the Executive Office of the President during an ongoing rulemaking?

A It is typical for all levels of OIRA to have some level of communication with other components of the EOP, which is Executive Office of the President. When we review -- distribute a rule for review under the executive order, the desk officer will submit it to other parts of the Executive Office of the President. And then, again, depending -- it's very issue specific -- depending on whether they have a particular interest in a rule, OIRA's management could also be communicating with other parts.

Q What role do these offices play in the rulemaking process

generally?

A So they typically have an interest, either some parts of the EOP, such as the Council on Environmental Quality or the United States Trade Representative, have formal interests to look for impacts of the rules, respectively under NEPA and under World Trade Organization obligations, and there are also the councils that are the policy councils of the President, the National Economic Council, which have priorities established by the administration, and they are offices that are interested in discharging those priorities through regulation and will review rulemakings to see whether they're consistent with those priorities.

[10:39 a.m.]

BY MS. AIZCORBE:

Q When you say that offices such as CEQ and the trade office have formal interests, do you mean by "formal" that they are documented in an Executive order or some other document?

A I don't have -- well, yes. Sometimes they will be. I don't know if the regulatory review responsibilities are documented, but for -- let me use the USTR as an example.

Under the World Trade Organization, we have certain responsibilities to not put in place technical barriers to trade. There is a process by which USTR has -- I don't know if it is through law, through ratification of the treaty, or through regulation, but they do have some formal obligation, the government, to review policies to see if they constitute or could be interpreted as constituting technical barriers to trade. And if a particular regulation is a concern, then they would be part of the review process and that concern would be addressed.

And in CEQ's case, the national NEPA -- I think means National Environmental Policy Act -- they have formal responsibility for issuing guidance under the National Environmental Policy Act and to see whether regulations -- I am not sure what their review authority is, but statute does establish CEQ as having that responsibility.

Q So, in the case of a rule like WOTUS, where we know there was collaboration with CEQ -- we know at least they organized one meeting -- would you say that there are ongoing discussions with that

office just to keep them apprised of the status of the rule? Or do you engage in more substantive communications with the office as the rulemaking is going on?

Mr. Luftig. Are you asking about his engagement or anyone's engagement?

Ms. Aizcorbe. Anyone within OIRA. I am asking generally for OIRA, unless I otherwise specify.

Mr. Mancini. Okay.

As a general matter, CEQ will be distributed the rule and has an opportunity to provide comments on rulemakings. But the specific dynamics of any particular rulemaking really depends on their interest in it. One of OIRA's functions under the Executive order is to facilitate and manage interagency coordination, including other components of the EOP.

BY MS. AIZCORBE:

Q And so, with respect to the WOTUS rulemaking, do you know how frequently the Office of Information and Regulatory Affairs engaged with CEQ?

A I believe CEQ was an active participant in the review of the rulemakings, these Clean Water Act rulemakings, under the Executive order.

Q Are you aware of whether they provided substantive recommendations regarding the rule?

A I am aware that they provided some substantive comments. But, to be precise, I don't recall whether the nature of any particular

recommendations that they made -- which I am interpreting as recommendations for things to emphasize or language or something that would have changed the rulemaking -- I don't recall whether they provided such recommendations.

Q When you served as Acting Administrator, you mentioned that you reported directly to the Director of OMB.

A Yes.

Q Did you communicate with other offices within the EOP, as well, during that time?

A As a general matter, yes, I did.

Q And what are the nature of those types of conversations?

A I would say that they were -- again, as a general matter, they can be on any number of topics. It really depends on the interests of the particular part of the EOP that is reviewing the rulemaking. During that time, which was approximately 3 months, I really can't recall the specifics of any issue that came up or would be able to say with confidence what happened during that time. But, in general, it could be communications on rulemakings for which they have an interest.

Q Do you recall during that time whether any of your discussions involved the WOTUS rulemaking?

A I don't recall.

Q To your recollection, at any time during the rulemaking, did you receive any instruction with respect to how to supervise or conduct review of the rule?

A I don't recall receiving instruction of that nature.

Q At any time during the rulemaking, were you aware of or receive any instruction with respect to how quickly OIRA should complete its review?

A During the review of the proposed and final rulemaking, we do have discussions of -- once we are in the position to potentially conclude review, those discussions take place. I would not characterize them as receiving instruction, but I want to be very precise. We do have discussions, including potentially discussions with other parts of the EOP as a general matter, of when a rulemaking will be concluded and released.

Q And who would generally provide input from other offices within EOP? Is it similar to what we have been discussing, if there is a related policy jurisdiction, that that office might weigh in on the timeliness?

A It could be for any number of reasons. As a general matter, there could be a statutory or judicial deadline, which we take very seriously. There could be other particular reasons why an agency would want to release a rulemaking at a particular time. That could be for any number of reasons. And those recommendations and reasons need to be weighed against whether or not we are in a position to conclude review under the Executive order.

Q Did any offices within EOP weigh in in the case of WOTUS, to your recollection?

A For the final rule? I don't recall any specific recommendations on timing for the proposed rule. For the final rule,

I do believe that there was discussion internally about the timing of the conclusion of the review of the final rule.

Q When you say, "internally," is that within EOP or within OIRA?

A Both within OIRA and within EOP.

Q Were you aware of or receive any instruction that OIRA should stand down on any concerns regarding the rulemaking or otherwise ensure its successful passage through the review process?

A So, before I answer that, I wanted to say that the phrases that are in the question, like "standing down" and "ordered," it is not the way that we would characterize how review works.

Q At any point, you can clarify --

A Okay. I just wanted to make sure that you understood that we consider review a process and that sometimes the process generates recommendations, but I would say the process doesn't generate, as a general matter, orders of the nature that you are talking about in this question.

But, that said, I am not aware of anything that I would characterize as an order for OIRA to not discharge its responsibilities under the Executive order to provide recommendations for this review.

Q How did you brief Mr. Shelanski once he joined the office about this rulemaking?

A To the best of my recollection, we briefed Administrator Shelanski once he was confirmed, because before he was confirmed he was not a part of the -- I don't believe he was -- I am not the lawyer,

but we didn't have substantive conversations before he was confirmed for a number of reasons.

Once he was confirmed, we had a discussion of a number of issues. I am confident that we discussed the nature of this review, which, as I mentioned, to the best of my recollection, the guidance was under review at the time. I don't have specific recollections, however, of the nature of those discussions. I am confident they took place, though.

Q Do you recall expressing any concerns or reservations about the development of the guidance or how it had progressed to that point?

A I don't recall any specific recommendations as part of his review, but there were discussions of the nature of the guidance review during that time after he was confirmed as Administrator.

Q Mr. Laity informed the committee that OIRA sometimes has discussions with agencies about when they're going to submit their rules and a timeframe for OIRA's review and that agencies sometimes ask for expedited review of a rule.

A Yes.

Q Are you aware of any discussions or requests to expedite review of the WOTUS rule?

A I will answer it in terms of the proposed and the final rule. In the proposed rule, I am aware of no discussions about the length of the proposed rule review.

For the final rule, as I mentioned before, there were discussions about the timing of when we might conclude review, and some of those

discussions included concluding review before our 90 days in the Executive order, which is a normative guideline. So, in that nature, there were discussions that included review that would be fewer than 90 days, which we commonly call expedited review.

Q Just to clarify so I understand --

A Sorry. I'm being a little complicated.

Q No, no, no, I understand. I just want to make sure I clarify. You referred to your time period of 90 days as expedited review?

A No.

Q Okay.

A No. I referred to -- to be precise, any discussion that we have that involves potentially concluding review in less than 90 days, we would call expedited review. Ninety days we would call a normal review. So I just wanted to be very precise about my response there.

Q As a branch manager, how would you generally become aware of the status of each rule's review within your branch?

A So, as a general matter, during my time as the Natural Resources and Environment branch chief, we have probably daily discussions about rulemakings, where I would provide guidance, maybe even read some rules. So branch chiefs are typically aware of almost every rulemaking that is under review of the branch. At least that is my personal experience, that was my job, to be aware of everything in the branch.

Q And just to clarify -- I apologize if we already covered this -- when you were the branch chief of the Natural Resources branch, what stage of the rulemaking or guidance was WOTUS in?

A So, to the best of my recollection, the development of the guidance happened primarily when I was a branch chief. Again, I mentioned before, to the best of my recollection -- I am fairly confident of this -- that I became Acting Deputy Administrator and Deputy Administrator during the review of the final guidance. And so, during the review of the proposed or final rule, I was Deputy Administrator.

Q And, at that time, would you say that Mr. Laity provided regular updates to you about his review of the guidance?

A Yes.

Q In your current capacity, do you receive status updates on review of the individual rules OIRA is reviewing, besides these general branch updates that are provided to the Administrator?

A As a general matter, I also depend on those branch updates to be informed of the rulemakings under review.

Q Mr. Laity informed the committee that between the two periods of review of the proposed rule and final rule that the EPA and Army provided OIRA with a high-level overview briefing of what would be in the final rule. Do you recall whether you were present at this briefing?

A I'm sorry. I didn't quite catch the whole thing. That was --

Q That is fine.

A -- my fault. Let me clarify. Between the proposed and the final rule development, we received a briefing from the Corps and the EPA, and I was present at that briefing.

Q Do you recall what was discussed?

A I think it followed very much the general principles that I laid down when I was describing the general process of a prebriefing. I believe it discussed several differences between the proposed and the final rule in a relatively detailed but not -- we did not look at regulatory language, to the best of my recollection. But they described a few policies that had changed, oh, plus the policies that didn't change. It seemed to me, I will say, a typical review of that nature.

Q And, to be clear, do you recall whether this briefing took place after the public comment period had closed?

A I don't recall when the public comment period closed relative to this briefing.

Q You don't recall the date of the briefing, do you?

A No, I don't.

Q Okay. Do you recall whether you discussed the public comments or comments coming out of the outreach meetings that had been received?

A I believe we did discuss those.

Q Mr. Laity informed the committee that a decision was made above his level that it would be better to address concerns about WOTUS

in public through a rulemaking rather than guidance, so the draft final guidance was withdrawn when the proposed rule was submitted.

Do you know who suggested withdrawing the guidance?

A I don't recall precisely who suggested doing that.

Q Do you recall how the decision arose?

A I believe there were discussions at a high level of the EPA and other interested components in OIRA about that change.

Q And so, when Mr. Laity was referring to above his level, he could have been referring to somebody within OIRA at a high level. Is that correct? You --

A Yes.

Q -- just said at a high level within OIRA, so I want to clarify what that meant.

A Yes, but let me be precise. I don't recall the specifics of that discussion, with the following exception: that I'm confident that it was a discussion with EOP leadership in some version. I just don't recall at what level it took place, from our point of view.

Q Do you recall whether the Corps was also involved in that discussion?

A I don't recall being part of any discussions with the Corps about this issue, but I'm confident the Corps was part of those discussions. We received a briefing on the rulemaking from both the Corps and EPA. So, by that nature, yes, I am confident the Corps was part of those discussions.

Q We touched a little bit on timelines earlier. We

understand the final rule was with OIRA for 6 weeks. Is that typical, in your estimation, for a rule of this size?

Mr. Luftig. The witness hasn't testified to the length that it was under review.

So answer it to the best of your ability.

Mr. Mancini. Okay.

So, to the best of my ability, the length of review, that sounds to me about what I would approximate the length of the review of the final rule. I can't really speak to whether or not that is the typical nature of this, but I will say that I am aware of other rulemakings that would be characterized as as big a priority as this rulemaking taking that long for a final rule review.

BY MS. AIZCORBE:

Q Do you recall whether any would take longer than 6 weeks?

A I'm confident that rules would take longer than 6 weeks, yes.

Q The comment period for the rule was extended two times, one extension for 3 months and another for just under an additional month. Is this uncommon for a rule of this size and complexity, in your experience?

A As a general matter, it is -- I am aware of several instances in which a rulemaking that the agency feels is sufficiently complex and would benefit from additional public comment, where comment periods are reopened. I would not characterize that as a highly unusual circumstance.

Q Does OIRA weigh in on whether extensions are granted or not, or is that an agency decision?

A As a general matter, we are made aware of the agency's intent on whether or not to extend the comment period, at least in my experience, but that is typically an agency decision.

Q Does OIRA evaluate how an agency addresses public comments in a final rule?

A Yes.

Q How so?

A Part of the charge that we feel under Executive order, a major part of the review of the final rule is -- and this is also a statutory requirement under the Administrative Procedures Act -- that agencies should be responsive to public comment.

As a general matter, that is often a subject of review. And we can typically ask agencies. We will read the response to comments sections sometimes that are very voluminous. There are many ways in which we would discharge that responsibility.

Q And would you characterize OIRA's review in this process as ensuring an agency has appropriately considered and responded to public comments? Or would you say that you more review the comments to get a sense of what they're saying?

A I can't speak to the frequency with which a desk officer would actually review public comments. That can happen during final review. We are reviewing both the public comments to see just whether the agency was responsive, but it is possible that we would review

public comments to inform our review under the Executive order principles. What I mean by that is we would review particular policies that were commented on to take a deeper dive into whether they were responsive to those particular policies.

Q And when you're comparing the public comments to the version of the rule at that stage, it would be the draft final rule? Is that accurate?

A Yes, this would be the draft final rule that has been submitted for review under Executive Order 12866. And so, as part of that interagency review under the Executive order, the responsiveness and the nature of the public comments can and is a subject of that review.

Q And you said that the desk officer would be the one conducting that review. Is that correct?

A As a general matter, the desk officer will manage the interagency review and be the lead on the substantive review, would be reading the comments and providing their take on the rule.

A rule that is economically significant also will have an economist formally assigned to the rule. We have three economists that are -- their title is actually "Economist." That's what I was in the Health, Transportation, and General Government branch. And for an economically significant rule, our system will assign that to one economist, and they will also do a very detailed review of the rule.

Q Are you aware of who conducted this review with respect to WOTUS?

A As I mentioned before, the desk officers for the proposed version of the rule was Courtney Higgins and the final rule was Vlad Dorjets. Jim Laity was a desk officer for a long time and was the desk officer for the water office for a long time, so he played a key role in the review of the proposed and final rule.

Q And if you don't know the answer to this question, that's fine, but do you know whether Jim Laity was the branch chief at the time when Ms. Higgins and Mr. Dorjets were desk officers on the rule?

A When I was promoted to permanent Deputy Administrator, he was assigned to the acting branch chief position. I don't recall the date that he was promoted to the permanent branch chief in relation to these reviews.

Ms. Rother. You said that an economist is assigned to the review?

Mr. Mancini. Yes.

Ms. Rother. Do you recall who the economist was that was assigned to the WOTUS review?

Mr. Mancini. It was Amanda Thomas.

BY MS. AIZCORBE:

Q And the economist works with the desk officer who is conducting this review? Or do they really do their own independent review of how the agency responds to comments?

A For how the agency responds to comments, that is -- typically, the desk officer will take the lead on that unless the comments speak to the economic analysis. I would say, as a general matter, there are no bright lines between the responsibilities of the

two; they will work very much as a team to review the rule.

Q So, to clarify, when you said that the economist will conduct a review, that's primarily of the economic analysis and underlying analysis that is submitted by the agency. Is that correct?

A So, as a general matter, the economist is assigned a review of rules that are economically significant, so they would be the lead on the review of the regulatory impact analysis. But when I mentioned that they work as a team and that there is no rule against the desk officers or economists -- I mean, they should be working together, ideally, to inform, because our responsibility under the Executive order is both the quality of the analysis and whether the analysis is informing the decision. And, by necessity, that is a team approach between an economist and a desk officer and other folks.

Q I'm going to ask you a series of questions today that have some level of detail regarding the rule itself.

A Okay.

Q At any point, if you do not know, we can say "do not know" and move forward.

A Yes. I'm --

Q So don't feel bad about that.

A -- well aware of that.

Q Okay.

Were you aware of the agency points of contact on this rulemaking?

A Yes.

Q Had you ever worked with Craig Schmauder on rulemakings

during your time with the Natural Resources Division?

A I don't remember or I could not tell you where that person is. So I can't say that I haven't worked with him, but I have no recollection of working with that person.

Q Could you name any other rules you've worked on or supervised where the designated agency point of contact was an attorney working with the rulemaking agency's office of general counsel?

A As a general matter, we leave organizational positions of that nature to the agencies. The regulatory seconds in some of the agencies are part of the general counsel's office. So, providing that description, the answer is yes.

Q And what do you mean by "regulatory seconds"?

A So I'm not sure whether it's an Executive order responsibility, but the way that the agencies are organized, they have what are called -- it's typically a senior career person that's called the regulatory second of the agency, and they are responsible for, I would say, the day-to-day interaction between the agency and OIRA. And sometimes that interaction involves discussions of a particular rulemaking.

Q And you're saying, to clarify, that in some cases you have found that that individual would be a part of the agency's general counsel's office. Is that correct?

A Yes.

Q And, in your experience, do these regulatory seconds in their daily communications on the rulemaking participate substantively

in the rulemaking development, drafting, review? Or is it more of a coordination with the regulatory staff of the agency?

A I will take those two in turn. In my experience, this is my personal experience, that it's fairly widespread but not universal within OIRA. It is more typically a coordination role. But the reason I started this answer is that there could be a time when -- and I'm aware definitively of a few times where there are substantive discussions with those regulatory seconds.

Q Would those discussions typically be accompanied by anybody else with regulatory experience or substantive policy experience on the rule from the agency? Or are you saying those conversations would happen solely with the point of contact?

A In my experience, as a general matter, there would be -- the agency would include every -- sometimes we call them subject-matter experts or policy leads would be involved in those conversations.

Q In your experience, getting back to the public comments, would you say it is your expectation that agencies complete review of substantive public comments before sending the draft final rule to OIRA for review?

A As a general matter, our expectation would be for them to be substantively comfortable with the response to the public comments. There are cases in which the agency may be time-constrained, such as a court order. And, in those cases, we would discuss with the agency what level they have responded to the public comments.

Q And you said that the agency would be comfortable with their

response to the public comments. I was more asking about whether an agency had completed review of the substantive comments, not even getting into their response to those comments.

Would you expect that their review of all substantive comments would be completed by the time that the draft final rule is submitted to OIRA?

A So we are typically not involved in an agency's review of the public comments, so we would not have insight into that. So I actually am not in a position to say whether the agency has a difference between reviewing and responding, for instance.

I was interpreting that as saying our responsibility under the Executive order would be to review the rule to see whether they have adequately responded to public comments. And that would be the nature of our interactions with the agency.

Now, that is a little bit different than saying "completed review." I just don't have an insight into how agencies would decide whether they have completed review or not.

Q Would you say that, in order to evaluate whether an agency has appropriately or adequately responded, that they would have had to conduct a majority, if not the entirety, of review of the substantive comments on the rule?

A Like I said, I am just trying to be precise here. We want agencies to be responsive to public comments, but I don't have insight into the agency review process of those public comments. So if the answer is -- you know, I can just say what we care about. And if the

agency is not responsive because they haven't reviewed that set of public comments yet, that could be something that we could talk to the agency about.

Q Would you consider it to be nonresponsive if the agency hadn't completed its review by that point?

A It could be potentially nonresponsive if the agency -- if we say, for instance, there is a particular policy that we want to interact on during the review of the final rule and they say, "We haven't read those comments yet." As a general matter, that could be a subject of the review.

Q One last question. Are you saying generally OIRA, then, doesn't inquire with an agency as to whether it has completed its review? Is that correct?

A What I'm saying is that it's an agency responsibility. They know the responsibility, they know the questions we'll ask under the Executive order. And we would not inquire as a matter of course, in my experience, like, "Is there a stage in your development process where you say you've completed comments?"

What we would inquire about is a particular policy matter under the Executive order. So, within the context of that policy matter, we would inquire of the agencies. And if the answer, as I mentioned before, is that we haven't read those comments yet, that could be a potential subject of discussion.

Ms. Aizcorbe. All right. Thank you. We can go off the record.

[Recess.]

[11:17 a.m.]

Mr. Longani. Let's go back on the record.

EXAMINATION

BY MR. LONGANI:

Q And good morning, Mr. Mancini. Like my majority counterparts, we're going to ask you a series of questions. I don't really expect this to actually go an hour. But forgive me if I'm wrong. I can be verbose.

If any of my questions are unclear in any way, shape, or form, please feel free to just tell me they're unclear, and I will try to rephrase them to make them clearer.

If you don't understand a question or you don't know the answer to the question, like as my majority counterpart said, please feel to say you don't know the answer. Just because I ask the question, it doesn't mean I expect that you know the answer. Okay?

A Yes.

Q Let's go ahead and get started. Mr. Mancini, my majority counterparts went over with you a little bit of your background. And I want to go back to that a little bit.

A Sure.

Q Okay. Now, my understanding is that you were branch chief of the Natural Resources Division in 2010 and 2011. Is that correct?

A Yes. Natural Resources and Environment Branch at OIRA.

Q Branch. Thank you.

A Division means kind of something different.

Q No. Fair enough. I appreciate the correction. The National Resources Branch. And you were promoted in January of 2013, correct?

