

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

INTERVIEW OF: JOHN GOODIN

Friday, June 24, 2016

Washington, D.C.

The interview in the above matter was held in 6410, O'Neill House
Office Building, commencing at 10:06 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

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Mr. Skladany. This is a transcribed interview of John Goodin. Chairman Chaffetz has requested this interview as party of the committee's investigation of the promulgation of the Waters of the United States rule.

Will the witness please state your name for the record?

Mr. Goodin. John Goodin.

Mr. Skladany. On behalf of the committee, I would like to thank you for appearing here today to answer our questions. And the chairman appreciates your willingness to appear voluntarily. My name is Jon Skladany, I am with Chairman Chaffetz's staff. And I will ask everyone else from the committee who is here at the table to introduce themselves as well.

Mr. Hambleton. Brian Hambleton, majority staff.

Mr. McGrath. Bill McGrath, majority staff.

Mr. Burns. Sean Burns, minority staff.

Mr. Longani. Kapil Longani, minority staff.

Mr. Bardo. Jack Bardo, minority staff.

Mr. Skladany. Thanks. I will go over the ground rules and guidelines that we follow during the interview. Our questioning will proceed in rounds. The majority will ask questions first for one hour, and the minority staff will have an opportunity to ask questions for an equal period of time if they choose. We will alternate 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'd like to take a break apart from that, just let us know.

As you can see, the official reporters are taking down everything we say to make a written record. So we ask that you give verbal responses to all questions. Do you understand that?

Mr. Goodin. Yes.

Mr. Skladany. So the court reporter can make a clear record, we'll do our best to limit of number of people directing questions at you during any given hour, just those people whose turn it is. Please try to speak clearly so the court reporter can understand and the folks down at the end of the table can hear you as well. It is also important that we don't talk over one another or interrupt each other if we can help it so the record can be as clear as possible.

We encourage witnesses who appear before the committee to freely consult with counsel if they choose. And you do have counsel with you here today. Will counsel please introduce themselves for the record.

Mr. Rackoff. Jonathan Rackoff.

Ms. Sublett. Stacey Sublett.

Mr. Skladany. Thank you. 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 you do not understand one of our questions, just let us know. If you don't know the answer to a question or do not remember, it's best not to guess, please just 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 that 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.

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. Goodin. Yes.

Mr. Skladany. And this applies to questions posed by congressional staff in an interview setting. Do you understand that?

Mr. Goodin. Yes.

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

Mr. Goodin. Yes.

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

Mr. Goodin. No.

Mr. Skladany. I will finally note that the content of what we discuss here today is confidential, so we ask that you not speak about today's interview with anybody besides your counsel who is present with you.

That's the end of my opening remarks. Is there anything my colleagues would like to add?

Mr. McGrath. There is one thing I wanted to add. This is agency counsel, I just want to make that clear. This is not your personal counsel with you?

Mr. Goodin. Correct.

Mr. McGrath. I just want to make sure that you understand that for your purposes that they represent the Agency. Is that correct?

Mr. Rackoff. That is correct, and we have advised Mr. Goodin accordingly.

Mr. Skladany. The time is 10:08 and we'll start with the first hour.

EXAMINATION

BY MR. HAMBLETON:

Q What is your current role with EPA?

A I'm currently the director of the wetlands division, which is located in the Office of Wetlands, Oceans and Watersheds, the Office of Water at EPA.

Q Are you a political appointee?

A No, I am not.

Q How many people work in the Office of Wetlands, Oceans and Watersheds?

A In the Office of Wetlands, Oceans and Watersheds, approximately 115 full-time employees.

Q And how many in the wetlands division?

A Approximately 25.

Q And how long have you been in this role?

A As the director, 4 days. As the acting director, for about 2 years and a few days.

Q So that would be roughly June of 2014?

A Yes, May of -- end of May 2014. Uh-huh.

Q And what did you do before that?

A I was in my position of record while I was acting, was chief of watershed branch, also located in the Office of Wetlands, Oceans and Watersheds in a different division.

Q And how long did you have that position?

A For approximately 10 years.

Q What did you do before that?

A Before that I was in the wetlands division as the chief of the Wetlands and Aquatic Resources Regulatory Branch.

Q And how long were you in that position?

A For just under 14 years.

Q At what point in the timeline of the WOTUS rule did you get involved with it?

A It was after the proposal had been issued and I want to say it would be within about a month to 6 weeks after that proposal came out, which was mid April in 2014.

Q When you assume --

A Acting, yes, uh-huh.

Q When you took the position and began to work on the rule, who briefed you on it, who brought you up to speed?

A There were a number of folks, but the -- I would say the initial briefings were by my regulatory branch chief, Russ Kaiser and his staff. And then several others that had roles that were about related to the rulemaking process, so from the Office of Water, that

was Greg Peck, and from OGC, that was OGC staff so I'm going to say probably Karen Wendelowski and Gautham Srinivasan, G-a-u-t-h-a-m S-r-i-n-i-v-a-s-a-n.