A I was actually asked to be acting Deputy Administrator in January of 2013. But my permanent position at the time was still the branch chief.

Q And in the 3 months between January and March of 2013, when you went from acting to permanent, you reported directly to the OMB director, correct?

A So as of when I was acting Deputy Administrator, we had an acting administrator at the time. And I reported to him.

Q Oh, okay.

A Yes.

Q At what point -- was there a point at which you reported directly to the OMB director?

A Yes. When I was assigned as permanent Deputy Administrator, and it was a fairly unusual set of circumstances where I became acting administrator at the same time that I was made permanent Deputy Administrator --

Q Okay.

A -- at that point, I reported to the OMB director.

Q Okay. And what time period did that entail?

A It was -- I should know the exact day, but it was March of 2013 through June of 2013. I can say substantively it was when Administrator Shelanski was confirmed in the Senate. I also don't

remember the exact day of that. But I believe it was June -- sometime in June of 2013.

Q Okay. Great. Okay. Can you describe the difference in terms of your day-to-day duties between when you were branch chief and when you were promoted to Deputy Administrator?

A Yes. So a branch chief -- a typical branch in OIRA is approximately eight professionals. And the branches are in charge of the day-to-day review of regulations under executive order, also for information collections under the Paperwork Reduction Act, but we won't get into that today. The -- so the typical branch chief, to my experience, is that they are helping to manage the day-to-day operations of the review and honing -- reading rules themselves, honing positions on particular rules, making recommendations to the OIRA leadership. Which by, I mean, that it's typically the administrator, and Deputy Administrator. There are two other political appointees in OIRA, which is the counselor and the associate administrator.

And so that -- so once I became acting deputy and permanent Deputy Administrator, you know, which is sheer numbers at OIRA's approximately 48 professionals. And the -- so it's much more of a -- I move away from the day-to-day management of a particular rulemaking. So I would be, like I said, as part of the previous set of questions, I would be -- depending upon the periodic updates from the branches as the -- as the Administrator and other OIRA leadership until the -- until the acting branch chief, so we assign an acting branch chief who was Jim Laity who became the permanent branch chief. You know, there's also

that the acting branch chief will probably provide, as a general matter, look for more guidance from the permanent leadership and a permanent branch chief, just as the nature of government works that way.

Q And in the last hour, you said as Deputy Administrator, your updates would normally come in the form of these biweekly briefings. Is that accurate?

A Yes. As a general matter, yes.

Q Okay. And those biweekly meetings would also be the primary mechanism by which the Administrator would receive information about rules that were pending. Is that correct?

A As a general matter, yes.

Q Okay. And it was at those meetings that OIRA would, in essence, determine how much attention a specific rule necessitated from the administration?

A Yes. We would -- so there -- we typically, like I said, we were 400 to 600 items per year of regulation. Those -- there would be some variation on that. The way in which the -- so those meetings are typical, and would be to decide which meetings need -- which rulemakings need more attention. And if we decide a certain number of these rulemakings need more attention, the Administrator said, I want a deeper dive into these things, then the Administrator, or other parts of OIRA leadership would ask for a separate meeting on that particular issue.

Q Now, in terms of your responsibilities in your current position --

A Yes.

Q -- do you have final decision-making authority to conclude the review of rules through the OIRA review process?

A I do not have independent decision-making authority to do that.

Q Okay. And who would make that final decision?

A It's --

Q If there is a specific person?

A Yeah. Under the executive order, these responsibilities have been assigned to the Administrator. It is typically not -- there's no signoff of the Administrator on each particular rule. It is more of a general discussion that we are prepared to conclude a review. So there's -- but the executive order assigns the OIRA Administrator certain responsibilities, so, in that nature, the OIRA Administrator has the authority to sign off on rulemaking.

Q Okay. But as you were just describing, it seems to be more of a collaborative effort in terms of whether or not the rule is going to be concluded or perhaps even returned to the agency. Is that a fair description?

A So for concluding a rule, which is the vast majority of time, that is a fair description. For a -- you also asked about a return of a rule. A return of a rule would have a more -- more involved procedure. It is a relatively rare instance that involves a public statement. And so I would characterize that as more formal than a typical review.

Q Okay. Mr. Mancini, I want to go through, in a little more detail, the role of OIRA in reviewing agency rules, and specifically, the process under which that rulemaking takes place, or rule review takes place.

Is it fair to say that OIRA review, formal review at least, is triggered by submission of a rule by an agency?

A Yes.

Q Okay. And I know my majority counterparts had talked to you a little bit about briefings that take place -- informal briefings that take place prior to rule submission. Do you remember that?

A Yes.

Q And is it unusual for agencies to approach OIRA with an informal briefing prior to submitting a proposed rule?

A It is not unusual for a rule of this nature. I would say it is typical for a rule of this nature to have some sort of prebrief before we commence formal review. And to clarify that, that prebrief is typically done at the initiation of the agency, who said we are going to prebrief. But it could be at the initiation of OIRA as well. But it is a typical step in the rulemaking process.

Q And so for a complex joint rule, such as WOTUS, it would almost be expected that such a briefing would take place prior to submission of the proposed rule. Is that accurate?

A So as I mentioned before, these joint rulemakings are relatively unusual. But with that caveat, rulemakings of this general nature that have this level of policy interest, it is -- I would

actually -- I think that's a fair characterization to say it would be expected that the agency or OIRA would initiate a prebriefing review.

Q Okay. And it's fair to say that OIRA's review is governed by the executive orders that you previously mentioned, 12866 and 13563. Is that correct?

A Yes.

Q And would you describe those as setting forth guiding principles for OIRA?

A Yes. That's how I would describe those.

Q Okay.

A And for the agencies as well. The actual executive order establishes responsibilities for the agencies and OIRA. And that's actually fairly formalized in the executive order.

Q And one of those principles is that it takes -- or OIRA would like to complete both a proposed rule -- the review of the rule, whether it be at the proposed stage or the final stage within 90 days. Is that correct?

A That is correct. We call that a -- a typical phrase we use is a normative deadline. It's under the executive order, and that is our goal to do that.

Q And is it fair to say there are times, for a variety of reasons, that you simply cannot meet that goal?

A Yes. It is fair to say that.

Q Okay. And what are the circumstances under which you might not be able to complete review within 90 days?

A So I will say, as a general matter, the -- if the rulemaking is complex, if it contains a lot of policy decisions, if there is a certain issue that is brought up under the executive order, it is -- those are often circumstances under which OIRA and the agencies could decide to take longer than 90 days for the review of the rule.

And there could also be issues of an interagency nature. As I mentioned before, a big responsibility of OIRA is to manage interagency review. So as a general matter, if an agency is expressing serious concern about a rule or has brought up issues that need to be resolved, and that resolution takes longer than 90 days, then it is -- you know, we are -- it's still our goal to do 90 days, but we also are to discharge our responsibilities under the executive order in other ways. And if it takes longer than 90 days to do it, then we may take that.

Q Is it fair to say that you will not compromise, or that your instructions to your staff, are not to compromise on the principles embodied in Executive Orders 12866 and 13563 in order to meet this 90-day deadline?

A So the executive order establishes principles, like I said, for the agencies and OIRA. And if the -- we are close to 90 days for review, and we feel there are significant issues to resolve to make the rulemaking more consistent with the principles of the executive order, it depends on the -- it really depends on the seriousness of the principles. Like I said, the 90 days is established by the executive order as well. It would be -- we would hope to avoid tradeoffs. But it is -- it is a -- something that we can and do -- will

do, is to say, We need to take longer than 90 days in order to resolve this --

Q Okay.

A -- particular principle, as a general matter.

Q Okay. And I think you said in terms of number of rules that OIRA reviews annually, I think you said transactions. Your answer to my majority counterparts was in terms of transactions. Is that right?

A Yes.

Q And I think you said 400 to 600. Is my memory right on that?

A That's what I said.

Q Okay. Great.

A And just to be precise, that is a very rough, best-of-my-recollection-type estimate. Those are publicly available if you want more precise estimates under -- go to reginfo.gov.

Q And those transactions, just to be clear, that includes but -- it's includes but is not limited to proposed rules as well as final rule review. Is that fair to say?

A Yes. That's fair to say.

Q But the bulk of those transactions would be reviews of proposed rules and final rules. Is that also fair to say?

A Yes.

Q Okay. And one other issue, and I'm sorry, I'm to be going back to this, but --

A No. That's okay.

Q But the informal meetings that take place oftentimes

on -- for complex rules prior to the formal submission of a proposed rule, those are not mandated by OIRA. Is that correct?

A Correct.

Q Okay. In those type of meetings, who would actually be involved from OIRA?

A From OIRA? Okay. Thank you for the clarification.

Q Absolutely.

A Again, it would depend on the nature of the rule. The -- it is -- it would be very usual to have, and I would say it's absolutely normal practice, to have the branch chief and the desk officer -- it is -- it would not be unusual for a complex rule to have -- for me to be involved in a certain number of those briefings, and to -- for one of the other political appointees in the office, as I mentioned, the counselor, or the associate administrator. They typically separate issues by subject matter. And, again, for a rule of this complexity -- they are welcome. It depends on the circumstances and their interests and their competing priorities, but it wouldn't be unusual for more senior leadership in OIRA besides the branch chief to be involved in those briefings.

Q Okay. And agencies designate who will attend these meetings on their behalf, correct?

A Yes.

Q Would you ever question, "you," meaning OIRA or someone --

A Yes.

Q -- in your role, let me try to be punctilious here with my

question. Would you, in your role, question the choice of agency designees for these types of meetings?

A As a general matter, we would not. We would leave it up to the agencies. I could -- just to be precise, we -- in an informal way, we could ask or invite certain parts of the agencies that we felt in a briefing would be more useful. But as a general matter, that is a very rare circumstance. The agencies who want to get their rulemakings finished send the staff that they feel could give us the most informed briefing in order to inform that process.

Q Okay. Because they want to get their rule --

A Because they want to get their rule finished. The incentive are aligned, as we say, on that.

Q And would you say the incentives were aligned in terms of the WOTUS process, generally, in terms of who was sent to these types of briefings?

A So I would say yes. To be more precise, the prebriefings were both attended by staff from both EPA and the Corps. And of -- we felt, at least, I will speak for myself, I felt at a sufficient number and level to provide us an informed briefing of the proposed and final rule. I have mentioned the proposed -- I mentioned the final rule briefing that I have a specific recollection of. I don't have a specific recollection of a prebrief associated with the proposed rule. But I will say that -- if there were, it would be a typical circumstance.

Q Okay. Brief indulgence.

Now, our understanding is, in terms of OIRA's decisions for rules,

OIRA either can confirm a rule as consistent with or without changes, or return a rule to the agency for reconsideration. Is that correct?

A There are other -- I think what you're referring to are the conclusion actions --

Q That's correct.

A -- in our system.

Q That is correct.

A Okay. Just to be precise. There are -- those are two major conclusion actions. There are other conclusion actions. The one -- the other one that I can think of, to the best of my recollection, is that we can conclude a rule consistent with the statutory judicial deadline as an official clearance action.

Q Okay.

A And to be clear, those are statements in our ROCIS system. And this -- ROCIS is the computer system that we use to manage regulations. That is a management tool. It is not a policy tool. So it is an indication of our best estimate of how -- of the conclusion action. But those aren't set under the executive order is the point I'm trying to make.

Q Okay. But that is how the final conclusions are set forth in --

A In our system, yes.

Q Okay. Is it a fairly rare occurrence to return a rule to the agency for reconsideration?

A Yes.

Q Okay. In your time at OIRA, how many rules have you returned?

A Personally, I have not returned any rules. I have -- like I said, I'm not the decider on those issues. OIRA has, in my time there, I would say -- this is a very rough guess, but I'm confident that it's not much more than this, is less than 10. I can also say as my time in -- from my time as branch chief through today would be -- we have actually returned three rules.

Q Okay. And is it fair to say, in terms of process, that OIRA looks at the rulemaking process, or rule review, process, as a collaborative process between OIRA and the relevant agencies? Or how would you describe it?

A Yeah. The -- let me try to be precise. We put a lot of weight on having a collaborative respectful relationship with the agencies. The executive order is an oversight mechanism. And, so, I feel "collaborative" may not quite be the adjective. We are meant to provide an oversight function under the executive order to ensure that the principles are met. As a professional execution of that executive order, I very much, you know, maintain weight on having a collaborative relationship. But there are cases where, you know, the executive order is fairly clear and that our role is to oversee these executive order principles.

Q Understood. Now, I'd asked you about the rarity by which rules are returned for reconsideration to agencies. Let's talk a little bit about situations where proposed, or guidances are withdrawn

and replaced by rules.

A Yes.

Q Is that a scenario that you've seen during your time at OIRA?

A I've seen that scenario once, to the best of my recollection.

Q Okay. And was it in WOTUS?

A Yes.

Q Okay. And did you understand why that was done in WOTUS case?

A We had -- there were a lot of discussions about this. I can say OIRA's position might be a little bit more precise than why. And I'm sure we would get to it. So --

Q Sure.

A -- the -- there are certain things that can be accomplished in rulemakings that can't be accomplished in guidance. There's a -- I'm not a lawyer, but there's legal history around that, and the agencies -- the agencies -- I believe it was the agency leadership that decided to pursue a rulemaking. And we -- I just say, as my personal position, I supported the decision as a personal matter, as I'm sure we will talk about that.

Q Okay. You supported that decision?

A Yes.

Q And why did you support that decision?

A For the reasons that we said. There are certain things that notice and comment rulemaking establishes that guidance doesn't

accomplish. Guidance is not binding, by its nature, to the agencies, and rulemaking is. And in the case of the rulemaking that we're discussing, the -- I'm trying to be precise here. Sorry. The -- I think they are better able to define the policies in a rulemaking versus a guidance, and provide definitive guidelines to the public about which waters would be jurisdictional, which weren't in the rulemaking versus the guidance.

Q And I think you've sort of answered this towards the tail end of your response. Why did you feel it was important for there to be a binding rule here in the WOTUS context versus just simply a guidance that would not have been binding?

A The reason that -- and I'll speak on behalf of myself --

Q Yes.

A -- that a factor, I would say a significant factor in the -- in our position that a rulemaking would be useful was that the public comments to the guidance were fairly consistent on that point. And it was across the positions of the commenters. So, for instance, both commenters that supported a -- and I would characterize as a more expansive, moving more waters under jurisdictional control, and commenters that supported either the status quo or providing fewer waters --

Q Reducing jurisdiction --

A -- many of those commenters supported -- recommended a rulemaking over a guidance.

Q So is it fair to say that the vast majority of stakeholders,

be they public, be they agencies, be they OIRA, supported a rulemaking in this case?

A I can't -- I can't characterize it as vast majority. I can say that we were -- that we were -- as I mentioned before, we saw significant public comment from many stakeholders that supported rulemaking over a guidance. I can't -- I do not read the public comments, as we've mentioned before, so I can't characterize it as a vast majority, but I could say it is a major request of the public commenters.

Q So it fair to say, then, that a -- you said a significant number of -- I don't want to misconstrue what you're saying --

A Yes.

Q -- significant number of stakeholders from both sides, people that were in favor of reducing jurisdiction of Waters of the United States versus people that were in favor of expansive jurisdiction supported rulemaking in this case?

A With the caveat that many of the stakeholders that -- that supported little or no change or a reduction, probably there -- there was a lot of significant comment about not proceeding with anything. But we had significant support in the stakeholder community from pursuing rulemaking instead of guidance.

Q Got it. Okay.

A If those were the two choices on the table.

Q If those were the two -- right. Versus people that were happy with the status quo who obviously, by definition, wouldn't have

wanted anything done.

A Yes.

Q Okay. So based on those public comments as well as agencies, the EPA, as well as the Army, as well as OIRA, the decision was made to move from guidance -- to withdraw the guidance and move towards a proposed rule. Is that correct?

A Yes.

Q Okay. All right. Now, I'm going to get a little more into the WOTUS ruling in just a minute, but I want to try to keep somewhat linear here. So forgive me. I'll go back a little bit now.

In your role as, and let's speak specifically about the WOTUS rule, were your updates in your role as Deputy Administrator during the proposed rule period generally provided to you during these biweekly sessions?

A I would say for this particular rulemaking, I did get an update in those biweekly sessions. There were other opportunities where I got an update as well.

Q Okay. And can you describe some of those other opportunities?

A For typically, I'll say as a general matter and specifically, as a general matter for rulemakings of this type, the Administrator will ask one of the OIRA leadership, typically the counselor or the associate administrator, or Deputy Administrator, to follow up with a particular issue more closely. And I don't have a specific recollection of whether Administrator Shelanski asked me to

follow this more closely. But because of the nature of this one, I would say I got more frequent than biweekly updates of this particular rulemaking.

Q Okay. And for this type of rule, is that unusual?

A No, that's not unusual.

Q In fact, would it be fairly typical?

A For a rule of this nature, by "this nature," I mean a large joint or single-agency rule that is identified by the agencies as a -- as a -- one of their highest priorities, that is typical.

Q Okay. And would your review usually come through, or would your review come through Jim Laity usually? Would he come to you with comments outside of the biweekly sessions?

A Yes.

Q Okay. Anybody else from OIRA that would update you on this issue?

A It would not be unusual for the rulemaking group to get together with Jim to, as a group, come and give me an update about particular issues. So I would have interactions with the entire rulemaking team.

Q Okay. And did that process of updating you continue through the final rule period as well?

A So once a -- just to be precise, once a rule is proposed, that is, back with the agency and they are taking comments, and so we would have little discussion of a particular rulemaking if it's not under formal review. Once it's submitted, or we receive a briefing,

or once that final rule stage of review is -- is initiated, and then I would say in this particular instance we had a similar cadence of my involvement in the final rule review.

Q Okay. So between the period of the draft rule and the final rule, in that interim period, there isn't much going on in terms of your involvement. Is that fair to say? Particularly, and let me be specific here, for the WOTUS rule?

A Correct.

Q And we'll get back to that in just a minute.

A Okay.

Q During the -- just to start chronologically, during the time period when you were branch chief involved in the WOTUS guidance review, who were your points of contact with either the EPA or the Army?

A As a branch chief, I would not be the primary point of contact in OIRA with that guidance development.

Q Okay.

A That would be still typically a desk officer involved. And the desk officer at the time was Jim Laity.

Q Okay.

A But my -- if I were to discuss, and there were discussions about this particular guidance document, it would be -- the ones that I can recall most frequently were an individual named Rock Salt at the Army Corps of Engineers. And, unfortunately, I don't remember her last name, but her first name was Nancy at the Office of Water in the EPA.

Q Okay.

A And if I were to spend 5 minutes, I'd probably remember it. But typically, it's senior officials within the two agencies that are developing the rule.

Q Okay. And when you became Deputy Administrator, with respect to the WOTUS rule, did you have any particular contacts that you would speak to, either at EPA or the Army?

A We received -- when we received briefings on the WOTUS rule, they were typically attended by senior officials. And, so, I don't recall his particular position, but Ken Kopocis from the Office of Water would be someone I would have, and had some conversations with. I don't recall the frequency or the nature, but they would typically be -- if there were a particular issue to discuss, it could be with him. And the Corps, I actually don't recall the particular names once I became Deputy Administrator as well as I do when I was branch chief.

Q Okay. Were most of the contacts that took place between OIRA and the EPA and Army during the WOTUS rulemaking process, both at the proposed stage and the final stage, done between Jim Laity and his counterparts at EPA and the Army?

A During the rulemaking --

Q Yes.

A -- stage?

Yeah, Jim Laity was the branch chief during that stage and had assigned desk officers. So it's either frequency of the typical day-to-day contacts and adjusting, and just the typical review would be at the desk officer level. But Jim was in frequent contact with

the Army Corps and EPA during this review.

Q Okay. And you would agree that Jim and/or the desk officers were, in terms of frequency, were the primary contacts with these agencies versus you, for example?

A Yes.

Q In the last hour, you touched briefly, or the majority touched briefly, on prior joint rule reviews. And I believe you had mentioned that there was one in particular on fuel economy standards that you recalled. Is that correct?

A Yes.

Q And that was done between the Department of Transportation and the EPA. Is that correct?

A That's correct.

Q And it's several rules --

A Yes.

Q -- correct?

Okay. Is it fair to say that there's no real blueprint for how joint rules unfold?

A I would say that's a fair statement. The typical standard would be that the two rulemaking agencies work jointly to develop the rule, but they are relatively infrequent, as I mentioned before. So I'd say there's no one -- we don't have any separate guidance, for instance, on how to do joint rulemakings within this process.

Q And in terms of the actual rule review process by OIRA for joint rules, again, would you agree that each rule, or joint rule, has

its own unique review process that is dependent upon its factual underpinning?

A I would say that that's typical of many rules. The one thing that we would do, and I wouldn't even say differently, because we always try to ensure that anyone who has substantive knowledge or equity in rulemaking would participate in it. But in a joint rule case, we would, to the extent possible, distribute comments to both agencies on an equal basis, try to have conversations with both agencies on an equal basis. So that's a -- I don't see that as a material difference in our rulemaking procedures, however.

Q And do you believe that was done in the WOTUS context?

A Yes.

Q Okay. Now I will get back to -- I have a few more questions of prior rule reviews. But before my time runs out, I want to address a couple of issues that the majority brought up during their hour.

A Sure.

Q Okay? So forgive me for hopping around a little bit.

One of the issues the majority addressed was the issue of agencies turning over documents, and specifically, the text, the preamble, and the economic analysis prior to submission of a rule. Do you recall that?

A Yes.

Q Okay.

A I recall that conversation.

Q And is it fair to say that if an agency does not turn over

one of those items, for example, OIRA can proceed should it be satisfied with the explanation for why a certain one of those items has not been turned over?

A To be precise, there are circumstances under which OIRA could commence a review without having a full package. And like the example that I used would be as a general matter if there were a court order that we -- that has to be met, we would, in those general circumstances, we would work with the agencies to get the materials as soon as possible in the process that we would -- we like to minimize cases in which this is the case because both for the interagency group and us, it makes it more difficult. But there are circumstances under which we commence something without having the full package.

Q Okay. You also mentioned, I think, that CEQ was an active participant in the WOTUS process or the interagency review process. Is that correct?

A Yes.

Q Anything unusual about that?

A No.

Q Anything improper about the fact that CEQ would be an active participant in a rule involving -- such as WOTUS involving the environment?

A So it is absolutely typical in our responsibility to ensure the involvement of all agencies and parts of the EOP who have an interest in a rulemaking, and that includes CEQ.

Q Okay. And is it also -- is it fair to say that during this

entire rulemaking process, OIRA, and you specifically, did not receive any order or mandate from EOP to not follow OIRA responsibilities to the T?

A Well, we received no direction from any part of the EOP to not discharge our responsibilities under the executive order to fully review this rule.

Q And do you feel OIRA met its responsibilities under the executive orders?

A Yes.

Q Okay. You also briefly touched on the issue of agencies asking OIRA to expedite review.

A Okay.

Q And anything unusual about an agency pressing to have their rule confirmed?

A I would say that it is not an unusual request from an agency to not take the full 90 days of executive order review.

Q Okay. Again, there was a briefing that took place, as you mentioned, between the proposed and final rule, a joint briefing from the Corps and the EPA for WOTUS. Is that correct?

A That's correct.

Q And that briefing, amongst other things, discussed differences between the proposed and final rule. Is that correct?

A That is correct.

Q Anything improper about that?

A In my opinion, no.

Q And, in fact, would you agree that that was quite helpful to the process, generally, to have such a briefing?

A As I mentioned, we feel as a general matter that briefings of that nature are useful inputs into the executive order review process. And as I mentioned before, it is -- it is a typical exercise of a rule of this nature to have such a briefing.

Q Okay. The final rule was approved in approximately 6 weeks. Is that correct?

A To the best of my knowledge, it was approximately 6 weeks. Yes.

Q Sir, did you have any discomfort about the fact that it was approved within 6 weeks?

A No. We -- as a general matter, we always have a desire to take the time that we need. And 6 weeks, as you notice, is -- is less than the 90 days. But in this particular case, I felt like we discharged our executive order responsibilities in that time period.

Q Did you feel you compromised your responsibilities under OIRA in any way, shape, or form due to the fact that you approved it in less than 90 days as a result?

A I do not.

Q Okay. And as you know, the comment period for the WOTUS rule, the proposed rule, was extended twice, correct?

A To the best of my knowledge.

Q It was extended at least --

A Yes. I will -- I actually have no specific knowledge of

those two. I've learned about it in this hearing. But -- so as far as I know, that's -- that's a true statement. But I don't have any specific knowledge of that.

Q Okay. Sure. Again, for a rule this complex, do you have any issue with the fact that the public comment period was extended so as to include and give stakeholders every opportunity to comment on the rule?

A So I'm not aware of the particular circumstances -- the reasons why which the public comment period was extended in this circumstance. And, again, those are generally agency responsibilities. But that said, I have no concerns about an extension of a public comment period of this nature. And I also have knowledge that it is -- it is a not unusual circumstance of large complicated rules to extend the public comment period.

Q And why did it not concern you?

A There is a -- under the -- it is a fundamental tenet of the rulemaking process to provide the public adequate notice of issues. And this is a statutory responsibility under the APA. And if an agency feels like there is a valid reason for extending the public comment period in order to provide that opportunity, we have no concerns about that.

Q Okay. My majority counterparts also talked to you briefly about agency representatives. And to use your lingo, regulatory seconds --

A Yes.

Q -- I believe was the nomenclature that you described. Just for my knowledge, and I know you described it a bit, but could you -- I want to make sure I understand what a regulatory second is. A regulatory second, based on what you had said before, is responsible for day-to-day interactions between OIRA and the agency. Is that correct?

A So to clarify, they would be -- they're typically responsible for day-to-day administrative interactions with OIRA. So what I mean by that is that a typical regulatory second is in a central office of an agency and will, for example, manage the physical submission of a rulemaking into OIRA. And, again, these are typical agency issues. But a typical regulatory second could be part of an office that provides some coordinating role within the agency as well. And that coordinating role could be substantive. And that's where I got into the discussion of that there could have substantive communications as well as the process level communications with the regulatory seconds.

Q So -- and that would be something that OIRA would defer to the agency in terms of who should be communicating at what point. Is that correct?

A So -- so we would -- that is -- that is correct in the specifics. We -- if an agency did not have a regulatory second or a central point of contact, we would probably ask the agency to provide that for administrative efficiency. And there are -- executive order, I believe, calls for something like a regulatory policy officer. And

so there is some executive order direction to the agencies to have that coordinating function be functional in their agencies.

Q Okay. And that regulatory second could provide both administrative and substantive information to OIRA. Is that correct?

A Yes.

Q I want to touch on one more issue before I end my session, or at least my first hour here.

Another issue that you briefly discussed related to agencies and their review of public comments prior to submission of a final rule. Do you remember that?

A Yes. I do.

Q Okay. So I want to follow up on that a little bit. Is it fair to say that OIRA's concerns with respect to review of public comments relates to whether or not the agencies in, and, in this case, the EPA and the Army, had adequately responded to the comments as a whole, and, specifically, to policy issues that OIRA is concerned with?

A Yes. I think that's a fair representation.

Q Okay. And did the agencies do so, in this case, to OIRA's satisfaction? And let me be clear, in the WOTUS case?

A Okay. I can speak for myself.

Q Yes. Please do.

A And as my position in OIRA, but I can speak for myself. We felt that the agencies adequately discharged their responsibilities to the responses to public comments in this instance.

Mr. Longani. Okay. Thank you. Go off the record.

[Discussion off the record.]

[12:16 p.m.]

Ms. Aizcorbe. It's 12:16. We can go back on the record.

BY MS. AIZCORBE:

Q I have just a few cleanup questions before we get started.

In the previous hour, Mr. Mancini, you said that you generally meet with the rulemaking group, or they came to provide you updates outside of the biweekly updates. I just want to clarify, who is a part of this rulemaking group?

A So, as a general matter for a subset of rules of which are higher profile or of particular interest, it would typically be the branch chief and the team reviewing the rule.

Q And by "team," you don't mean the entire branch. It would just be the desk officer --

A The desk officer and the economist if the economist was working actively on the rule.

Q Okay. And they would brief you and other senior leadership within OIRA? Was there anybody else?

A It could be either way. As a general matter, the Administrator, as a result of those meetings, would say, "I'm particularly interested in a rulemaking, and I would like more frequent updates." My office is right next to the offices of everyone, so a lot of it would be more informal.

Q Would the Administrator participate in any of these biweekly updates?

A The more frequent updates?

Q Yes.

A It's possible, yes. It is a typical practice for the Administrator to ask for a dedicated or more frequent update on a particular rulemaking outside of the biweekly process, which are meant more to be a more expansive, branch-wide discussion of everything that's going on.

Q And did Administrator Shelanski ask for that type of a routine or regular update towards the end of the rulemaking or after he came onboard?

A I don't recall whether he specifically asked for a more frequent update of that nature. I do recall that we had conversations with him dedicated to this rulemaking.

Ms. Rother. In the WOTUS rulemaking in particular, the rulemaking group consisted of the branch chief, the desk officers, and the economist. And that would be Jim Laity and who else?

Mr. Mancini. And, as I mentioned, the desk officer for the proposed rule was Cortney Higgins, and the desk officer for the final rule was Vlad Dorjets, and the economist for both proposed and final rule was Amanda Thomas.

Ms. Rother. Was anybody else involved in these?

Mr. Mancini. As I mentioned before, as a general matter, one of the other political appointees besides the Administrator could be involved in the review of the rule. I don't recall any specific conversations where they would be involved, but, as a general matter,

they could typically be involved in a more frequent discussion or update on a particular rulemaking.

BY MS. AIZCORBE:

Q To clarify some earlier points, during your time with OIRA, have you worked on or overseen any rule reviews for any Army or Army Corps rules?

A Yes.

Q Would you be able to approximate how many or what percentage of your portfolio those would contain?

A The Army Corps, during my time as branch chief -- when I was an economist in the other branch, did not cover the Army Corps. In my time as branch chief, the Army Corps had a reasonable number of rulemakings. They do not, by the standards of a rulemaking agency, produce all that many rules. But whatever rules were produced during that time period as branch chief, I would receive, again, frequent updates of that nature.

Q And you mentioned earlier, when you were mentioning some of the names of points of contact at the EPA and Army, I believe Army Corps, you mentioned Rock Salt. Are there any other names of Army or Army Corps individuals who you recall working with or at least consulting in the course of a rulemaking review?

A So, specific to the Corps, an individual named Chip Smith was often a contact. I don't recall the frequency with which I personally contacted him, but he was a frequent contact with OIRA on Army Corps rulemaking reviews.

Q Do you recall whether Rock Salt and Chip Smith were what you would consider policy or subject matter experts versus these secondary -- I forgot what you called them, secondary regulator --

A Regulatory seconds?

Q Right.

A Rock Salt was a senior official in the Army Corps. I do not recall whether he was a political or a career official.

Chip Smith, I believe he was more of an administrative official. I don't recall whether or not he was the main regulatory second. But he, at least for the interactions I'm familiar with, was more of that role.

Q When I was asking how many rulemakings you'd participated in during your time at OIRA, you mentioned 400 to 600 transactions, but now I believe you might have been referring to the total number that OIRA --

A Okay.

Q -- took and --

A Right. Right.

Q -- engaged in during that time. Do you have an idea how many you personally either were involved in or oversaw during your time at OIRA?

A That would be hard to estimate from my time as an economist, because I would be assigned to a subset of rules officially but also working on others. So I would hesitate to offer a guess for the time before I was a branch chief.

When I was a branch chief, I think it is fair to characterize that I was somewhat involved in a management capacity in all the transactions within that branch. I would say a typical natural resources/environment branch had a relatively large number of transactions, so my best guess would be several hundred transactions.

And in my time as Deputy Administrator, again, I think it's also safe to say just take the number of rules that OIRA reviewed and that I was potentially involved in some capacity, getting biweekly briefings, that kind of thing.

Q Do you know why a guidance was first pursued in the WOTUS context?

A I'm aware of the briefings we received where it was discussed that they wanted to pursue a guidance. A factor in whether the guidance -- that I can recall, a large factor on proceeding with a guidance was that the previous administration had attempted to address this issue, as well, in guidance. And so I believe that was a large factor in deciding to issue subsequent guidance. It was just the rulemaking stage or -- let me be clear. Actually, let me modify that statement. It wasn't a rulemaking, but it was the administrative stage that many folks felt was the appropriate stage at the time.

Q Are you aware of whether the guidance under the Obama administration was substantially similar to or the same as the guidance under the Bush administration?

A It was different.

Q Okay. And how so? Do you recall?

A That's potentially a long answer.

Q Okay.

A But what I can recall most specifically, and I am confident there are other differences, but the guidance under the previous administration -- the guidance was to look at -- tributaries are the one that I can speak to now confidently.

The previous guidance stated, to the best of my knowledge, that a jurisdictional decision should be made on a tributary only based on the characteristics of that particular tributary part. The guidance developed in the Obama administration has a policy to aggregate tributaries for the purposes of jurisdictional decisions. So if one tributary were considered jurisdictional, they all would, taking more of a watershed.

That's the one issue that I can speak with confidence is a difference. Like I said before, I am confident there were other differences, but I can't speak in this venue off the top of my head about that with specificity.

Q When a policy or administrative measure like this is carried between administrations and there are changes made, does OIRA engage with the agencies on the specific changes in policy that are either taken out or added or changed in any manner? Or do you leave it to -- do you essentially start fresh?

A So we did review the guidance as a formal action under the Executive order, and as part of the discussions of that review of the guidance, the changes between the previous guidance and the current

guidance would be discussed.

Q Getting back to some of our questions about the comment review -- I just want to wrap up, so I apologize if any of this is duplicative -- do you recall ever having inquired about an agency's completion of a comment review -- and that would be you personally -- or advising any of your staff within the branch to do so?

A As a general matter, yes.

Q And do you recall which types of rules those would be for?

A I can't talk about -- I can't recall besides providing examples of a rulemaking. But I will provide one example, that in some large rulemakings, some agencies provide a separate response-to-comments document. And to the extent that that document is in the various stages of completion, we could discuss the status of that document as part of a rulemaking review or a prebriefing associated with that rulemaking review.

Q Was one of these documents completed in the WOTUS review?

A I don't recall the status of the completion of a comments documents in this case or whether they provided a separate response-to-comments document. I just don't recall.

Q And you don't recall whether you engaged in discussions about whether that document should be created?

A Personally, I don't have recollections of that kind of discussion.

Q Were you ever informed that or hear that the draft final rules analysis of public comments was not or might not be complete by

the time OIRA received the draft final rule?

A I don't recall having conversations specific to that issue.

Q During final interagency review, is the draft final rule typically accompanied by an agency's analysis of public comments?

A I think there are two ways of doing this. Agencies, as a general matter, could have the response to public comments as a part of what we would call the preamble discussion. Other agencies, as I mentioned, could have a separate response-to-comments document.

To the extent that other agencies are interested in seeing that response-to-comments document, it is part of the rulemaking record that could accompany review. But I can't speak to how much other agencies actually look at the document.

Q At what stage in the rulemaking process would something like that accompany a rule?

A It is typical that it would accompany the -- that we would have access to the public comment response document as part of the final rule review.

Q And so when that's submitted for review with the draft final rule. Is that correct?

A As I mentioned, there are circumstances under which it may not be complete, as in other rulemaking stages, but, typically, we would be reviewing a response to comments, whether or not they're in a separate document or part of the preamble, as part of the final rule review.

Q We understand that certain substantive changes were made

after the rule underwent public comment and the draft final rule was completed, including modifying coverage of certain ephemeral and intermittent ditches and waters within the 100-year floodplain.

Do you recall discussing either of those changes with OIRA before they were adopted?

A To be precise, are you asking about changes that happened during formal review of the draft final rule or changes that happened as a result of the public comment between approval of proposed and the final rule? Or both?

Q Both. If it's easier to do it separately --

A Okay.

Q -- then that's preferable.

A Yes, we did have discussions of both of these issues, I'll just say. I just don't -- my request for clarification was I don't recall when we had substantive discussions of these issues.

Q So you don't recall whether that happened after OIRA received the draft final rule?

A During our review of the draft final rule, we did discuss these issues, so I do recall. I just don't recall the depth of the discussion of the issues during the briefing that we had before the submission of the draft final rule.

Q Do you recall how these changes were proposed or why they were proposed?

A So, on the ephemeral versus intermittent stream, let me clarify that I remember a general discussion, I recall a general

discussion. I don't recall the specifics of the policy changes for that particular issue. So that was just -- I would say that was a part of the review, but I don't have a more specific knowledge of that.

For the changes to the floodplain, the EPA did provide us a general discussion of the changes to the floodplain coverage. We had the discussions about the goals of that and why it was changed. I believe the general discussion -- I probably can't get into the specifics here -- was to provide more clarity to the public about which waters were jurisdictional and which weren't, to provide less of a case-by-case analysis in those circumstances.

Q And you mentioned EPA. Was the Army or Army Corps participating in that discussion as well?

A Yes. I apologize. The Army Corps and EPA were equally involved in those discusses. They had participated in each briefing in an equal manner.

Q Are you aware of whether additional science was conducted or alternatives were evaluated to support the changes that were made, including the change of the 100-year floodplain?

A By "additional science," could you clarify?

Q Sure. Did the EPA or Army Corps discuss coming to that proposal by any specific type of evaluation or other development of science that would support that proposal, or did they just say that it was a decision they came up with without any additional science being created?

I don't know if that clarifies it, but what was OIRA's knowledge

at that time of how these proposals were being developed?

A So that was actually more on additional because -- that was the clarification I was asking. So they did ask for comment on these issues in the proposed rule, and they received comment, public comment, on these issues. And I can say with confidence that public comments were an input into those.

As far as additional science, those public comments may or may not have scientific findings or studies. I don't have that kind of specific knowledge of this issue. There were scientific studies being conducted in association by the agency.

So I would characterize this as -- what I have personal knowledge of is the attempt to be responsive to the public comments.

Q And you mentioned that that was with respect to both the ditch proposal and the floodplain, the 100-year floodplain proposal, correct?

A Again, I am more familiar with the specifics of the floodplain proposal. I just don't recall the -- and could not really tell you the difference now about ephemeral versus intermittent. That is an issue that is maybe getting a little bit past my ability to speak with knowledgeably here.

Q My question was mainly on timing, because the draft connectivity report, which is the scientific basis underlying the rule, was developed as the rulemaking was going on, but it was completed before the final stage of this rulemaking process.

So my question was more, when these substantive changes were being

made to the rule, was then any effort made to conduct additional science or evaluate alternatives to these new proposals, to your knowledge, besides what was existing at that time based on what the agencies had in that connectivity report?

A So --

Mr. Luftig. Sorry. Before you answer -- I don't think he spoke to the connectivity of the report. So he can answer based on the way you've premised the question, but I don't know that -- I don't know the extent of his knowledge about the connectivity report based on the question.

Ms. Aizcorbe. I'm not asking about his knowledge about the connectivity report.

Mr. Mancini. So the clarification that I was going to make to the question was that the connectivity report, to the best of my knowledge, was an input into the decisionmaking. There are other inputs into the decisionmaking. The "significant nexus" test is a legal test that we were trying to meet. Science can inform that, but the connectivity report was an input. So I would not characterize it, to my understanding, as the major scientific basis for the report, for the rulemaking.

Again, I have no knowledge of the level of the scientific research being done besides the connectivity report. So I don't have knowledge, insight into the weight the report was given in this particular issue or whether there were other studies either taking place or based on public comments on this issue.

Q And just to clarify what you just said about the "significant nexus" test being a legal determination or evaluation and that the connectivity report, you mentioned, does not provide the basis for the rulemaking, can you just sort of flesh that out? I'm not sure I followed.

A So, again, based on my personal knowledge of the connectivity report, it was a scientific study of the connectivity of the waters to another water. And that came up with certain results. And maybe this was a little bit more in the weeds than I should have gotten, but I -- that the connectivity of a certain water, its application to the Clean Water Act -- the Clean Water Act jurisdiction is what I meant to say is ultimately a legal issue. And I think the connectivity report can provide scientific insight into that legal determination, but it isn't itself a -- you know, provides any definitive advice or definitive findings that would inform that. It is one of many inputs into the decisionmaking process. And that's the difference that I was trying to capture with that statement.

Q If substantive changes are made to a rule after final interagency review, are agencies given a second chance to review the revised rule?

A So, during the Executive order review, agencies with an interest in the rule could be given the opportunity to provide the changes to the rule. It is typical that if a rule changes during review, then that revised rule will be shared with the interagency group as well.

Q Are you aware of whether it was done so in this case?

A I don't have any specific knowledge of this in this case.

Q Do you recall any discussions about recirculating the rule for a second round of public comment after changes were made to the rule?

A By clarifying, you mean that whether or not a reproposal of the rule came up as an issue during the review of the draft final rule under --

Q Correct.

A Okay.

Q We've heard from the Army and the Corps that there was some discussion about recirculating the rule again after it was changed as a draft final. And so I was just wondering if you recall there being discussions at OIRA about recirculating the rule in its proposed stage, so going back, opening up for another second round of public comment.

A I actually don't recall specific conversations about that issue.

Q Were you aware of how or whether the EPA was considering the Corps' comments in the final rule?

A So, as I mentioned before, this is a joint rulemaking, and I was aware of significant discussions between the EPA and the Corps on policy issues in development of this joint rule.

Q And how were you aware of those discussions between the EPA and Corps?

A When we would receive a briefing for this rulemaking, the

briefing would typically be jointly conducted by the Corps and EPA.

Q Do you recall who were at these briefings?