Q What is your background or expertise in developing rules like WOTUS?

A Well, I do have regulatory experience, based on my time in the EPA, and in my previous jobs I was involved in, either proposed rulemakings or activities related to rulemaking. It was probably not a frequent part, but it is -- it was a part of both of those.

Q Working on regulations in general?

A Yes.

Q Okay.

A And then working on guidance from existing regulations was certainly a part of that.

Q And what role did you play in the development of WOTUS?

A I would say that the primary role was coordinating a variety of activities related to the development of the final rule. And among other things, that included providing staff that were relevant to the process, both in terms of everything from the substance of the rule to the various processes associated with the rule, to staff that were engaged in managing the comments that were coming in as a part of the proposal. And I worked alongside other colleagues that were in other relevant offices that were also working on the rule.

So we had colleagues from our 402 -- Clean Water Act 402 program that were involved, colleagues from our Office of Research and

Development, colleagues from Office of General Counsel, and then the Corps of Engineers.

Q Have you played a familiar role in any other EPA rules or was this your first one?

A It was my first one in the capacity of director.

Q Have you worked with the Army Corps in any other rulemakings?

A Yes. In the early 2000s, I worked on a rulemaking regarding the definition of fill material. And then in the early to mid 1990s, worked on a rulemaking related to the testing and evaluation of dredge material for discharge in waters.

Q Who would you say has the most experience and expertise with respect to the Clean Water Act -- with respect to Clean Water Act implementation in the wetlands division?

A We have a variety of folks that have different elements of expertise, it's a fairly wide ranging statute. But as it applies to the 404 program, which is in our purview, my branch chief, Russ Kaiser has a lot of experience. He actually worked for the Corps of Engineers for a number of years, and worked in headquarters for a number of years, so he has a lot of experience. The lead staffer that chaired our rule workgroup staff committee has a lot of experience in jurisdiction, Donna Downing has been involved for quite some time in jurisdictional rules. And then there's a variety of expertise outside the division, too.

Q That leads to my next question. What would you say, same question EPA-wide?

A Probably Greg Peck has the most experience. He's greater than 30 years, most of those years at the agency involved in some form or another with wetlands work.

Q Who did you report to throughout the rulemaking?

A My direct boss was Benita Best-Wong, who is the director of the Office of Wetlands, Oceans and Watersheds.

Q Would you interact with people beyond her in the higher structure as well?

A I would. There were a number of settings in which our division was meeting in forums related to the rule, and they include forums that were chaired by the assistant administrator, or acting assistant administrator at the time, Ken Kopocis from the Office of Water. So I was often involved in those meetings. We had a variety of other forums where we were talking about the development of the rulemaking, and they involved folks not only from the Office of Water, but from OGC and other parts of the agency. So, yes, several.

Q So when you say "forum," do you mean a meeting to update progress?

A Correct.

Q To discuss strategy?

A Yes, exactly those sorts of things. So there were a number of those settings. Briefly, one setting was what we called the rule workgroup, which was comprised at EPA of representatives from all of the regions, and all relevant offices that were interested in participating. So would be the various programs from the Office of

Water, not just 404, but 402 and others, Office of Research and Development, Office of General Counsel and Office of Policy that were engaged in that setting.

A second setting was the meeting that was chaired by our acting AA, the one I just mentioned before this which involved mostly people from the Office of Water, but typically, also a regional representative, a representative from OGC, and sometimes a representative from ORD as well. And then there was a larger, toward the -- as the process picked up, we had a larger group that was more agencywide chaired by folks from the administrator's office, and that included not only our folks from OW, ORD, OGC, but folks from our communications team, congressional team and the like.

Q Roughly how many people would be in that group?

A So for that final one, I think with regular attendees, it was probably 15 to 20.

Q And so going back to the rule working group that you mentioned first, about how many people would that be?

A That was probably larger. I would say on the order of 25 to 30. I was not always a participant on that one, that was primarily composed of staff working directly.

Q Was that, I guess, more of a technical group or --

A It was both technical and legal and policy oriented. They had representatives from all of that. It's the most fundamental of the groups that EPA typically forms to handle a rulemaking.

Q Okay. And this second group that you mentioned which was

headed by sounds like the head of Office of Water?

A Yes.

Q How many people --

A I would say that was probably around the same number, maybe 12 to 18, something like that.

Q To that last group, the larger agency-wide group, to the best of your knowledge, can you list who was there, who would generally attend these to the best of you can?