A Just to say, I don't recall that -- there were probably several of these briefings. The one I recall most clearly is the briefing that happened presubmission. And I do recall that Ken Kopocis from EPA was there. I don't recall the names of everyone in the Corps, but there were a familiar set of officials at the Corps. I just don't recall their names.

Q Do you recall receiving any representations made to you or anybody else at OIRA that the Corps' comments were reflected in the final rule, besides just receiving it from the agencies?

A By "representations" -- the rulemaking was jointly developed by the Corps and EPA, and, you know, policies would be discussed by the Corps as part of those briefings. And so, to the extent that those are considered representations, that they're reflective of the Corps' policies, yes, I received those.

Q And when you say it was developed jointly by both agencies, what gave you that impression? These briefings that you're referring to?

A Yes.

Q Okay.

A The briefings, the discussions, the interactions with both agencies. As part of rulemaking review, like I mentioned before, as a general matter, both agencies were very involved in the rulemaking review.

Q And those would be with the designated points of contact at both of those agencies, correct?

A It would be with, as I mentioned, the regulatory seconds and the points of contact. As a general matter, typically, the subject matter experts from agencies are involved in the review and the discussions with OIRA, as well. But on this specific one, especially for the rulemaking where I was Deputy Administrator, I was not personally involved in that level of discussions with the agencies.

Q So you are not aware of whether the subject matter experts were actively engaging with OIRA during this review.

A During the briefings that I was involved in, those briefings included subject matter experts. So I have no specific knowledge of other ways in which the subject matter experts were involved in the discussions of the review.

Q How does OIRA typically review an agency's cost-benefit analysis?

A As a general matter, the agencies will provide us a draft of the regulatory impact analysis -- under the Executive order, they're required to for economically significant rules -- as a part of the review process. And this is for the proposed rule. And for those types of rules, we assign an economist, and the economist will review the rule -- although the desk officer may review the rule and analysis, as well -- to review it against the principles of the Executive order and our circular, A-4.

And then, once we conclude review, that draft regulatory impact

analysis will be put into the record and is subject to comment, as is the rule. And so there will be public comments that are -- maybe not every time, but it's not unusual for a set of public comments to be on analytical results.

And that process would repeat itself for the final rule, in that we would receive the draft regulatory impact analysis and we would look at that to see whether it changed. Again, it is a supplementary document that is different than the legal notice and comment issue, but we would see whether there were any changes made to the regulatory impact analysis as part of the review, and then review it again against the principles of the Executive order and A-4.

Q Does OIRA maintain any standards of what to consider when evaluating the quality of analysis besides the Executive orders and A-4?

A Those are the primary documents. There are other guidance documents, but those are probably the -- that's the majority. What I'm thinking of is there's a checklist on our guidance, and then there's Information Quality Act guidance that could be -- the response to an Information Quality Act request could be discharged in this process as well.

Q Do you recall discussing the quality of the regulatory impact analysis with respect to this rulemaking?

A Yes.

Q And do you recall the nature of those discussions?

A So, again, before I answer, I'll say that the majority of

my personal discussions were during the guidance development process. And the agency did produce an analysis as part of the guidance development process. And we had discussions about how to conduct that analysis under the unusual circumstances of this rulemaking.

Q And what do you mean by "unusual circumstances of this rulemaking"? That it was a joint rulemaking? Or --

A That it was a rulemaking that had -- this comes up often, that there are not many rulemakings that have a regulation, that have two Supreme Court decisions that affect the nature of the policies and have guidance that is intervening in that regulation and it's being replaced with another guidance. So I would characterize that as a unique set of circumstances for a rule and guidance development.

Q Do you recall what was specifically discussed or decided upon when you were talking about how to approach the analysis?

A So when I discussed the analysis of the guidance policies as the branch chief, and Jim was a part of these discussions -- surprising to hear that -- we talked with the agencies about how to potentially capture an impact in these circumstances. What we talk with the agencies about and they agencies did was they tried to look at a subset of potential permit decisions that -- and there are other aspects of this too. These are just the ones that I can recall with confidence. They discussed how to look at a set of permit decisions under the current policies currently in effect and then look at the set of permit decisions under the new policies and see whether there were any differences between the two and then try

to provide, to the extent possible, some monetary impacts of those changes in policy.

Q To your knowledge, did the agencies revise their analysis after changes were made to the rule, such as the distance limits and the 100-year floodplain and the ditches exclusions?

A So, to go to the rulemaking, I have more knowledge of the basic analytic principles established in the guidance. I don't have specific knowledge of the particular changes in the impact analysis associated with the proposed and the final rule.

Q Mr. Laity informed the committee that, in implementing the Executive order requirements, there's always a rule of reason where the bigger and more important the rule is, the more effort one puts into things like cost-benefit analysis and developing reasonable alternatives and so on. Would you generally agree with his statement?

A Yes, I would generally agree with that.

Q Were you aware at any time of any efforts to produce or discussions about producing an analysis that maximizes benefits of this rule?

A An analysis is to analyze the costs and the benefits of the rule. Maximizing the benefits of the rule is a principle the Executive order says the agencies should follow to the extent possible. So the analysis is to inform that decision.

In this circumstance, I don't recall any specific discussion of that nature to say, "We need to maximize the net benefits in this circumstance."

Q And would you say the same, that you did not have any knowledge of discussions about producing a cost-benefit analysis where the costs were outweighed by the benefits?

A I don't recall having particular discussion about that issue. I am aware of the general difficulty in the circumstance, because we did discuss it, of trying to monetize the different impacts of this rule. Because, in practice, these will inform future permit decisions, many of which the conditions, the interventions of the permit are unpredictable at this point. But we do have general discussions and had specific discussions in this case about whether there were quantitative or qualitative impacts that could be discussed in greater detail.

Q And do you recall what came out of those discussions?

A When I was branch chief, I think that the general part of the guidance -- general philosophy behind the analysis came out of those discussions. So I would say it's fair to characterize that they discussed with us the methodology for figuring out a subset of permits that were representative and trying to look at the differences in policies being contemplated and figuring out the impact of those permits. So that was probably -- I'm confident, that said, that that discussion informed their approach.

Q In your experience, does OIRA encourage agencies to consider indirect effects in its costs and benefits analysis?

A As a general matter, we do encourage the agencies to consider important indirect effects -- and I may as well use a Jim

characterization that I agree with; it's "to a rule of reason."
Because there is some -- and I think this is official in our
guidelines -- there is a feasibility constraint often on agencies, and
indirect effects can be -- if they are far removed from the direct
impacts. But if they're important, yes, we do.

Q How does OIRA handle situations where stakeholders report
different cost estimates than those used in the proposed rule? Does
OIRA make recommendations for agencies to reevaluate their analysis
when these amounts differ?

A We would take those comments into consideration. And it
is possible as a general matter that we will look into those comments.
And if we felt like the commenters are making valid points, then we
could ask the agency more information about how they address those
points.

Q Do you recall doing so in the case of WOTUS?

A Let me think for a second.

I recall having conversations of that nature as part of my normal
update to the WOTUS, but I don't recall being involved at a high level
of detail in those types of conversations.

Q Have you experienced situations where OIRA will make a
recommendation for an agency to reevaluate its analysis and the agency
does not do so?

A If we make recommendations to the agencies, it is very
unusual for an agency to not do anything in response to our
recommendation. The typical recommendation could include various

stages and strengths of recommendation, but the agencies do typically have to respond to it. They may not do exactly what OIRA asks in the first round. It often becomes a conversation between the analysts or desk officers.

Q And the agency's response in these types of situations would be factored into OIRA's decision to conclude review in a certain manner at the end and allow the agencies to promulgate a rule or not --

A Yes.

Q -- or to return the rule. Is that correct?

A Yes. The potential responsiveness and the strength of the policy recommendations and the agency's response to those recommendations always go into a decision on whether or not to conclude review on a rule.

Q Have you ever experienced a case where OIRA's disagreement or recommendation has not been adopted and that has precluded a favorable or successful conclusion of the rulemaking?

A So, as I mentioned, in this administration, as a branch chief, there has been a return of a series of rules. In that case, I would say that the concerns that were raised during Executive order review were not responded to adequately.

Q Do you recall having any discussions about the WOTUS rulemaking that any aspect or recommendation that OIRA made was not satisfied and potentially discussing issuing a return of the rule?

A I do recall policies where OIRA made recommendations that were not adopted into the rule.

Q Do you recall which ones those were, or is it too long to list?

A No, I think it's -- I can recall one --

Q Okay.

A -- that during the draft of the final rule, a change was made by the agencies to remove a foot limit, and -- because I'm being careful to be -- I know with confidence, I believe it was 4,000 feet, but I will defer to the text of the rule if it's different than that. And I believe the policy was that, within a 100-year floodplain, if the isolated water was more than that distance away, that would not be considered jurisdictional.

And, again, I believe that policy was changed to remove that, so anything within a 100-year floodplain is potentially jurisdictional and becomes more of a case-by-case determination. Again, this is the best of my recollection. And OIRA's recommendation, I can speak personally that we recommended to retain that difference.

Q You recommended retaining the difference that was ultimately in the final rule about including that 100-year coverage?

A No. We recommended to retain the foot limit beyond which an isolated water would not be considered jurisdictional.

Q And that was decided against?

A Yes.

Q And who decided against that?

A I actually couldn't -- I don't recall the specifics of that discussion.

Q Have you ever experienced -- I know there's a limited number of joint rulemakings, but you did say you've been involved in some of them. Have you ever experienced a case where one of the two joint agencies were not involved in the process of developing a cost estimate or the analysis underlying the rule?

A No, I have not.

Q I would like to introduce our first exhibit into the record.

[Mancini Exhibit No. 1

Was marked for identification.]

BY MS. AIZCORBE:

Q I will introduce this as exhibit No. 1.

A Okay.

Q You will get this copy.

A Thank you.

Q And I will be referencing subject number 2 in this email, if you could read that and familiarize yourself with it.

A Okay.

Q I'm only going to reference the first two sentences, so if you are done --

A Okay. I'll read the first two sentences then. And let me read them again so I'm precise.

And this is an email from Jim to --

Q To EPA and the Army.

A Okay.

Okay.

Q In a December 12, 2013, email under subsection number 2, Mr. Laity tells the EPA and the Army that, quote, "a lot of stakeholders are complaining that the rules reads like substantive decisions have already been made, and includes no 'alternatives' as required by EO 12866. This is a fair concern."

Mr. Laity informed the committee that alternatives were ultimately included in the final version of the proposed rule that was published. Is it common for agencies to submit a proposed rule to OIRA and then develop alternatives after the fact?

A As a general matter, it is -- let me think about this. It is common for OIRA to suggest the analysis of other alternatives. So, as I read this, it would not be uncommon for us to do this. I can't speak for the frequency with which agencies don't submit anything with alternatives, but it would also be common for an agency to submit a regulatory impact analysis with alternatives.

What I'm trying to say is that the subject of this email, whether or not there was an adequate discussion of alternatives, is a typical subject as a general matter of an Executive order review.

Q Are you aware of whether the draft proposed rule as it was submitted to OIRA contained any analysis or discussion of alternatives?

A I am generally aware that the Corps and EPA provided a draft regulatory impact analysis with the proposed rule. I do not recall or am aware of the nature of the alternatives, whether they existed in that analysis.

Q Did you discuss the concerns Mr. Laity raises in this email

with Mr. Laity?

A I don't recall having a discussion on this particular issue.

Q When in the rulemaking process are agencies required to develop and consider alternatives?

A They are -- let me be precise. The rulemaking process is governed by the Executive order. And the draft regulatory impact analysis that are submitted to OIRA accompanying draft proposed rules -- let's say, our circular, A-4, says the agency should develop alternatives at that point.

Q So would you expect this draft RIA to include alternatives when it is submitted to OIRA in some form?

A The draft RIA is governed by Circular A-4, and Circular A-4 says that agencies should develop alternatives as part of that regulatory impact analysis.

Q So you're saying it would be OIRA's expectation, if the agency is complying with Circular A-4, that there would be alternatives in that draft RIA?

A Yes, it would be our expectation. However, I would say that it is not unusual for OIRA to engage with the agency at that point to develop alternatives. And that could be a significant point of the review process.

Q Would you expect that a proposed RIA include -- I mean, I'm basically getting at the point that if OIRA receives a draft RIA that does not contain any discussion about alternatives, what would OIRA do?

A As a general matter, if an RIA had no discussion of alternatives, we would ask the agency to develop and analyze alternatives.

Q And then at that point, if the RIA is not changed or if the draft regulatory text is not changed, does that raise any concern on your part because they did not provide meaningful, you know, consideration of alternatives?

A So, just to clarify, the draft regulatory text would not -- it is possible that you have alternative regulatory text, but I would say it is much more common to not have -- to have one regulatory text and have alternatives, either levels or policies, that are more well-explained in the RIA and the preamble. So having alternative actually full-blown regulatory text is relatively unusual.

But, yes, with that caveat, we would ask the agencies to be responsive to that, and if an agency were not responsive to development of a regulatory alternative, that is a potential issue during Executive order review.

Q And you're saying, just to make sure I'm clear, that it is not uncommon for agencies to develop alternatives after the draft RIA and proposed rule has been submitted to OIRA for formal review?

A So, to clarify, I said it is not uncommon for OIRA to engage with the agencies on providing more alternatives. That could happen in the case where they actually have some alternatives already developed, or in a case where they don't have alternatives.

I would say it is -- to the best of my knowledge, most, which I

mean more than -- more or less than not an RIA will come in with an alternatives discussion included as a part of the draft. But that does not mean that we will not engage on that discussion to the point we're asking them to do other alternatives during review of the rule.

Q Okay.

We discussed a little bit earlier the connectivity report that accompanied this rulemaking. Mr. Laity informed the committee that he raised the issue with the agencies that the report was not finalized at the time the agencies pursued the rulemaking but that the agencies said that they felt comfortable that the substantive science was done.

Did you discuss the fact that the report was not completed with anyone during your review?

A Yes. I remember a discussion with Jim Laity of this general nature, yes.

Q And do you recall what you discussed?

A I think we discussed what he is discussing, whether the current status of the connectivity report was adequate to inform the rulemaking at the time.

Q Have you experienced other rulemakings where an agency will develop the science concurrently with developing the rule itself?

A As a general matter, yes.

Q And how frequently would you say that is done?

A I can't really predict -- I can't really give you a frequency estimate.

Q Do you recall any examples?

A Not off the top of my head, no.

Q In that case, is OIRA not concerned that the agency is basing its rulemaking on science that is not finalized?

A So the status of the science that is being developed for a rulemaking as a general matter can be the subject of a review. And I'll venture to say it would be a potential discussion with the agency about whether it's adequate -- adequately developed to inform the rulemaking. So, as a general matter, yes, the state of the scientific research could be a subject of review.

Q And was it in this case?

A So the connectivity report, to the best of my knowledge, was a significant input into this review. We concluded this proposal under the Executive order with the current status of the connectivity report. So we did not feel that was an issue significant enough to not conclude review of the proposal.

Q Are you aware of anybody at OIRA who read the connectivity report?

A I can speak for myself. I did not read the connectivity report. I am not aware of the level of review of anyone in OIRA who read it.

Q Can you explain briefly OIRA's process for evaluating peer reviews of scientific assessments?

A As a general matter, we have guidance that we've established under the Information Quality Act. That's the peer review guidance with which you're probably familiar. It is on our Web site. And it

requires a level of peer review for influential and highly influential scientific assessments.

But OIRA does not have the item-by-item oversight under that act of each particular instance where that takes place. In cases where we are aware of the agency doing highly influential, the agencies sometimes come to us and say, what is your opinion of whether or not this is highly influential under the act? And here's our process for peer review.

The agencies typically have their own guidance, as well, and our guidance calls for their guidance. It's a bit of a bureaucratic -- but the agencies should follow their own guidance on that. So that's the general nature by which we interact with the agencies on peer review issues.

Q Does OIRA evaluate compliance with that peer review bulletin?

A So we will report on compliance with the Information Quality Act in our yearly report to Congress. What we will typically interact with the agencies on is on what are called "requests for correction" under the Information Quality Act, and, again, with the caveat that we don't have, like, formal oversight, there's no formal submission and discussion. We'll often discuss with the agencies, if they have an information correction request, their response to that. And, in that sense, if we do not feel as a general matter the agencies are being responsive, we will interact with the agencies.

On the peer review, again, it's similar. We have some various

interactions with agencies on scientific products to the extent that the peer review comes up. And if it's considered highly influential, we will interact with the agencies about that peer review process.

Q And does that occur in the course of rulemakings such as WOTUS?

A As a general matter, it could occur during that process.

Q Do you recall whether it did occur in this rulemaking?

A I actually don't recall the specifics of that type of conversation in this rulemaking.

Q Mr. Laity informed the committee that if an agency had a peer review that meets the requirements of the peer review bulletin, OIRA would generally accept the scientific validity of whatever the document was at face value. Is that your general understanding as well?

A Yes, that's our general understanding.

Q And who at OIRA would evaluate whether a peer review meets the requirements of the bulletin?

A As a general matter, in our statistics and science policy branches, we have some specialist scientists that are involved in the Information Quality Act issues, and they would typically have an input into that discussion.

Q And you're saying you don't recall whether they did with respect to this rulemaking?

A No, I simply don't recall.

Q Do you recall whether the connectivity report was

determined to be highly influential?

A I don't recall.

Q In the email that I introduced earlier as exhibit 1, under subsection 1, which you can take a look at now --

A Yes. Should I read the whole paragraph or sentences?

Q I'm going to start at -- sure, read the whole 1.

In this email, under subsection 1, Mr. Laity discusses comments, including those submitted by Congress, that, quote, "we are letting the rule get ahead of the science, and should not propose the rule until the SAB review is complete," or the Science Advisory Board review is complete, unquote.

The agencies proposed the rule on April 21, 2014, yet the Board did not complete its review until October 17, 2014. Do you know why the agencies did not listen to Mr. Laity's advice regarding waiting for the Board ready to complete its review before proposing the rule?

A I don't know.

Q Did OIRA do anything about the agencies' refusal to wait, to your knowledge?

A The specific knowledge I have of this issue is this email. And I believe that Jim is offering advice to the agency that is different than waiting until the rule is complete. But I'm not aware of any specific changes or things that the agency did in this area.

Q In the same section, Mr. Laity continues, quote, "If we can show that the report already went through a round of peer review (which was hopefully favorable) and was already revised once to address peer

review comments, this will help a lot to address this concern," unquote.

In your experience, does OIRA usually evaluate results of peer reviews or how an agency addresses those recommendations?

A In rulemakings in which there is a large scientific component, it is a potential subject of discussion during review. I can't tell you with what frequency we would look at those studies, but it would not be unusual, for a rulemaking in which the science is informing the decision, for us to at least read documents such as this.

Q Do you know in this rulemaking whether anyone at OIRA reviewed the comments made during the initial peer review of the report or of the Science Advisory Board's review?

A No, I do not.

Q Do you know whether anyone at OIRA asked the agencies how they planned to address the concerns and comments expressed in those reviews?

A In the peer review? I don't know.

Q Mr. Laity informed the committee that he did not look at the comments that came out of those peer reviews. Does that seem questionable to you in the case of a large rule such as WOTUS where a significant portion of it is based on this scientific review?

A For instance, Jim, I assume, is just speaking for himself. I can't speak to whether someone else besides him looked at these comments. That is really the discretion of the branch chiefs, to figure out whether it would be efficient and worthwhile for the review to look at documents like that.

Q During your time at OIRA, have you reviewed comments from the Science Advisory Board on rulemakings you're reviewing? Or any other peer review?

A Thank you.

Q Yes.

A I can more confidently say "yes" --

Q Okay.

A -- to the latter.

Q And is there any specific circumstances that would give rise to you reviewing peer reviews in one case over another case?

A Yeah. So, as I mentioned before, for instance, if the EPA or another agency were proposing a range -- and OSHA does this, as well. And the rulemaking is really about the level that an agency would set, and that level is set both by the statutory components of the actual rule in those cases -- sometimes even the cost-benefit analysis can't be considered. If the science is significantly informing those levels, then that would be a case in which we would be more likely to consider looking at the science in more detail, including peer review comments.

Q What is OIRA's review if a peer review recommendation or recommendations are critical of the underlying assessment?

A Like I said, we don't review those in any formal way during the development of a scientific product such as a Science Advisory Board report. We do not have review authority over that.

Q Was it your impression at any point that the reviews from

these two peer reviews were favorable?

A I don't have specific knowledge of the nature of the peer reviews in this case.

Q Is it rare that a peer review report is not made public?

A That depends on the nature of the process by which it's created by. My sense, based on my knowledge of these -- and I always have to say I don't have a knowledge of the frequency with which peer reviews are taken. I know the ones that are associated with rulemaking.

But, that said, I would say it is typical for a peer review of a rulemaking to be -- of a scientific product based on a rulemaking to be made public.

Q Okay.

Ms. Aizcorbe. Time. We can go off the record. Thank you.

[Recess.]

[2:11 p.m.]

Mr. Longani. All right. We're going to go back on the record.

BY MR. LONGANI:

Q Okay. Mr. Mancini, we're going to go ahead and introduce an exhibit to start with. Actually, hold off on it. Just one second, and we'll introduce it. And I think it will be exhibit 2. Is that right? Yeah, 2.

Mr. Mancini, are you familiar with the Government Accountability Office?

A Yes.

Q Okay. And what's your understanding of their role as a Federal agency?

A My understanding of their general role is to -- what I'm familiar with is that they occasionally do studies of particular areas in the executive branch, often, I believe, at the request of a Member of Congress.

Q Okay. Would you agree that they are an independent agency?

A By "independent," do you mean -- "independent," I'm sorry, has a special meaning in the executive branch.

Q Okay. Well, what is your meaning?

A If you mean by that that they have a -- if they're unbiased or if that -- I think that's what you were trying to get at.

Q Yes.

A So, yes, I agree.

Q So you would agree that they are an unbiased source within

the government?

A Yes.

Q Okay. They were not a party -- and "they" meaning the GAO, the Government Accountability Office -- they were not a party to this rulemaking? And by "this," I'm referring to WOTUS?

A Correct.

Q Okay. Were you aware that following the completion of the final WOTUS rulemaking, the GAO conducted a review of the agencies' compliance with all relevant administrative requirements, including the economic analysis as well as the Administrative Procedure Act, and concluded that the agencies met every single requirement?

A So I'm aware of the general investigation. But I did not review the GAO analysis to be able to verify that.

Q Okay.

A I simply didn't read it.

Mr. Longani. Sure. And now I'm going to introduce exhibit 2 for the record.

[Mancini Exhibit No. 2

Was marked for identification.]

BY MR. LONGANI:

Q Mr. Mancini, I'm going to direct your attention to the top of this document right underneath the title, the first paragraph, I suppose, would be the best description of it, starting with: "GAO reviewed the Department of Defense, Department of Army, Corps of Engineers, Environmental Protection Agency's (collectively the

agencies') new rule on the Clean Water Rule." Do you see where I'm at?

A Yes.

Q Okay. So if you could just review that to the end of the paragraph.

A Okay. The first paragraph?

Q Yes, please. And I'll give you a moment to take a look at that.

A Okay.

Q Mr. Mancini, I'm specifically going to direct you to the portion of that paragraph that comes right after the second finding of the report. And, specifically, it states -- and I'm going to start with the second sentence and then skip to the second part of that sentence, for the record. It says, quote, "GAO found that," and then it has, Number 1, its first finding, which I'll just read for the record, which is, "the final rule does not establish regulatory requirements but, instead, defines the scope of waters protected under the Clean Water Act in light of the statute, science, Supreme Court decisions, and the agencies' experience and technical expertise"; and, second, "the agencies complied with the applicable requirements in promulgating the rule."

Mr. Mancini, did I correctly read that --

A Yes.

Q -- portion of paragraph one in exhibit 2?

A It sounded like you correctly read it. Yes.

Q Okay. It's not a trick question, I promise.

A Okay.

Q I hope I was able to read it correctly.

A Okay.

Q Mr. Mancini, do you have any reason to disagree with the GAO's finding that the agencies complied with the applicable requirements in promulgating WOTUS?

A With the caveat that I'm not familiar with the report and know the specific requirements under the executive order, but to the extent that the applicable requirements include those, then I agree with this statement.

Q Okay. The report includes an assessment of various regulatory requirements that were complied with. For example, the GAO concluded that the cost-benefit analysis was complied with.

Do you disagree with the GAO's finding of compliance as to the cost-benefit analysis?

A No, I do not.

Q Do you disagree with the GAO's finding of compliance as to the regulatory flexibility analysis?

A No. I do not.

Q Do you disagree with the GAO's finding of compliance with the Unfunded Mandates Reform Act of 1995?

A No.

Q Do you disagree with the GAO's finding of compliance with respect to the Administrative Procedure Act?

A No.

Q Do you disagree with the GAO's finding of compliance with respect to the Paperwork Reduction Act?

A No.

Q Do you disagree with the GAO's finding of compliance with respect to executive orders -- fulfilling Executive Orders 12866 and 13563?

A No. I do not.

Q Do you have any basis to suggest that the GAO did not conduct an independent analysis of the EPA and Army's regulatory compliance in the WOTUS rulemaking?

A I have no basis to suspect that or think that.

Q Now, Mr. Mancini, in the last round, you discussed a bit about the economic analysis and specifically the cost-benefit analysis. Do you remember that?

A With the majority questions?

Q Correct. Sorry. Last round, I'm sorry, with my colleagues from the majority. Yes.

A I do remember that. Yes.

Q Yes. I want to go back to that for a brief moment. Okay? First of all, Mr. Mancini, you mentioned during that last round that you were involved in discussing -- or you discussed with the agencies the methodology to be used in the cost-benefit analysis. Is that correct?

A That is correct.

Q And do you know what methodology they ultimately decided upon using?

A To the best of my knowledge, the basis for the analysis that I described in response was the methodology that they incorporated into the proposed and final regulatory impact analysis.

Q Okay. And, Mr. Mancini, do you think the economic analysis with respect to this rule was difficult -- or let me put it this way -- was challenging?

A I believe I talked a little bit about that before. I believe that there were challenging circumstances involved in this analysis. Yes.

Q Can you expound upon that in terms of the challenges faced in doing an appropriate economic analysis, and specifically a cost-benefit analysis, for the WOTUS rule?

A I will -- in addition to the discussion I had before about the intervening steps that need to be considered, the way that could affect the analysis is in what's known as the baseline. And in a case like this, the baseline for analysis, when you have a regulation that has been modified somewhat by more than one Supreme Court decision and subsequent guidance, the discussion of how to define the state of the world preceding the regulation was an especially challenging one in this case. The other difficult thing that I would say, considering this is difficult, is that it is not typical to have a rule that is primarily associated with a jurisdictional statutory interpretation. To try to find a legitimate way of analyzing the economic impact of

what is a jurisdictional determination that will be implemented through a subsequent permitting step was another challenge in this case.

Q At any point did you receive instructions as to how that economic analysis should turn out?

A No.

Q Or what that result should be?

A No. I did not.

Q From any party in the government?

A I'm confident that no one provided instruction to me to inform -- we received input as part of interagency review process, but I would never -- I would not characterize anything as any kind of instructions about the results of an analysis.

Q Okay. Do you feel that the methodology that was ultimately settled upon to do the economic analysis was appropriate?

A I believe that the methodology that I described, that I characterized as a significant part, but I cannot say there were other -- there weren't other parts, I believe that was a credible attempt at the analysis of this -- of the impact of this rulemaking.

Q And OIRA was satisfied with that attempt, correct?

A We -- they talked with us during the development of that rule, and this methodology was developed with our input and recommendation. So we had -- I'm sure we had comments on the specifics of the RIA. But the general analysis we were satisfied was a credible attempt.

Q Mr. Laity informed the committee that he felt that the

cost-benefit analysis that was submitted with the rule appropriately included an estimate of both costs and benefits. Would you agree with Mr. Laity?

A Yes. I would agree.

Q He also informed the committee that he thought it was a reasonable cost-benefit analysis. Would you agree with Mr. Laity as to that point?

A Yes. I would say my characterization as credible and reasonable are similar characterizations.

Q And Mr. Laity also informed the committee that he felt -- he ultimately found that it was consistent with the requirements of the executive orders. Would you agree with that?

A I would agree with that.

Q Would you have recommended concluding the review of the rule as consistent if you had significant unresolved concerns about the economic analysis?

A No.

Q Do you have any evidence to suggest that the rule was forced upon the Army by the EPA?

A I don't have evidence to suggest that this wasn't -- that that circumstance existed.

Q In fact, would you agree that the evidence that you're aware of points to the fact that this was a joint process between -- the rulemaking was a joint process between the Army and the EPA?

A The interactions that I had with the agencies and my

personal interactions led me to believe with confidence that this was a joint interaction -- this was a jointly developed rulemaking.

Q And the economic analysis itself came to you as -- or came to OIRA as a joint product of the EPA and the Corps of Engineers, correct?

A The -- yes. That is correct. The economic analysis associated with the rulemaking was developed jointly by the two agencies. The one small caveat that I would say is that it may have been -- and I just simply don't remember -- introduced as part of a rulemaking package that came from one of the agencies. But the actual methodology was jointly developed by the two agencies.

Q Now, at the beginning of the majority's hour, they talked briefly about point of contacts and the individuals who were representing the positions -- or the point of contacts for OIRA with both the Army and the EPA. Do you remember that conversation?

A Yes. I do.

Q Okay. Did you have any doubt during this process that the Army's point of contact, Mr. Schmauder, in any way, shape, or form was representing the Army's point of view on the WOTUS rule?

A I have no reason to think that he was not representing the Army's point of view in this rulemaking.

Q I want to talk to you a little bit generally about the process of developing a rule. And I kind of want to step back and look at this really from a 50,000-foot level.

Is it fair to say that rulemaking is a flexible process by its

very nature?

A There are -- by "flexible," I will clarify my -- in my head, that means --

Q Sure.

A -- there are various ways of developing rules and various methods by which particular instances -- particular issues are discussed, and in that nature, yes, it's a flexible rulemaking.

Q So let me follow up on that. Isn't it fair to say that rules evolve over time, which is why there are various stages of the rule, including a proposed phase and then a final phase, which is -- and in between those phases, a public comment phase. Isn't that why there were multiple stages of rulemaking?

A Final rules -- under the law, final rules should be at least responsive to public comments. So it is actually a requirement that rules potentially be modified if significant issues arise during the process.

Q And is it out of the ordinary for rules to change between the proposed rule stage and the final rule stage in response to public comment?

A No.

Q And, in fact, isn't that what the process is designed to do?

A Yes. The process is designed to -- for rulemakings to be responsive to public comment. And that often involves changes to the rulemakings and is -- sometimes would require changes to the

rulemaking.

Q And I think, speaking of that, in the last hour in discussions with the majority, you indicated that one of the changes that was made during the draft final rule process was a change to the 100-year flood plain. Is that correct?

A Yes. If you refer to the removal of the foot limit beyond which rules -- waters would not be jurisdictional, that is correct.

Q And the reason for that change was what?

A To the best of my knowledge, I believe that this was a change that was made in response to a concern raised by the Corps of Engineers as part of the review of the final rule under the executive order.

Q So it was responsive to a concern of the Corps of Engineers. Is that correct?

A To the best of my knowledge, yes. That's correct.

Q Okay. And, in fact, were there discussions about this during the public comment period as well?

A I am -- there were discussions of the use of the 100-year flood plain during the public comment period. I am confident that the public responded about this. I am not aware of whether comments spoke particularly to this foot cutoff issue.

Q Okay.

A And if I might add one --

Q Sure.

A -- one more clarifying statement about that. This was something which the agencies specifically requested public comment on.

So, to the extent that it was a subject that was identified during the proposed rule phase, that also speaks to why I can say I'm confident that it was discussed during public comment.

Q Okay. Okay. Now, you also talked about the fact that there were -- that there are multiple inputs into a rule, including science and the legalities of that rule. Is that correct?

A That's correct.

Q What other inputs are there besides science? And let's talk specifically about the WOTUS rule.

A Okay.

Q What other inputs would there be?

A The input -- there would be input on -- for instance, you said the legal issues. So there would be case law as well as various court cases that counsels would look at and interpretations of rulemakings in order to inform whether that was an approach. And there would also be a discussion of impacts. For instance, in this case, if it were -- as we have already discussed, if it were simple to define jurisdiction in this case, we wouldn't have had such a high profile rulemaking. So there will be discussion in the public comments about the impacts of different decisions in the jurisdictional space. Even the economic impacts, that could be an input into the discussion if there were a particular class of waters where it was especially important for -- to cover them so the permits would provide them protection under the Clean Water Act. So there could be some -- and then there would just be, for instance, where it's not necessarily a

scientific or legal -- I'll give you an example of manmade waters presented some unique issues to discuss that I would not put in either the scientific or legal. It would -- put it into perhaps the purposes of the water body itself. But that could be input that we get from industry during rulemaking.

Q So it's fair to say that there are multiple goals and multiple competing factors that one has to balance in determining the final version of a rule. Is that fair?

A That is fair, yes.

Q In fact, Mr. Laity informed the committee that it was his view that the ultimate decision on exactly how to write the rule was absolutely based on science, but it was also informed by policy choices. Would you agree with that?

A Yes.

Q He also informed the committee that there was a balancing among different competing goals. And one of those goals was to provide more regulatory certainty to the regulated community and also to the stakeholder community in States and the localities, for example. Do you agree with Mr. Laity?

A Yes.

Q Now, another issue that was talked about with respect to the reg flex analysis, the RFA analysis, was the issue of indirect effects. Do you remember that?

A During the previous questions?

Q Yes.

A Yes. I do.

Q And Mr. Laity informed the committee that ultimately it was Mr. Sunstein as a lawyer who made the decision to accept EPA's legal interpretation regarding indirect effects versus direct effects. Is that consistent with your knowledge?

A Actually, I don't have a specific recall of the decisionmaking process in that instance.

Q Okay. Would that have been the appropriate level for that decision to have been made knowing full well that you don't know if that was how this decision was made?

A As a general matter, that is -- that would be an appropriate avenue for resolving issues of this nature. I would add that the -- when it comes to statutory interpretation, that various counsels' offices within the agencies would also be involved in such a discussion.

Q Okay. Brief indulgence. Just need to move a couple documents.

Okay. Okay. Another issue that was discussed in the last hour related to the science in this matter, the science underlying the WOTUS rule. At the end of the day, did you have -- were you satisfied in your role with the science as presented to OIRA?

A As part of the rulemaking process?

Q Correct.

A In my personal role, I was satisfied.

Q And if you were not satisfied, would you have made that known

through Jim or whoever it is that you needed --

A Yes.

Q If you had concerns, was the question.

A With the clarification that as my role as Deputy Administrator would -- may or may not include that level of discussion of a particular rulemaking. Now, you're talking about the WOTUS rule, and in this particular case, I could say that I was involved in discussions with the -- about the science of the rulemaking. And if I were -- I had the opportunity to express a concern about the status of the science, and I did not.

Q And, Mr. Mancini, is it your understanding that the draft connectivity report was released in September of 2013? Is that around the timeframe that you recall that being released?

A I actually don't have a specific recollection of the release date.

Q Okay. Do you recall that the connectivity report, the final one, was released in January 2015 before the final rule was submitted?

A Again, I don't have a specific recollection of that, the --

Q Okay.

A -- final. Well, again, I don't have a specific recollection of the final release date.

Q Okay. Do you recall if it was submitted before the final rule was submitted to OIRA, draft final rule was submitted to OIRA?

A So a connectivity report of that nature does not go through

a formal review process in OIRA. I am aware of having a general discussion, to the best of my recollection, about the results of the connectivity report. But I cannot tell you with confidence exactly when those discussions took place relative to the rulemaking development.

Q Okay. And so let me talk specifically about OIRA's role in the peer-review process. Mr. Laity informed the committee that OIRA -- that one round of peer review is sufficient to comply with the peer-review bulletin. Is that your understanding as well?

A Yes.

Q And the WOTUS rule actually underwent two rounds of peer review. Isn't that correct?

A So I understand it went through two rounds of peer review. Again, primarily based on the exhibit 1 email, just to clarify. The first round of peer review, I'm not aware of the nature and the specifics of that first round of peer review and to say whether it would be compliant with the act. In general, a science advisory board review is compliant with our guidelines. So I could say with confidence that the second round of peer review that was the SAB was compliant with peer-review guidelines.

Q But you're not saying that the first round was not compliant.

A I'm saying I just have no knowledge of the first round of peer review.

Q Okay. Great. Sorry. I just wanted to be clear.

A Yes, as I do.

Q As we all do.

So is it your understanding, Mr. Mancini -- well, strike that.

Mr. Laity informed the committee that there was an internal peer review, at which point the report, connectivity report, was revised in response to the internal peer review. And then an external review was done by the scientific advisory board, after which the report was revised again. Do you have any reason to disagree with Mr. Laity's summary of the stages that the report went through?

A I have no specific knowledge of that. But to answer your specific question, I have no reason to disagree or think that statement is inaccurate.

Q In fact, Mr. Laity told the committee it was the gold standard of review. Do you have any reason to disagree with Mr. Laity's description of the level of review that the connectivity report went under?

A Again, as a general matter, science advisory board reviews are considered a -- what I would call a more robust set of peer reviews that would not necessarily be necessary to comply with the guidelines. But as far as this particular concern, to answer your specific question, I have no reason to disagree. But I don't have specific knowledge of the details of this particular peer-review process.

Q Would you agree generally that two rounds of peer review for a science report is strong evidence of -- well, withdraw that question.

Would you agree that two rounds of review is a positive in terms of the strength of a rule ultimately?

A A science report that goes through multiple rounds of peer review as a general matter, especially if those -- both of those peer review rounds would be consistent with the peer-review guidelines, I would characterize that as a robust peer-review process.

Q Okay. Okay. Mr. Mancini, in a joint rulemaking situation, would you expect differences of opinion to occur in the rule of this, and by "this," I mean WOTUS, WOTUS' magnitude and complexity?

A Do you mean differences of opinion among the two agencies developing the rule --

Q Yes.

A -- two or more?

Yes.

Q And does OIRA help the agencies work out these differences of opinion?

A Yes.

Q How so?

A We will often play in a similar role that we would do to resolve differences between an agency that's reviewing another rule. In this case, the joint rulemaking will necessarily involve an amount of communications among the two agencies that OIRA will not be part of. One way would be the agencies may ask OIRA to try to resolve a dispute or a -- or any disagreement among the agencies. And we view that as part of our role in the executive order to do that.

Q Okay. And I know you've only -- you've had limited experience by the very nature with joint rulemaking, because they're rare, as I understand. Is that correct?

A That is correct.

Q And but based on your limited prior experience, would you agree that that type of discussion or disagreement between agencies and OIRA's role in attempting to mediate those differences is commonplace?

A During my limited review experience with joint rules, I would say that it is common for the two agencies to have an issue that they don't initially disagree on that they could involve OIRA in the conversation about.

Q And you've been at OMB across both Democratic and Republican administrations. Correct?

A Correct.

Q Has the issue -- or has OIRA's role changed in terms of mediating those type of conflicts between agencies and joint rulemaking between administrations?

A With the caveat that I don't recall very many specific joint rulemakings in the previous administration in which I was a part, I see no difference in the way in which we would interact with agencies on joint rulemakings between the two administrations.

Q Okay. In a joint rulemaking context, are you aware of a situation where every team member's recommendations was adopted and integrated into the final rule by the ultimate decisionmaker?

A No.

Q Is it realistic for staff to have that expectation, in your opinion?

A As a general matter, staff do not have that expectation. And I could speak for OIRA staff on that issue.

Q Okay. Does the fact that a team member, be it -- and I'm going to speak specifically about WOTUS -- be it the Army, Army Corps, EPA, or OIRA, the fact that any of those staff members' recommendations was not adopted a sufficient basis to say that the rulemaking was flawed?

A Ultimately, OIRA will conclude review of the rule as consistent or not with the executive order. The disposition of any one recommendation, the ultimate action that the agencies took as a result of that recommendation, there are many reasons, legitimate reasons, within this process that those recommendations would not be adopted. And that is a common outcome of the regulatory review.

Q As you know, in the WOTUS case, the Assistant Secretary of Army for Civil Works was ultimately the decisionmaker for the Army. Is it your understanding -- or do you believe that the Assistant Secretary of the Army for Civil Works is the appropriate decisionmaker with respect to the WOTUS rule?

A That is my understanding, yes.

Q Mr. Mancini, are you familiar with the Administrative Procedure Act?

A I would say I have some familiarity with the act, yes.

Q Is it your understanding that, under the APA, it does not require a specific -- it doesn't require a specific length of comment period?

A I actually -- off -- I believe that that's the case. Actually, I just had to think about it for a second. Yes, that's my understanding.

Q Okay. Is it also your understanding that E.O. 12866, section 6(a), suggests that agencies 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? Do you agree with that?

A Yes. That sounds like the executive order, to the best of my knowledge.

Q Okay. And as we, I think, established earlier in your testimony, the comment period for WOTUS was 200 days. Is that correct?

A Well, what I said in my previous questions was that I was not familiar with the exact time period.

Q Okay.

A I believe. But I am familiar with the fact that the comment period was extended.

Q Got it. Mr. Mancini, the rulemaking process from beginning to end, including the guidance period, took approximately 6 years. Would you consider that to be a rushed process?

A I would consider that to -- agencies often take that long to produce a policy. That is a typical period. I would not consider

that a shorter than average period to develop a rulemaking policy.

Q Okay. So would you agree that it was not rushed?

A I think that's a fair characterization, that it was not rushed.

Q Are you aware of any agencies, including OIRA, being directed by the President or anyone at the EOP to promulgate this rule with a disregard for science?

A I'm aware of no such conversations of that nature.

Q Are you aware of the agencies being directed by the President or anyone at EOP to reach a finding of no significant impact?