A Yeah, um-hmm. Typically, it would include from our group at the Office of Water Ken Kopocis who was the acting AA. K-o-p-o-c-i-s. And Greg Peck and, Benita Best-Wong, my boss. Dave Evans who was my -- is the deputy office director, but was my predecessor in the job at the wetlands program, so he was knowledgeable about the issue. And then Russ Kaiser. So that would be most of the folks from water that would be involved there. Then for the Office of General Counsel, that was typically Stacey Mitchell, Steve Neugenboren, N-e-u-g-e-n-b-o-r-e-n, and Gautham Srinivasan, Karen Wendelowski. And toward the latter part I think Carrie Wehling, W-e-h-l-i-n-g.

From ORD, that was often Jeff Frithsen, F-r-i-t-h-s-e-n, and occasionally, let's see, may have occasionally been another person from ORD, too, whose name is escaping me at the moment. Matt Fritz, and before him -- I'll come back to that name, Arvin Ganesan. And then from, let's see, communications side, Monica Lee, Travis Loop occasionally, or other folks that I can't recall.

Q That's all right.

A And then occasionally, depending on the meeting or the time we would have, we would have other folks there. I didn't get to meet all of them but --

Q Do you remember the names of anyone from the administrator's office that was there?

A The deputy chief of staff I named Arvin Ganesan.

Q Okay.

A And I believe organizationally some of the other comms, communications folks are located in the administrator's office, but I don't know the organizational structure as well on that one.

Q Thank you. So how did directions typically flow to you during this rulemaking, where did you receive your direction from? How did that work?

A Well, it was certainly multifaceted, given the complexities of the science and the law that were there. So we had interactions with the Corps of Engineers through our workgroup there. We had interactions with our rulemaking workgroup, and in many of those settings, issues were bubbled up and raised to our attention to various groups' attention, and then for purposes of decisionmaking and moving forward with framing options and things of that nature. Then it was my chain that was involved in that, largely Greg Peck and Ken Kopocis, and my boss, Benita or Dave. We did then also have other input from other folks in counsel and research in those forums. So I would say that one characterization of the working groups is that oftentimes

those issues would be raised or discussed in those settings so that each of those settings provided an opportunity for discussion on the issues and discussion of potential ways forward and implications and things of that nature so --

Q So correct me if I'm mischaracterizing this, so you would oftentimes sort of convene these groups, some groups we just discussed, and there would be an issue, and you would get direction from around the table. Is that accurate?

A Yes. The way I would phrase it, first of all, I was not the convener of the group, but depending on what the setting was, we would be engaged significantly in all of them. But we would look to leadership in those settings for direction to the extent that was not self-evident or a consensus or whatever in the process. And then, from the rule workgroup, my staff would be raising that, or I would raise that in the context of those discussions.

Q Throughout this process, about how many times, or maybe how often would be a better term, did you meet with political appointees throughout this rulemaking?

A I would say that it was fairly frequent, at least once, twice, three times a week, depending on the particular phase that we were in for the rulemaking process.

Q Did you ever have conversations with divisions of the Executive Office of the President rulemaking?

A Not to my knowledge.

Q Did anyone from the Executive Office of the President join

you in calls or meetings throughout your work on WOTUS?

A Not to my knowledge. Although I do just organizationally want to make sure --

Q Sure.

A -- we did do a briefing, at one point, on the science, which was held in the OEOP, although I'm not sure based on the acronym what that includes.

Q Who you were actually presenting to?

A So -- yeah. To the extent that OMB is included in that larger picture, I was not a regular participant in interactions with OMB, but that was certainly part of our rulemaking process.

Q That meeting that you mentioned, when did that take place?

A I want to say the spring of 2015. I think it was shortly after the -- it was right around the time -- it might have been the end of 2014, but it was the winter time frame when the science report had come out, and the SAB report was coming out associated with the science.

Q Okay. In that meeting what role did you play? Did you present --

A No. I don't recall having very much at all to say there, since it was primarily the interest here about the science reports of Jeff Frithsen, our ORD rep was the one that gave the --

Q So ORD were sort of the presenters?

A Yes.

Q And you were there to give support?

A Yep, yep.

Q So was this a technical meeting then?

A Yes. I terms of presenting the research there. Yes. Jeff had to do a couple of slides.

BY MR. MCGRATH:

Q Jumping back for one second. Obviously, this meeting -- what was the interaction between you and your office and OMB and OIRA specifically? You said this meeting but then you worked with them a bit so.

A At the division level, at my level, that was not particularly extensive. Normally for rulemakings, OMB works through our Office of Policy --

Q Okay.

A -- or through higher levels at the Office of Water.

Q Were they part of any group meetings or anything like that you attended?

A Not to the best of my recollection. There may have been some, but I can't recall any specifically.

BY MR. HAMBLETON:

Q So I think when we met last week, you had mentioned that, and correct me if I am wrong, you had met with Administrator McCarthy about six to 10 times regarding the rule. Is that correct?

A Yes.