A By meaning -- by saying that, under the RFA, as I assume that's what you're referring to, no significant impact on a substantial number of small entities, we were involved in conversations about the interpretation of the Regulatory Flexibility Act and the circumstances. But I am aware of no direction of the nature of which you're talking about reaching a particular outcome.

Q So you were never directed by anyone, including the President or anyone in the EOP, to reach a specific decision of no significant impact. Is that correct?

A No.

Q Okay. Are you aware of any of the agencies being directed by the President or otherwise to promulgate WOTUS in violation of legal requirements and regulations?

A No.

Q Throughout this process, Mr. Mancini, several agencies

beyond EPA and the Army commented. Isn't that correct?

A That is correct.

Q Is there anything inappropriate about other agencies commenting on the development of this rule?

A By "commenting on the development of this rule," you mean commenting as far as the executive order process?

Q Correct.

A On the contrary. Agencies are supposed -- we highly encourage agencies with an interest in a rulemaking and other components of the EOP to actively participate in rulemaking.

Q And as a result of those interagency comments, is it common to then make adjustments or alterations in response to those comments that come from interagency -- that come as a result of the interagency process?

A It is common for an agency to address those comments and to make clarifying -- anywhere from clarifying edits to potential changes in policy based on those comments.

Q And, in fact, would OIRA encourage the responsible agencies in the WOTUS case, EPA and the Army, to respond to interagency comments with respect to the rule?

A Yes.

Q Mr. Mancini, the prime goal of this rule, the WOTUS rule, was to provide clarity to all stakeholders. Isn't that correct?

A That was one of the major goals in the rulemaking.

Q One of the major goals would be to provide clarity.

A Yes.

Q Okay. Particularly in light of the fact that, after the original regulation had been promulgated, there had been a series of Supreme Court cases interpreting that regulation. Isn't that correct?

A That is correct.

Q And a subsequent guidance as well. Isn't that correct?

A Yes. I believe in 2007 -- and I'm fairly confident in that statement -- that the previous administration -- to clarify, I was not a part of this branch at that time -- provided guidance on interpreting the Clean Water Act in light of the Supreme Court decisions previous to that guidance.

Q Another one of the goals -- well, strike that.

If implemented, would one of the benefits of the WOTUS rule be to have an impact on the ability of people in terms of obtaining clean drinking water?

A The Clean Water Act is about the cleanness of surface water. The Safe Drinking Water Act has another set of authorities that cover drinking water specifically. But to the extent that more permits lead to fewer pollutants in the water supply that are subsequently used for drinking water, it could have that impact.

Q Okay. Part of the rule -- so what part of the rule does is to preserve protection of certain bodies of water for Clean Water Act jurisdiction purposes, correct?

A That is correct.

Q Okay. I think I'm done with my round. Just one brief

indulgence, make sure I don't have anything else.

Mr. Longani. We can go off the record.

[Discussion off the record.]

Mr. Longani. We can go back on the record.

Mr. Mancini. Just a -- I'm sure this is not substantive, but in the spirit of a slight clarification, there was one -- I said that I had recalled that there were no joint rulemakings under the previous administration. And I do recall actually that there was one rulemaking during which I was in the Branch on Fuel Economy at the end of the previous administration. So I just wanted to clarify that. In fact, I can think of one incident, not none.

Mr. Longani. And just to follow up on my question back then, is there any difference in terms of how you treated joint rulemaking, the process of joint rulemaking, from a Republican to a Democratic administration?

Mr. Mancini. That I was aware of --

Mr. Longani. Just in terms of process.

Mr. Mancini. Yeah. I'm aware of no process differences in the way that we treated those rulemakings relative to the fuel economy rulemakings that happened in this administration.

Mr. Longani. Okay. Now we can go off the record.

[Recess.]

[3:02 p.m.]

BY MS. AIZCORBE:

Q Mr. Mancini, in the last hour, we were speaking a bit about the peer review, and I did not have time to ask you, are you aware of whether the agencies completed a response to the peer review comments in the case of WOTUS?

A I am not aware.

Q We have talked a little bit about the agency's methodology. And Mr. Laity observed that the Agency, EPA specifically, was not consistent in how it presented its scientific baseline in different contexts, in that the EPA used existing regulation to show the rule narrowed jurisdiction in certain cases, but then uses current practice to show a 3 percent increase in jurisdiction.

Did you, at any time, discuss the Agency's inconsistent methodology with respect to this rulemaking?

A We did discuss the increase in jurisdiction, I believe, based on the methodology. I don't have a specific recollection of discussing the circumstances under which they used a different basis for concluding that there was a narrowing of jurisdiction.

Q Do you know why they used two different types of analyses -- or methodologies?

A With the caveat that I am not specifically aware of the methodologies they used, I don't have knowledge of the different ways in which they approached this analysis.

Q Have you encountered other rulemakings where agencies used

different methodologies within the same rule?

A So the methodologies here -- again, I am not familiar with the specifics of the methodologies that you are referring to, so I can't really provide you an answer about providing other examples that are similar to this.

Q Just for background, in case it does give you some sort of -- it does jog your memory, the EPA used the existing regulations to show that the rule narrowed jurisdiction in certain cases, for example, for their RFA certification and some of their public statements when they were saying that, you know, 117 million Americans would be without clean water, but then used the current practice, which Mr. Laity informed us, is what OIRA accepts for purposes of developing its economic analysis. And so, I was just curious if you recall any other situation where an agency would use one method or baseline to develop its analysis and another for other parts of the rulemaking?

A Okay. Thanks for the clarification.

Q Okay.

A For the purposes of the RFA, it is possible that the nature of the impacts that are considered for RFA purposes are different than the nature of the impacts that are considered in the analysis for executive order purposes.

As I am sitting here, I can't provide you another example, but I am -- but that is a -- that is a potential outcome of the differences in the requirements under the executive order and the Regulatory Flexibility Act.

Q Mr. Laity informed the committee that the OIRA does not review compliance with NEPA. Is that your experience?

A Yes.

Q Can you explain why that is not considered a part of OIRA's responsibilities under Executive Order 12866?

A So the responsibility for NEPA compliance, to the best of my knowledge, falls under CEQ responsibility, and they are part of the executive order process, and so, as the agency who has the expertise in NEPA compliance, we would involve CEQ in the -- in the discussion and the review of the final rule, and if there were potential issues or concerns raised about NEPA compliance, those concerns could be raised as a general matter during executive order review of a rule.

Q Is that something that OIRA would reach out to CEQ in any case a rulemaking contains a NEPA analysis, or would CEQ come to OIRA to discuss any concerns it has?

A So the agencies would probably be the entities, as a general matter, to discuss NEPA compliance with CEQ, but, again, it could come up as part of an executive order analysis, at which point OIRA and the agencies and CEQ could get together and have this discussion.

Q Do you recall whether this was discussed in the WOTUS context?

A There was some discussion of what level of NEPA analysis was necessary for different options of the draft final rule during that executive order review.

Q And when you say "different options," what do you mean by that?

A I mean that, as we discussed before, agencies are looking at different alternatives, different policies that they are promulgating, and NEPA does have -- there are analyses of alternatives under NEPA as well as the executive order, and in the context of looking at those alternatives, there was discussion of the level of NEPA compliance necessary for them.

Q Okay. And do you remember the outcome of that discussion or those discussions?

A To the best of my knowledge, the particular concern that was discussed during the draft final rule, maybe this will cover other questions as well, is that whether or not one option that the agencies were considering would require an environmental impact statement. And the outcome of that discussion, I believe, was that none of the options under consideration and the option that was adopted would require an environmental impact statement.

Q And what do you mean by "options"?

A Again, I mean, we were discussing different policies, different approaches to the rulemaking, and those approaches could have

different impacts, and those different impacts -- there was a discussion of whether those differing amount of impacts would change the rulemaking from doing an environmental assessment to needing an environmental impact statement.

Q And do you recall -- excuse me. So those discussions about whether the options in the rule would give rise to needing to complete an EIS, that was discussed internally within OIRA?

A It was discussed internally within OIRA and with CEQ and the agencies.

Q And to your recollection, the decision was made between OIRA, CEQ, and the agencies that an EIS was not necessary? Is that correct?

A To the best of my recollection, yes.

Q As you know, Executive Order 12866 requires the Administrator of OIRA to provide guidance and oversight over the rulemaking process, including agencies' compliance with other applicable law. Can you maybe give us a sense of how that other applicable law is interpreted by OIRA in the scope of what you review in a rulemaking?

A Probably the biggest case -- and I will stop after my first example to see if you want another one -- is under the Administrative Procedures Act that we discussed before, whether or not the agency has complied with notice and comment rulemaking is a big part of the review and ensuring that the final rule is a logical outgrowth of the proposed rule. So those APA procedures that are very much in practice

intertwined in the executive order procedures.

Q And when we were discussing the fact that OIRA does not review a rulemaking for NEPA compliance or compliance with NEPA because CEQ has that responsibility, then does OIRA weigh other relevant rulemaking requirements or statutory requirements and how they are going to oversee those requirements based on other aspects or parts of EOP that might have that responsibility? For example, if there is some other statute, not NEPA, but requiring that an agency do X in a rulemaking, what would give rise for OIRA to say, "Okay, we are going to conduct oversight of X in this case but not in this case"?

A So after -- so as a general matter sitting here, I can't think of another statute that is sufficiently similar to NEPA to provide a general answer. The example I can think that is most consistent with what you are asking about is the USTR's obligation under the World Trade Organization rules, and I believe that some of those are statutory. And, again, whether or not a regulation provides technical barriers to trade, we would rely heavily on the USTR's determination of that and try to resolve that issue based on their guidance of what is a technical barrier to trade and what isn't.

Q Getting back to the Army's finding of no significant impact and your discussion with CEQ and the agencies to accept the agencies' environmental assessment and FONSI, did you discuss in those discussions the fact that Army had previously recommended an environmental assessment and FONSI but then changed its recommendation to seek an EIS at all, or did you only discuss the final environmental

assessment that was submitted with the rule?

A I don't remember the sequence of the discussions on this subject, but I am aware of a concern that I believe was from the Army Corps that the adoption of certain provisions in the final rule, in their opinion, would require the production of an environmental impact statement.

Q And to your recollection, were the Corps represented in these internal discussions where you decided to accept the FONSI?

A So, to the best of my recollection, the change that was made during the draft final rule was due in part because of concerns raised by the Army Corps. And the options that I had mentioned before about looking at different policy options, I believe the change in that policy was -- although it was, as I mentioned before, we didn't agree -- we may not have agreed with this policy, but I believe the Army Corps identified that that change would allow them to continue to have a finding of no significant impact and rely on the environmental assessment.

Q So you are saying, to your recollection, the Army Corps represented that the changes in the rule and what we understand specifically involved the distance limitations --

A Yes.

Q -- would not give rise to an EIS?

A Yes. So, to the best of my recollection, the position of the Army Corps was that the removal, and I don't also -- to clarify, I don't remember at what level this was expressed to me, but I do

recognize that it was a concern brought up by the Army Corps, is that having that distance limitation in the rulemaking gave, at some level, the Army Corps a concern -- I cannot say with certainty whether it was the leadership or not -- that retaining that would require an environmental impact statement, because it was a significant change to waters that had already been found protected.

Q And when you say that the 100-year flood plain language may have inspired some of those concerns of the Corps, do you recall discussing any other parts of the environmental assessment that the Corps had problems with?

A No, I don't.

Q Okay. And you don't recall whether both the Army and the Corps were represented at that meeting, do you?

A Well, I don't think I mentioned that there is a specific meeting, in-person meeting, about these issues, but in general, I don't remember whether or not the Army, as well as the Army Corps, the Army proper, I guess to say, was represented in these discussions.

Q Okay. What is your experience overseeing tribal consultation compliance under Executive Order 13175?

A We do, as a general matter, ask the agencies about their consultation. We do consider that a potential subject of our executive order review.

Q And when you ask the agencies about their consultation process, would you say that OIRA is reviewing the sufficiency of those consultation activities?

A We would probably -- I won't say the word "probably." I will try to avoid that. Our interaction with the agency would be more on the existence of the consultation with the tribes. It would be less usual for us to discuss the quality or the level of that consultation, but we would -- I would say that it would be not unusual for, if we asked the question, "have you conducted tribal consultation under this executive order," and they said no and, during the course of review, either us or another component of the EOP or another agency said, "Well, we really think that falls under the executive order," we would go back and ask the agency what their plans were. But we would probably not get involved in the details of those plans.

Q The final rule provides that a tribal consultation process for the rule included multiple webinars and national teleconferences. The Army and Corps have indicated that this type of informal outreach does not satisfy government-to-government consultation for purposes of the executive order. In your experience working on these rules and conducting oversight over this rulemaking, would you agree with that statement?

A As a general matter, I would -- the description of webinars and formal conferences sounds like potentially -- as a general matter, potentially consistent with the executive order. Specific -- to the specific rulemaking, I have no specific knowledge of the level and depth of the outreach to make a statement in this specific case.

Q And what makes you say that it is in line with -- potentially in line with the executive order?

A Because I could imagine the description of outreach could include webinars. It could include participation at conferences. The general goal of the executive order is to provide -- this is the executive order on tribal consultation that I will clarify that we -- that this is not a defined OIRA-type of issue -- but is to provide more than just the standard public notice and comment for rulemakings that could potentially impact the tribes. And my statement was meant to say that those sound like extra steps, over a normal public notice and comment process, and depending on the depth of the consultation, it sounds like it could potentially be consistent with the executive order.

Q And so, as far as the sufficiency of an agency's compliance with conducting consultation with tribal governments, OIRA would not inquire to the level of whether every tribe had been contacted. Is that an accurate statement?

A That is -- that typically would be beyond our level of discussions with the agency.

Q But in OIRA's case and your review, it would be sufficient if anything above and beyond a public comment period was pursued by the agencies?

A When I said "potential," you know, there could be a set of circumstances under which the agency has said, "Well, I have done X, Y, and Z," and we could come to the conclusion that we think that more outreach would be necessary. So I don't say -- I wouldn't say that under any circumstances that the agency comes in and said, "We did this

outreach," that we would automatically say, "That is fine." There is potentially a subject of the review whether that outreach was adequate.

Q And I recognize we are dealing within the small scope of joint rulemakings, but if a joint rulemaking agency came to OIRA and said that they do not agree that it was sufficient or in line with their own guidance on compliance with that executive order, what would OIRA do?

A As a general matter, if one of the joint agencies developing the rule said that they had a disagreement with another agency about this or any issue, outreach issue, we would typically get the agencies together and discuss the issue.

Q Was that done in this case?

A I actually do not know whether or not that was done in this case.

Q What is your experience overseeing federalism consultation -- or -- and compliance under Executive Order 13132?

A So federalism would be -- it would look somewhat like what I have described for the tribal. The federalism -- again, there are typical requirements under Unfunded Mandates Reform Act that require outreach, and that outreach, which is a statutory requirement, and outside analytical principles, that would be the typical level of outreach. We would look for federalism consultation that looks similar to that kind of outreach required under UMRA.

Q And do you recall how that was pursued in this rulemaking?

A I do not recall the specifics of that.

Q As has been discussed earlier, the EPA concluded and certified that the rule does not have a significant economic impact on a substantial number of small entities under the RFA, relieving it from conducting a regulatory flexibility analysis and Small Business Advocacy Review Panel under the Small Business Regulatory Enforcement Fairness Act, or SBREFA. When did you become aware that the EPA was going to certify the rule?

A I believe I became aware of the certification, that specific issue, I believe, during the proposed rule phase.

Q Do you recall how you became aware?

A To clarify, there is a discussion of the applicability of the RFA to this rulemaking throughout the guidance development process as well as the rulemaking, but the reason I said proposed rule is the certification is a step that happens during rulemaking, I believe, to the best of my recollection, and that is when the specific conversation about certifying the rule under the RFA came up.

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

A I am aware of that, yes.

Q Did you read their comment letter?

A I did not.

Q Okay.

Ms. Aizcorbe. I would like to enter exhibit 3.

[Mancini Exhibit No. 3

Was marked for identification.]

Mr. Mancini. And before we start this, I want to modify that just very slightly. I have no recollection of reading this letter, but I wanted to be clear that when I said I do not, then I have no recollection of reading this letter specifically.

BY MS. AIZCORBE:

Q You are more than welcome to take some time to look at it or skim it, but I can also summarize their findings. They made three major findings, one of which was what I just said, was that the agency improperly certified the rule; the second of which is that the rule imposes direct costs on small business; and, third, that the rule has a significant economic impact on small businesses.

A Okay.

Q On page 3 -- oh, excuse me. No, no. I take that back. I apologize.

We were speaking a little bit earlier about how the EPA used the existing regulation as a baseline for its certification when it used current practice for its economic analysis. You mentioned that there might be situations or circumstances within an agency's RFA or reg flex analysis that would give rise to a need to use a different baseline. Is there anything about this that jogs your memory about why the agencies chose to use a different baseline in this context?

A When I was discussing before about a different baseline, I believe I was discussing it more in the context of the analysis, where the executive order -- we believed the executive order, in the parlance

of the RFA, as I mentioned before, potentially includes indirect effects on entities as well as direct effects that would be caught in the RFA.

Q And so are you saying that you don't -- that doesn't track with what we are discussing now about their use of the existing regulation as a baseline?

A So that could potentially have an input into the discussion. I don't remember the specifics of this, but the definition of "direct effect" under the RFA could have had an impact on whether or not to use this baseline versus another baseline. I just have no specific recollection of the details of that discussion.

Q So, moving on, then. The EPA drafted a document entitled "Final Summary of the Discretionary Small Entity Outreach for EPA's Planned Proposed Revised Definition of Waters of the United States".

Have you reviewed this document?

Ms. Aizcorbe. And I will pass it and enter it into the record as exhibit 4.

[Mancini Exhibit No. 4

Was marked for identification.]

Mr. Mancini. Thank you. Oh, this is the --

BY MS. AIZCORBE:

Q Yes. And I have tabbed the relevant section for you.

A Okay.

Q If you could just read or become familiar with the first sentence of the last large full paragraph. I believe it is the -- one,

two, three -- fourth paragraph on that page.

A Okay. Okay.

Q On page 3 of this document, the EPA states that, the rule does not have a significant direct economic impact.

Are you aware of whether this was the standard that EPA employed in deciding not to conduct a regulatory flexibility analysis and SBAR panel?

A So the abbreviation "SISNOSE" is the abbreviation of the standard of impact that would trigger the SBREFA panel under the RFA.

Q Are you knowledgeable generally of SBREFA and its requirements?

A Yes.

Q Do you know anything within SBREFA that limits an agency to only consider direct economic impact in its decision whether to certify a rule?

A To the best of my knowledge, and I said this before, I am not a lawyer, that the -- but the RFA -- my understanding is the RFA covers direct economic impacts. It doesn't cover certain types of indirect economic impacts.

Q The SISNOSE acronym that you just referenced, to your knowledge, does that include the word "direct"?

A I don't believe that this particular sentence in the RFA, although I have not memorized the RFA, includes the word "direct".

Q In your experience, has OIRA encouraged agencies to consider indirect impacts?

A As part of the executive order analysis?

Q Correct.

A Yes.

Q Did you do so in the case of WOTUS, to your recollection?

A To the extent that the economic analysis included impacts that the sentence suggests are not direct -- that EPA did not consider direct economic impacts, then the answer is yes, the analysis, although I would clarify that, again, to the best of my knowledge, "direct" has a specific meaning under the RFA, and there is also a -- which means a directly regulated entity, I believe, but the executive order contemplates if the impacts, indirect impacts, are significant, that they be added. I believe that Circular A-4 has a discussion of such a potential analysis.

Q Were you aware that the agencies estimated the rule will impose indirect costs?

A If -- to clarify, if you mean that the agencies considered the indirect -- the costs that they analyzed in the economic analysis, the methodology I described before, during the previous round of questioning, then, yes.

Q Did you ever discuss potential inclusion of the rule's indirect costs in the agencies' analysis under the RFA?

A Again, to the best of my knowledge, the agencies' analysis on the RFA includes direct costs and not indirect costs.

Q And so it would be OIRA's interpretation of that in its oversight activities to only require that an agency look at direct costs

in its RFA certification? Is that correct?

A Again, to the best of my knowledge, that is what the Regulatory Flexibility Act requires and that is how we generally apply it during the course of review.

Q The rule provides that it may -- the rule may direct -- excuse me. I will start over.

The rule itself provides that it may result in direct costs from other programs as a result of implementation. Would you say, in your experience, it is common that agencies do not consider such costs in a rule's cost-and-benefits analysis?

A As an implementation cost? Again, under the executive order, if costs are predictable, then they could be included in a regulatory impact analysis even if those costs were otherwise implemented through an implementation rule.

Q Mr. Laity informed the committee that it is not really OIRA's role to interpret or to second-guess an agency's certification under the Regulatory Flexibility Act.

Do you agree with his statement generally?

A We will have -- yes, I generally agree. I would say that the quality and parts of the analysis under the Regulatory Flexibility Act could be a subject of review. This is because the President issued a guidance that said that he cares about small-business impacts, and this is part of this administration, and so I just want to be very clear that we will engage with the agencies about small-business impact, but the narrower question of the certification is one that is ultimately

the agency's certification.

Q Can you explain how OIRA took Advocacy's comments into consideration, which, again, stated that EPA improperly certified the rule, if OIRA does not involve itself in questioning a certification?

A So to the extent that SBA submitted similar comments during the interagency review -- and I believe this is the public letter that was issued in between the proposed and final rule; I am not sure, but this was in the public comment -- to the extent that they made similar comments, we would send those comments to the agency, and we would potentially convene an interagency group to discuss those concerns and comments.

Q Do you recall whether that was done in this case?

A No. I have direct recollection of a conversation that happened along these lines during the development of the guidance process. I do not have direct recollection or know the extent of this discussion during the rulemaking process.

Q Mr. Laity informed the committee that OIRA leadership had internal discussions and ultimately accepted the EPA's determination that it was appropriate to certify based largely on the discussion of what is a direct and an indirect effect and what is the appropriate baseline.

Were you a part of these discussions?

A I was a part of these discussions, to the best of my recollection, as part of the guidance development process and less as part of the rulemaking process.

Q Do you know who was a part of these discussions for the rulemaking?

A So, for the rulemaking process, like I said, I don't have a direct recollection of who was involved in those discussions, but for the guidance processes, I have a little bit more recollection.

Q For the guidance processes that you were involved with, do you recall any more detail about the nature of those discussions?

A Yes. And, again, with the caveat, please stop me if I sufficiently answer the question. We had what I would discuss as interagency discussions about this issue with senior leadership at the EPA and the Corps, and these issues were discussed in depth during those discussions.

Q And when Mr. Laity refers to what is a direct and indirect effect, can you elaborate at all on what he might have meant by that?

A I believe he meant something similar to the conversation we are having now, that the direct effect -- and, again, based on my best understanding of the RFA -- something like this regulation actually imposes regulatory requirements on this set of entities. That would be, in my opinion, a direct effect.

An indirect effect would be -- I can provide an example -- is that a regulation regulates another set of entities but predictably raises the prices of the suppliers of a small-business entity or something like that. I believe that is considered an indirect effect under the RFA.

Q And when you were discussing earlier that OIRA would

encourage an agency to include indirect effects if they are significant, what does that mean in the small-business context? Do you mean if they are significant to a certain stakeholder group or industry group, or do you mean if they are significant within the context of the entirety of the costs imposed by a rulemaking?

A We would mean more of the latter, in that if it were, again, subject to the rule of reason that the economy is integrated and you might be able to find an indirect impact on almost anyone, if it appears to be an important part of the rulemaking analysis and, moreover, is an important part of the decisionmaking, we would be more likely to encourage an analysis of such impacts.

Q So if that data was provided to the agencies during the public comment period or if it was otherwise available -- and by "data," I mean the data regarding indirect effects on stakeholder groups --

A Yes.

Q -- would OIRA encourage an agency to consider those in its justification for certification under the RFA?

A Again, to the best of my knowledge, I believe that the certifications in the RFA are based upon direct effects, and to the extent that those are agreed upon that those are not direct effects, then my understanding is that those are not taken into account as part of the certification process, to the best of my knowledge.

Q And who decides whether they are direct or indirect effects?

A I believe that was the subject of a lot of discussion during this rulemaking.

Q Does it change based on the rule?

A It changes based on the rule and the case law. And my understanding is that there are some times when it is clear that something is a direct or indirect effect, and there are some times when it is not clear.

Q And so, in this discussion, you were addressing whether, on a case-by-case basis, certain costs may be direct or indirect? Is that a fair characterization?

A Yes.

Q Cass Sunstein was the Administrator at the time of this determination. Did you discuss the certification with him or anyone else within the EOP?

A I am not -- just to be precise, I don't remember the exact timing of the certification, like we said before. But I don't remember having a particular discussion with Cass Sunstein. I do remember discussing this with Michael Fitzpatrick, who was the Associate Administrator during some of these discussions, Associate Administrator of OIRA.

Q And what role did he play in this decision?

A He was a part of the interagency discussions, and he was a part of the internal OIRA discussions on this issue, a general part of the team discussing this issue.

Q Did you ever discuss having EPA conduct an informal small-business outreach meeting in lieu of an SBAR panel or regulatory flexibility analysis?

A We discussed EPA conducting a process that was similar to the SBREFA process without coming to a finding of whether or not it was subject to SBREFA.

Q Was the decision to accept EPA's justification for certification ever revisited, to your knowledge, after the informal small-business outreach meeting?

A I don't have a recollection of revisiting the discussion.

Q Mr. Laity informed the committee that the information the agencies received from this informal outreach meeting were considered before promulgating the final rule.

I just want to clarify that you can't explain how they were considered if the decision to accept the EPA's certification was already agreed to. Is that correct?

A Like I said before, the executive order contemplates considerations of impacts that aren't considered direct under the RFA. And I don't have any specific recollection, but I do have specific recollection that the impacts of the rulemaking identified during public comments in this outreach were considered in the rulemaking process.

Ms. Aizcorbe. I am going to enter this next email as exhibit 5.

[Mancini Exhibit No. 5

Was marked for identification.]

Mr. Mancini. Sure.

BY MS. AIZCORBE:

Q And I would only be referencing the second --

A Regulatory Flex Act?

Q Yep. That is where we are.

A Okay.

Q Okay. And only the second paragraph there under that section.

A Okay. Okay.

Q On December 11, 2013, Mr. Laity sent you an email which included comments that he had previously sent to the EPA and Army. Under the Regulatory Flexibility Act Compliance section in the second paragraph, he states that, quote: "The proposed rule would also make clear that this is a 'voluntary' outreach effort on the part of EPA, which is not judicially reviewable under SBREFA," unquote.

Was it your understanding that the certification and outreach effort were not going to be judicially reviewable in this case?

A So my understanding is that a certification is judicially reviewable, but that is -- let me be clear. This is -- even though this was sent to me, this is something I need to review again. This is consistent with my understanding of the RFA. My understanding is that if an agency makes a certification, then based on the -- then that certification is challengeable.

I interpret this as saying that the details of the SBREFA process would not be reviewable in that the SBREFA process itself was not required, but the certification, to the extent that those types of decisions are reviewable in the RFA, I believe they are subject to judicial review.

Q Mr. Laity informed the committee that he had an agreement with the EPA to make the informal outreach meeting as much like the SBREFA process as possible, as you previously commented on.

A Yes.

Q Sort of in all but name. This arrangement is also mentioned in the same paragraph in this email. Is it your opinion that SBREFA-like outreach satisfies an agency's obligation to comply with the Regulatory Flexibility Act and SBREFA?

A It is my opinion in this particular case that this was not designed to comply with the RFA. I believe this was accompanied by a certification, and that is reviewable.

Q Do you think that it is SBREFA-like in all but name if the action is not judicially reviewable?

A The decision whether or not to conduct a SBREFA panel is subject to the certification, is subject to judicial review. This is a reflection of the desire to get -- like I can say, we had specific discussions about this issue, so I am not being speculative; I am just trying to find the right words -- that to get sufficient small-business impact on this rule under some uncertainty of whether or not a certification was justified at that time.

Q In your time at OIRA, have you ever experienced asking an agency to produce an informal SBREFA-like report in lieu of conducting a panel of regulatory flexibility analysis?

A To the best of my recollection, the specificity of this request was somewhat unique.

Q Considering the small business stakeholders and the SBA Office of Advocacy's comments that the EPA improperly certified this rule, did you at any point question the EPA's certification?

A We did discuss EPA's compliance with the RFA. That implies that if the decision was that they did not comply with the RFA, that they could certify, but I don't remember a specific discussion about the certification itself.

Q At any time, did you feel or anyone else at OIRA were under any pressure to agree with EPA's certification?

A No. I don't believe we were under pressure to agree with this.

Q You were never told that you had to accept the certification?

A We had a recommendation that was similar to this recommendation. And so I say, speaking as for myself, that our recommendation was, as a matter of policy, to run a SBREFA process to EPA.

Q When you say, "we had a recommendation," you are referring to OIRA's recommendation to the EPA?

A It was OIRA's -- I would say OIRA's recommendation -- this happened, in my recollection, as part of guidance development process, when I was the branch chief, so we recommended it to the EPA and the Corps and our leadership that they run a SBREFA process.

Q Is there any other office within the EOP that would have weighed in at that time about the certification?

A As part of the discussions of the guidance documents, the CEQ was involved in many discussions in some capacity, although I will say I don't have a specific recollection of the level or intensity of their discussions, only that they were involved.

Q Do you recall who decided which small-business industry representatives to invite to the outreach meeting?

A I do not have that recollection.

Q Did you advise how OIRA staff should resolve the conflict with the Office of Advocacy?

A I was involved in those discussions with the Office of Advocacy. Those discussions had two characteristics: One was whether there were cases in the RFA world that would speak directly to this issue, so that was one of the methods by which we sought to resolve this. And I think the other method was what kind of outreach EPA would conduct.

Q And regarding the first point on cases, do you recall whether you found any that supported this kind of a determination on EPA's behalf?

A So, speaking for myself, we received input from the counsel's office -- various counsels. I don't recall, again, the nature and the extent of the involvement, but I will say that this had input from the counsel's office from the agencies and other parts of the EOP, that my understanding of that discussion was that there was no clear case law that would apply to this particular instance and, to clarify, whether or not this particular set of circumstances was

a direct or indirect effect on these regulated entities.

Q You mentioned before that you didn't recall when the certification was made, but Mr. Laity informed the committee that the decision to accept EPA's certification was well before the proposed rule was developed or submitted to OIRA, suggesting, as you said, that this discussion happened during the development of the guidance. Can you explain how an agency would make the decision to certify a rule before it is developed, or are you aware that the EPA undertook a new analysis when it undertook the rulemaking itself?

A So there are two ways in which, in general, an agency would be able to certify: One is that the nature of the -- well, three ways, actually. One is that they do an analysis, and it shows that it does not have a significant impact, either a significant impact or on a substantial number of small entities, so it would be a fact-based determination on direct impacts. The other way that -- or none. There are certain circumstances. I would say there are certain rules by their nature that just don't affect small entities. So they would do an analysis, show that it doesn't regulate small entities, and they would be done with it.

The third way would be to -- a process similar to this, to say: We think this rule may have impacts, but we are not sure whether those impacts are direct or indirect under the act. And they would run a process to inform that decision.

Q Were you aware of who developed the theory that this rule is a definitional rule and, because of that reason, it would not have

any impacts on small businesses?

A Now, I am -- the fact that this is a definitional rule, I don't remember that -- I don't recall that being the way that this was characterized in the process. The way that I best understand this was characterized in the process is that this rule has a -- again, as I mentioned before, there are very unique circumstances in this rule. The two things that we discussed was the rule relative to the previous regulations on this issue, and so a regulation was in place, and this is a new regulation, and whether or not that provides the basis, and whether this is direct in the sense that the -- the fact that this is a definitional rule that will be implemented on subsequent permitting decisions and is not indirect. Those were the two basic ways in which we were discussing this issue.

Q I am going to skip ahead a bit. Are you aware of the so-called Peabody Memoranda detailing concerns raised by senior Corps leadership regarding scientific, legal, and procedural deficiencies in the rule?

A I am aware of the memorandum.

Q Do you recall how you learned about them?

A I don't recall learning of this memorandum during the final rule review.

Q Do you recall how you learned about them after the rule review was completed?

A I believe that I became aware of this memorandum when it was general -- made generally aware. I am not -- I can't speak to

whether it was released to the public or not, I am not sure, but I believe I was made generally aware around that time.

Q Did you have any discussions within OIRA or other offices with EOP about the concerns in the memoranda?

A I recall having a very general discussion about the memorandum, but not a detailed discussion about the memorandum.

Q And who was that with?

A It was -- to the best of my recollection, it was with Jim Laity.

Q I am just going to skip around --

A Okay.

Q -- so it is going to be very random.

A That is okay.

Q At any point, did you recommend that the agencies take more time to conduct additional science, assess additional alternatives, or fully consider public comment, or for any other reason?

A I don't recall making a specific recommendation that the agencies take more time doing anything.

Q In your experience overseeing or reviewing Army Corps rules, have they ever expressed dissension over any of their other joint rulemakings?

A Over the joint rulemakings?

Q Or any of their own. It would just be probably uncommon that they have dissension over their own rules, but you can include that in your answer if that is relevant.

A I am just -- I am trying to be precise. We are aware -- I am generally aware, including times where agencies -- different levels of the agencies have different positions on issues, and I am aware of times when the Army Corps has had concerns expressed at one level of the agency that aren't expressed at another level.

Q And when you say "another level," are you referring to the Army or within the Army Corps?

A Primarily within the Army Corps.

Q Are you aware of any concerns that OIRA was not invited to outreach meetings regarding this rule?

A I am not aware of such concerns, no.

Q Are you aware of any situations where OIRA was not included in discussions with other agencies about this rule?

A So in -- just -- it is probably not worth clarifying, but I will, that this is a jointly developed rule. I am confident that the agencies themselves had a very deep and detailed discussion during the development of this rule and during the proposed and final rule.

Q Outside of the two rulemaking agencies?

A Outside of the two rulemaking agencies. I am not aware of significant discussions taking place within OIRA about the rulemakings.

Q Mr. Laity informed the committee that OIRA occasionally received instruction to ensure a rule makes it through the review process, including court-ordered deadlines, and on occasion, very high-profile rules where the administration has made a public

commitment to get something done by a particular time.

Can you give any examples of such high-profile rules Mr. Laity might have been referring to, and would WOTUS be one of them?

A So --

Mr. Luftig. Is that a quote from his --

Ms. Aizcorbe. It is. Page 165 of his transcript.

Mr. Luftig. Okay.

Mr. Mancini. Okay. So an example of a high-profile rule that I can think of is the National Ambient Air Quality Standard on particulate matter that was issued in late 2012, and by coincidence, this was ending the time of my branch chief that I would have such a specific issue. That was issued pursuant to a court order that had a specific deadline that we had to meet.

Q Have you any awareness of any such instructions with respect to the WOTUS rulemaking?

A As I mentioned before, we had general discussions about the priority of this rulemaking and when we might conclude review, but I was not aware of any instruction -- of any discussions of the nature that you are talking about, about talking about specific deadlines for the review's conclusion.

Q Or that the rule receive a successful passage through the rulemaking review?

A So this was clearly identified as an administration priority, and so, to that extent, there was a discussion that this was a priority and this should be a rulemaking review priority, but we did

not receive any instruction to modify our executive order procedures to accommodate this rulemaking in any way.

Q And how was it communicated to you that this was a rulemaking and administration priority?

A It was included in multiple versions of the regulatory plan of EPA and the Corps, and that is an indication that it was a high-priority rulemaking. We, you know, received instructions from EPA leadership and Corps leadership that this was a high-priority rulemaking.

Q Were you ever told that your communications regarding this rule would have to be treated in a certain manner?

A No.

Q Who at OIRA is handling the nationwide permit rulemaking for the 2017 cycle? Are you aware?

A That rulemaking is actually under formal review right now, and so I am aware that that is under review, and it is being handled by the Natural Resources and Environment Branch, but as in many things under formal review, I can't really discuss the details of that.

Q Who is currently the branch chief of the Natural Resources Branch?

A Jim Laity.

Q In your experience with joint rulemakings, is it typical that you would consult with both agencies through the review process?

A Yes.

Q Individually or together?

A Together. As I mentioned before, I know -- in the interest of time -- but I am not aware of any briefing that happened on this rulemaking without the presence of both agencies.

Q In your experience, have you ever begun review on a rule where one agency of a joint rulemaking has not contributed their comments or input on a portion of the rulemaking?

A Again, agencies may -- even in joint rulemakings, agencies may take a lead in one part of it, but I am not aware of any area where there was disagreement about submitting the rule for review.

Q We spoke earlier -- my counterparts asked you about how the agencies worked together on this rulemaking, and you said it was they jointly developed this rule.

The Army and the Corps informed the committee that they did not receive a copy of the economic analysis or technical support document for the rule until after the draft final rule was submitted to OIRA for interagency review. Were you aware of this during OIRA's review?

A I was not specifically aware of this fact.

Q Given your experience at OIRA in reviewing rules, including these larger rules where multiple agencies have interests, would it concern you if one of the rulemaking agencies had not reviewed these types of analyses before the draft final rule was finished?

A As a general matter, joint rules are meant to be joint rules. And just let me clarify. I have no knowledge to the extent that this analysis was shared at any different point. I would point out that the core of the analysis that I discussed before was developed by the

Corps and EPA jointly, so --

Q How so?

A As I mentioned, the methodology that I talked to you about about looking at certain permits under the old policies and the new policies, that was an exercise conducted by the Corps and EPA jointly.

Q We understand that the Corps provided data from its own database to the EPA, who then used that data to conduct its own analysis. Are you referring to something separate from that?

A I am referring to during the guidance process. And, again, I can't speak to what you are referring to, but I am referring to what I have knowledge of is, during the guidance process, my understanding is that representatives of the Corps and EPA did a -- got together and looked at the old policies, looked at the new policies, and tried to estimate, in this case, the increase in the jurisdiction under the new policies and trying to provide estimates of the impact of that increase.

Q And you don't know whether that process was used or repeated in the rulemaking itself?

A My understanding was that the basic methodology was incorporated, but I don't have knowledge about the particular details of the development of that in that way.

Q Okay. Just a few cleanup questions.

When were you notified by the committee -- excuse me.

When were the notified that the committee asked for your interview, if you recall?

A Approximately when you -- I am not sure. Approximately

when you asked for it. I would say it was within the last few months.

Q Have you been asked to produce documents or emails related to this rulemaking?

A Yes, I have.

Q Are you aware of whether that was in response to the committee's request?

A To my knowledge, it was in response to the committee's request.

Q Do you recall when you produced these emails and documents?

A Throughout the past few months, I believe, I produced those documents and emails.

Q Have you produced all of the emails and documents related to your work on this rulemaking?

A I have produced what counsel has asked me to produce that was consistent with the request. I don't recall any specific documents that I didn't produce, but I was -- to be clear, I have produced what I was asked to produce.

Q Do you recall what you were asked to be produced?

Mr. Luftig. Can we go off the record for a second?

[Discussion off the record.]

Ms. Aizcorbe. Can you tell the committee what you have been asked to be produced?

Mr. Mancini. I was asked to produce communications that, to the best of my knowledge, were consistent with what we would produce under a FOIA request, so the nature of the communications, but we would

produce that. So, as far as I am concerned, I am just trying to be precise here, that I produced for counsel review all the emails I had on Waters of the United States.

Ms. Aizcorbe. Do you recall for what date range?

Mr. Mancini. I don't recall for what date range.

[Discussion off the record.]

[4:03 p.m.]

Ms. Aizcorbe. We can go back on the record.

BY MS. AIZCORBE:

Q Do you recall who you provided these emails and documents to?

A I provided them to the Counsel's Office.

Q And is that within OIRA or OMB?

A It's OMB's Counsel's Office. OIRA does not have a counsel's office.

Q Okay. Did you receive any instructions in preparation for today's interview?

A We discussed this -- today's interview with counsel.

Q And from whom specifically?

A I discussed with Charles and other members of the Counsel's Office.

Q And what instructions were you given?

A They -- what I would characterize the specifics is that they told me to tell the truth.

Ms. Aizcorbe. Okay. Did you have anything else?

Ms. Rother. And you said that you had been asked to produce documents for the committee in the last few months. Generally speaking, does that mean the last few months within this calendar year, or do you recall whether it was the fall or the summer?

Mr. Mancini. Yeah. To the best of my recollection, I really don't recall when I produced those documents. So I don't want to

speculate on when they were produced.

Ms. Rother. Okay.

Mr. Mancini. Except for more than I have at this point.

Ms. Aizcorbe. But to your knowledge, you've produced everything that you have on the rule?

Mr. Mancini. Yeah. To my knowledge, that I was -- I produced everything that I was asked to produce. I'm just trying to be precise that I did not read the subpoena. I don't know the scope or whether it was focused on a particular thing. But I produced whatever I had to produce in a timely manner.

Ms. Aizcorbe. Okay. Thank you very much. We can go off the record.

[Recess.]

Mr. Longani. Okay. Go back on.

By MR. LONGANI:

Q Mr. Mancini, good afternoon. This will be my last round. So I'm going to try to get through it as quickly as possible. Okay?

A Okay.

Q According to the final rule, the final WOTUS rule, it says that, quote: The agencies began consultation with federally recognized Indian tribes on the Clean Water rule defining 'Waters of the United States' in October of 2011. It subsequently states that the consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, continued in stages over a

4-year period until the close of the public comment period on November 14, 2014.

Mr. Mancini, do you have any reason to disagree with that statement?

A No.

Q Okay. Do you believe that, indeed, the agencies began consultation with federally recognized Indian tribes on the Clean Water rule defining Waters of the United States in October of 2011?

A Like I said, I have no reason to doubt that statement.

Q Okay. And, Mr. Mancini, you are familiar with the November 6, 2000, Executive Order 13175, which is entitled "Consultation and Coordination with Indian Tribal Governments"?

A I'm generally aware of that executive order.

Q Okay.

Mr. Longani. In fact, let me -- give me exhibit 10.

I'll mark this -- I don't even know what number we're on, 6.

Mr. Mancini. Six.

Mr. Longani. Six. Thank you.

[Mancini Exhibit No. 6

Was marked for identification.]

BY MR. LONGANI:

Q And I've put in front of you now, Mr. Mancini, what's been marked as exhibit 6. I'm going to ask that you look at section 5, and specifically subsection (b).

A Section?

Q 5(b).

A I thought you said E. There is no section E.

Q B as in boy.

A Okay.

Q And while you're reading that, I'm going to read it out loud.

And subsection 5(b) states: To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute unless, one, funds to cover the costs are provided by the Federal Government, or, two, the agency prior to the formal promulgation of the regulation, A, consulted with tribal officials early in the process of developing the proposed regulation. And that's 2(A). And I'll stop there. I'll let you catch up to me.

A Okay.

Q Okay. Great. Mr. Mancini, as far as you're aware, does Executive Order 13175, which is now in front of you as exhibit 6, have additional requirements regarding when the tribal consultation must occur?

A Again, I'm not familiar with the exact language of this, but I'm not aware of any other requirements than what is stated here.

Q Okay. And would you agree that the discussions that began in October of 2011, hypothetically, I know you don't know it for a fact, but you have no reason to disagree that it didn't happen, but assuming that it did happen commencing in October of 2011, would you agree that's

fairly early in the WOTUS process?

A So the -- that is certainly well before the issuance of the proposed rule in 2013, as you -- as we have been discussing, there was a guidance process that was developed. And I believe that guidance process was being developed around this time period.

Q Okay. But as to the regulation itself, as to the rule itself, that didn't start until 2013. Is that correct?

A I agree that the -- this consultation happened before the -- well before the submittal of the proposed rule to OIRA for formal review under the executive order.

Q Okay. The rule, the WOTUS rule, further states that, quote: In 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings.

Do you have any reason to disagree with that statement as a matter of fact?

A I have no basis to disagree with that.

Q And so contrary -- or in addition to what was set forth in the last hour, not only the agencies state that there were webinars, but the rule indicates that there were face-to-face meetings as well. Is that correct?

A That's what the statement says. And, again, I have no basis for not believing that statement.

Q Okay. Pull out 11.

Mr. Longani. And this is -- I'm going to mark this as exhibit 7.

[Mancini Exhibit No. 7
Was marked for identification.]

BY MR. LONGANI:

Q Mr. Mancini, I'm handing you over what's been marked as exhibit 7. The title of this document is "Final Summary of Tribal Consultation for the Clean Water Rule: Definition of 'Waters of the United States' Under the Clean Water Act; Final Rule." It's dated May 2015. Do you see that document?

A Yes. I have the document in front of me.

Q All right. I'm going to ask you to turn to page 4 of that document. I'm going to ask you specifically to take a look at the last paragraph and, more specifically, the first sentence of that last paragraph that starts with, "On October 12, 2011."

A Okay.

Q Mr. Mancini, that first sentence in exhibit 7 says, and I quote, the last paragraph again, page 4, it says, "On October 12, 2011, EPA sent a Tribal Consultation Notification letter to all federally recognized tribal leaders, via mail and email, inviting tribal officials to participate in consultation and coordination events and provide comments to EPA in coordination with Army." Did I read that sentence correctly?

A Yes. It appears to me you did.

Q Okay. Mr. Mancini, is there any basis to believe that that

statement -- do you have any basis to believe that that statement is not true?

A No, I don't.

Q Okay. Further on the -- I guess the third-to-last sentence, same paragraph, that starts with, "In the course of this consultation," and I'm going to read it out loud. It states, again, page 4, exhibit 7, last paragraph: "In the course of this consultation, EPA coordinated with Army, and Army jointly participated in aspects of the consultation process." Do you have any basis to question the accuracy of that statement?

A No. I don't.

Q I'm going to ask you to turn to page 7. And I'm going to ask you to look at the second-to-last paragraph, second sentence, starting with, "On May 21." I'll read it out loud: "On May 21, 2015, EPA's Office of International and Tribal Affairs confirmed the adequacy of the agencies' tribal consultation in the attached memorandum." Any basis to question the accuracy of that statement?

A No.

Q Any basis to challenge that finding?

A I've not -- I have not reviewed that finding --

Q Okay.

A -- so I have no basis to challenge that finding.

Q Okay. Get exhibit 12.

Mr. Longani. I'm going to mark this as exhibit 8.

[Mancini Exhibit No. 8

Was marked for identification.]

BY MR. LONGANI:

Q I've handed you a document, Mr. Mancini, that's entitled "EPA Policy on Consultation and Coordination with Indian Tribes." It's dated May 4, 2011. Is that the document that you have in front of you?

A Yes.

Q Okay. Again, I'm going to ask you to turn to page 7, sir. And I'm going to ask you to read section D on page 7, please. And the title of that section is "How Consultation Occurs."

A Okay.

Q Mr. Mancini, the first sentence of section D on page 7 says: "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."

Based on EPA's policy, is it reasonable to conclude that tribal consultations could include webinars, teleconferences, face-to-face meetings?

A Yes.

Q As you know, Mr. Mancini, after conducting the tribal consultation, the agencies concluded that the rule would not have an impact on the tribes as specified under Executive Order 13175. Is that your understanding?

A That is my understanding of the finding that they made.

Q Okay. Do you have any basis to challenge the agencies' conclusion?

A I don't have a basis for challenging that conclusion.

Q Would this rule have been confirmed by OIRA if any tribal concerns were not properly addressed?

A In practice, this is a subject that can come up during interagency review. The degree to which this is a significant subject of review is very case specific. If there were significant -- if we felt like there were significant issues or deficiencies in an agency's particular case -- I'm talking in general -- as a general matter here, if that tribal consultation was not adequate, I think I've mentioned before that we feel that is a legitimate subject to review and could potentially ask the agencies to do more tribal consultation.

Q And in the WOTUS context, you did not ask EPA -- "you" meaning OIRA -- did not ask the EPA or Army to have further tribal consultations. Is that correct?

A I actually have no specific recollection of ever making that recommendation. But I don't want to -- I can't speak for all of OIRA on the particular issue because I have no specific recollection about that particular issue.

Q Okay. Would you agree at the end of the day that OIRA would not have confirmed it -- would not have confirmed the WOTUS rule had there been outstanding concerns from OIRA's end regarding tribal consultations?

A So, based on my knowledge of this issue, which is very

general and is not based on a detailed look at this, that we did not have significant concerns about the OIRA -- the tribal consultation issue under that executive order.

Q Okay. Thank you. I'm going to move on to the RFA, the Regulatory Flexibility Act. And I know you had some discussion with my majority counterparts in the last hour. And I want to go back to that a little bit.

First of all, it's your understanding, is it not, that the agencies certified that WOTUS would not have a significant impact -- economic impact -- on a significant number of small entities. Is that correct?

A Yes. That is correct.

Q Okay.

A The exact phrase, and I'm sorry to have to do this: significant impact on a substantial number of small entities.

Q Absolutely. I think SISNOSE.

A SISNOSE.

Q Right. And that was the finding of the agencies, correct?

A Yes.

Q Okay. And so under the Regulatory Flexibility Act, no formal analysis was required after that, correct?

A That is my understanding of the requirements of the RFA, that under a certification that the -- now, just to clarify, there often will be analysis conducted in order to justify that certification. In this case, I'm not aware of the specifics, but the certification was

made on the particular issues. So there could be analysis, small-business analysis, accompanying rules that are certified as a basis for that certification.

Q Okay. Yet despite the fact that the agencies did not need to initiate a SBREFA panel, the agencies proceeded to engage in outreach similar to what would take place had a SBREFA panel been empaneled. Is that correct?

A To the best of my knowledge, they conducted outreach that was designed to be similar to the outreach that would be conducted under the SBREFA process.

Q Okay. Would you agree that the fact that the agencies went ahead and proceeded to engage in a SBREFA-like panel would go to the thoroughness of the analysis that the agencies were undertaking for the WOTUS rule in terms of ensuring that all stakeholders had their voice heard?

A So the -- to be precise, I'm going to answer the question without adopting all the language that you used about --

Q Please. Use your language.

A -- ensuring and things of that nature. But the outreach to small entities we considered an important part of the rulemaking development process. That is, in part, a response to this administration's guidance on this issue. So I wanted to clarify that there's a specific memorandum that OIRA operates under that recommends a close look at small-business impacts. And it is all part of your retrospective review process that the administration has placed an

emphasis on. That memorandum is available to the public. And that memorandum is not predicated necessarily on whether or not an impact meets the requirements of the Regulatory Flexibility Act. So we considered that a -- still in effect even if there's a certification in place.

Q Okay. And did the agencies comply or satisfy the standard that you just set forth or the principle that you set forth?

A So the agencies did conduct an outreach that was designed to be similar. I don't recall the specifics of what that outreach came to or whether or not that had a significant impact on the policies in place. As I mentioned before, this is a relatively unique rulemaking. And the issue of whether a jurisdictional change has impacts and things of that nature is -- just leads to the conclusion that I can't say with specificity that that outreach had impact on the isolated waters decisions or other similar decisions.

Q Give me 13.

Mr. Longani. I'm now going to introduce deposition exhibit No. 9 -- not deposition. Excuse me. Exhibit No. 9. I just read your sticker out loud.

[Mancini Exhibit No. 9

Was marked for identification.]

BY MR. LONGANI:

Q Mr. Mancini, I'm giving you a report that's titled "Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule Definition of the 'Waters of the United States' under the Clean

Water Act; Final Rule," dated May 2015. The authors listed are the United States Environmental Protection Agency as well as the Department of the Army. Do you see that, Mr. Mancini?

A Yes. I do.

Q All right. I'm going to ask you to turn to page 20, please.

Mr. Mancini, I'm going to ask you to read the first paragraph all the way to where the next section starts, the adjacency section. I'm going to ask you to read it.

A The paragraph that starts "The public comments identified" --

Q Correct.

A Okay. Okay.

Q All right. Mr. Mancini, the section that I asked you to read identifies several public comments that were made during the SBREFA-like process. And at the end of those -- the summary of those comments, the report states: "These and other comments received were considered in the development of the final rule." Do you have any reason to doubt that is indeed the case?

A No, I don't.

Q Okay. And do you in fact know that to be the case?

A I know it to be the case that many of these issues identified in these bullet points were considered in the development of the final rule.

Q Okay. And during the actual outreach process, the SBA Office of Advocacy did participate. Is that correct, to your

understanding?

A I actually do not remember if they -- whether they participated or not.

Q Okay. And I think you mentioned this in the last round with my counterparts, but just to confirm, Mr. Laity had told the committee that the decision to accept -- OIRA's decision to accept the EPA's determination certification for the rule was largely a legal determination. Would you agree with that?

A I agree that the determination was largely legal, yes.

Q And based on what you had testified to, some of those legalities involved what a direct and indirect effect was and the appropriate baseline. Is that correct?

A Yes. That was a major subject of discussion during this process of whether a particular impact would be considered direct or indirect under the RFA. And those terms can have different meanings in difficult contexts. But the extent that they had meaning under the RFA, that was the discussion.

Q Okay. And lawyers undertook those discussions primarily. Is that correct?

A Counsel were significantly involved in those discussions. I hesitate to say primary versus -- I don't remember the frequency or the nature of those discussions. But counsel was significantly involved.

Q In terms of the legal determinations, was it fair to say that counsel was significantly involved --

A Yeah.

Q -- in the legal determination of what a direct versus indirect effect were --

A Yes.

Q -- as to the WOTUS rule?

A So, as I mentioned before, OIRA does not have a counsel's office. And I can -- I can state with confidence that counsel in the agencies and at OMB were involved. What I can't state with confidence is the details about the nature of those discussions, except that they were extensive and that counsel were involved in them.

Q Okay. Another issue that came up in the last round involved timelines and deadlines. Mr. Mancini, you've worked for both Republican and Democratic administrations. Is that correct?

A That is correct.

Q And would you agree that, regardless of the political affiliation of an administration, every administration has its priorities. Is that correct?

A That is correct.

Q And would you also agree that those priorities play into -- that those priorities are conveyed during the rulemaking process in terms of either elevating or -- well, let me withdraw that question.

Would you agree that those priorities, regardless of administration, are provided to OIRA or indicated to OIRA in some way, shape, or form?

A Yes. Under the executive order, which was in effect in the previous administration and this administration, Executive Order 12866, one of the goals of OIRA review is to ensure that regulations are consistent with the President's priorities. I believe that's the exact language in the executive order.

Mr. Longani. Mr. Mancini, I'm going to give you now a document. It's a memorandum, actually, that I will refer to as the Civiletti Memorandum. I want to draw your attention to what's already been highlighted at the top. This is going to be exhibit No. 10.

[Mancini Exhibit No. 10

Was marked for identification.]

BY MR. LONGANI:

Q I'm going to ask you, Mr. Mancini, to just read the highlighted portion, please.

A Okay.

Q Okay. And what I provided to you -- what I provided to you, Mr. Mancini, is a document that's titled -- to the left column, it says, in quotes, "Civiletti Memorandum." The title of the document is "Administrative Authority to Construe Section 404 of the Federal Water Pollution Control Act." And the two paragraphs underneath that state as follows: "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, 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 that act, 33 United States Code, section 1344(f)."

Do you see that?

A Yes. I do.

Q Okay.

A I'm going to actually ask you now to turn to page 201, the highlighted section there. I'm going to ask you to read that as well. And just look up when you're done reading it, if you don't mind.

Okay.

Q In this memorandum, Attorney General Civiletti determined, and I'm reading, quote: "It is the Administrator who has the overall responsibility for administering the act's provisions, except as otherwise expressly provided." "It is the Administrator as well who interprets the term 'navigable waters' in carrying out pollution control responsibilities under sections of the act apart from section 404." Based on your reading of this memorandum, portions that I've provided to you, Mr. Mancini, is it reasonable to conclude that the Civiletti opinion establishes the Environmental Protection Agency's primacy in Clean Water Act issues involving navigable waters?

A To just be clear, I think you mentioned in -- when you were reading it, that it said "other than 404," where it says "under 404." It's a different -- I'm not sure whether you read it completely consistently with the words.

Q Oh. I apologize if I misread. Let's focus on the first

paragraph. If I misread it, I apologize.

A Okay. I'm sorry. I'm just trying to be precise.

Q No, that's okay. No, if I misread it, I apologize.

A To be clear, my familiarity with this memorandum consists of what you've shown me today. And so I don't -- I have no knowledge of whether this is still in effect or there's been superseded by a subsequent memorandum. But to the extent that this is a memorandum that has still -- in effect from the Attorney General, this does establish what it appears to establish, that EPA, as it says, has ultimate administrative authority to interpret the term "navigable waters."

Q Okay.

Mr. Longani. I'm now going to show you -- and I'll mark this as exhibit 11.

[Mancini Exhibit No. 11

Was marked for identification.]

Mr. Mancini. Okay.

Mr. Longani. Okay.

And, Mr. Mancini, what I've put in front of you now is a document. It's exhibit 11. And it's titled "Memorandum of Agreement." It is a memorandum of agreement between the Department of Army and the Environmental Protection Agency concerning the determination of the section 404 program and the application of the exemptions under 404 after the Clean Water Act. Did I read the title correctly?

Mr. Mancini. It appears so, yes.

[4:44 p.m.]

BY MR. LONGANI:

Q I am going to ask you to read section I, paragraph 2.

A Okay.

Q It states in part, "The Attorney General of the United States issued an opinion on September 5, 1979, that the Administrator of EPA 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 section 404(f) exemptions."

Did I read that correctly?

A It appears so, yes.

Q I'm going to ask you to turn the page now. There's another highlighted portion at the end of the first complete paragraph on the second page. Could you read that, please?

A Okay.

Q It says, "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 decision if the agencies disagree."

Did I read that correctly?

A Yes, you did.

Q In your opinion, is there any doubt about who the lead agency would be in a joint rule between the EPA and the Army on determinations of jurisdictional scope under the Clean Water Act?

A So, again, I'm familiar with this memorandum to the extent

that you've shown it to me today. I would add that this is a 1989 memorandum. To the extent that the agencies still consider this in effect, this seems to establish EPA as a lead agency in interpretations of the act. But, again, I am only familiar with this to the extent that you have shown this to me today.

Q Okay. Do you have any reason to, based on your experience in the rulemaking process, particularly in the WOTUS process, to disagree that the EPA is the lead agency in a joint rulemaking process between EPA and the Army?

A So, to be precise, the rulemaking that -- this seems to imply that for issues of geographic jurisdiction EPA is the lead agency. There may be other rulemakings under the section 404 program that the Army Corps is promulgating that don't involve geographical jurisdictional scope. They could involve permitting conditions. In those cases, I would characterize the Corps as more of a lead agency. Of course, the act as administered by the two groups.

So just trying to answer this in my general understanding of the process, is that this -- under section 404, rulemakings that don't involve geographic distribution, if they aren't joint and they are Corps rulemakings, EPA will be a significant participant in that group, but under our Executive order procedures, we would work with the Corps and probably consider the Corps a lead agency in that.

Q So, as to the WOTUS rule specifically, do you have any opinion as to who the -- based on what I've provided to you, would you agree that, as to the issue of navigable waters, for example, that the

EPA would be the lead agency?

A So I am --

Q If you know.

A Again, to the extent that this establishes the EPA is the lead agency, I have no reason to doubt that agency.

Q Okay.

A In my experience as one of the participants in the rulemaking, this was a joint rulemaking, and the agencies were treating it as a joint rulemaking, in my experience during this particular rulemaking.

Q And can you expound upon that a bit more? You said they were treating it as a joint rulemaking. Does that mean that you felt both parties were being heard and both parties participated in the appropriate roles that they needed to for the WOTUS rule?

A Yes. My experience with this rulemaking process is that, as I mentioned before, we received briefings that were jointly administered by the two agencies and that issues, with perhaps one exception, were discussed jointly with the agencies, based on my personal experience.

Q Do you have any reason to think that either agency was cut out of any important issues?

A I have no reason to think that either agencies were not involved in the discussions that they needed to be involved in or cut out of significant discussions.

Q I'll clean up with a couple of questions here.

Mr. Mancini, the WOTUS rule had to clear OMB prior to being published in the Federal Register, correct?

A The Executive order --

Q The final rule.

A Yeah, the final rule -- we would need to conclude review, is the term of art we use, in order for the rule to be published in the Federal Register.

Q Okay. And would OIRA have cleared this rule if there were any significant concerns about either the process, the underlying science, the cost-benefits, or any other issue if those issues had not been properly addressed to OIRA's complete satisfaction?

A So there's a lot of description in that question.

The rulemaking process is a process that leads to compromises in the best sense of the word, in my opinion, that rulemakings, as we've discussed before -- we may have had recommendations on the rulemaking that we felt should have been adopted to approve this rule. So we would not have concluded review on this rule if we didn't feel that the rulemaking met the conditions under which we're allowed to conclude review.

And that's both legal and policy and analytical. I have said that the analysis was a credible attempt to look at the analysis in this unique set of circumstances, that there was robust discussion of the legal issues and there was a robust discussion of the policy issues.

But I want to be clear that we conclude reviews of rules under the Executive order because rulemakings could contain provisions -- in

this case, I have clarified that we made one recommendation that we think would have improved the rule under the Executive order that wasn't adopted by the agencies. But that is not an unusual circumstance as the result of a review.

Q Can you expound upon that? You said it's not an unusual circumstance. What do you mean by that?

A So, in an Executive order review of a rule, it is not unusual for OIRA at some level to make a recommendation that isn't fully adopted by an agency. Part of our job, as I see it as a career OIRA member, is to review rules to see whether they're consistent with Executive orders and, if we feel they could be improved, to make recommendations for improvement. And those could be adopted or not adopted by the agency, or justified, or further discussion or modifications.

But we conclude review of rules that -- the reason I'm being a little bit more verbose because of your "complete satisfaction" modifier, to be honest, that sometimes we conclude reviews of a rule under the Executive order and it's completely -- it's a normal part of the Executive order process to conclude review of the rules that don't contain provisions that we recommended to improve the rule review under the Executive order. And that is a normal and usual part of the Executive order process.

Mr. Longani. Okay.

I think we're almost done, Mr. Mancini. Just give me 1 second to check with my colleague.

Mr. Mancini. Okay.

Mr. Longani. Okay. We're done. Thanks.

Mr. Mancini. Thank you.

Mr. Longani. We met your 5 o'clock. Thank you, Mr. Mancini.
Appreciate it.

[Whereupon, at 4:56 p.m., the interview was concluded.]

Certificate of Deponent/Interviewee

I have read the foregoing ____ pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Witness Name

Date