Q Can you describe those meetings, please?

A Yes. Those were organized as briefings on the rule itself,

so they weren't any of our workgroup meetings that I previously described. Those were set up as separate briefings on the rulemaking process.

Q It would be sort of separate from the other three?

A Correct. And we would typically have one of the policy issues framed up for presentation and discussion. I was responsible for presenting several of those briefings to her. We had probably at least 2 dozen or so folks that were in the room and we would cover, again, some -- typically some discreet part of the Waters of the U.S. rulemaking, presenting options and implications and recommendations and such.

Q Roughly when did these meetings occur? Maybe a better question would be at what stage of the rulemaking did these occur?

A To the best of my recollection, we may have had an earlier one in the late summer or early fall, but the majority of them took place in the winter of 2015, 2016.

Q When you said the earliest one took place in the late summer, is that the late summer of 2014?

A Yes, correct. I'm sorry. I may have misspoken, I said 2015, 2016. I meant 2014, 2015 for the wintertime.

Q Okay. So you sort of have this one in the summer of 2014, and then sort of more of a group come together around the winter of 2014, 2015?

A Yeah. I can't remember exactly when the first one was, but they definitely became more regular as the comment period closed, and

as the specific issues were briefed up.

Q Okay. So you said you presented yourself a couple of -- what presentation were you responsible for, or did you give? What were the subjects of those?

A So we had several on the proposed rule provisions where basically -- could be divided in several categories based on the subject matter of the rule. And by way of example, those include things like the traditionally navigable waters, waters that are interstate, tidally influenced waters, maybe as a group; tributaries and issues associated with tributaries; adjacent waters and issues associated with adjacent waters. And so we would typically have one or two briefings on each of those kind of major sections of the rule as we divided them up.

Q All right. Do you recall discussing compliance with the Regulatory Flexibility Act during those meetings?

A I don't recall directly talking about that in the administrator briefings.

Q How about -- do you recall any discussions in those meetings about the Small Business Regulatory Enforcement Fairness Act, sometimes called SBREFA by its acronym?

A Again, I don't recall specifically briefing her on that topic.

Q Do you recall other conversations about either of these?

A Absolutely.

Q Okay.

A Part of the process of doing the rulemaking is to be compliant with a set of executive orders and other relevant rule components, so RFA and SBREFA were things that we were engaged with, both prior to my arrival for the proposal stage of the rule, as well as when we were finalizing the rulemaking.

Q Do you recall -- did you discuss or was there discussion in the meetings about timing of the rule? Timing of rollout and that sort of thing?

A I think we had -- to the best of my recollection, I think there were some target dates that were in mind from our assistant administrator for water. I don't recall as many of those discussions happening at the administrator's level, but from everything from a workload management standpoint to everything else, I think we had identified about a year as being the general target that we would work toward, from the time of the proposal.

Q So coming out of these meetings, did you receive any directives, instructions, that sort of thing?

A Typically, at the end of these, there would be some similar conversations about the material that was presented and whether there was direction to do additional work on options, or to bring to the table additional items, or that there was general comfort with the direction, or a direction. Those would all be possible outcomes and did happen at one point or another from those briefings.

BY MR. MCGRATH:

Q So you broke down these presentations by types of waters.

Is that kind of what you said?

A Typically, yes.

Q What would the categories be to separate it out?

A Sure. So, I think we had one on waters that we lumped together what in the jargon of our rule would be A-1 through A-4 water. So traditionally navigable waters, interstate waters, tidal and then impoundments. We would often lump those together because they have most of their -- most of that is captured in the statute directly and there's probably not a lot to --

Q You mean navigable?

A There's not a lot to talk about in terms of the agencies changing their approach to that. And then we have -- tributaries would be another topic, and the limits of tributaries, adjacency and the parameters of what constitutes adjacent waters, and then other waters which waters formerly isolated, that discussion. And then I recollect that we also had a conversation, too, about the exclusions and exemptions from the rulemaking as well.

Q And the other waters you're talking about, the isolated waters were intermittent also would fall under that or would that be tributaries?

A Intermittent would typically would be under tributaries.

Q And was it broken up to see what the amount of change the rule would have on each one of these or how much could be added -- would be added to the rule? Was that sort of the presentation that was being given there?

A I think most of the discussions set up each of these issue areas, first in terms of how they were presented in the proposed rulemaking, in terms of the comment that was sought on those. We would typically have a section on the science or discuss the science related to each one. We would typically have a section or a discussion on the relevant law and our court cases for each of these. And then, we would talk about some of the options or comments or implications from each of those areas, and then talk about the relevant importance of those implications.

Q Would there be a PowerPoint or handout given?

A For briefing for the Administrator, typically we did have a PowerPoint.

Q Did you have versions that had your own notes put in it, too? Were you doing the presentation or was someone in your office?

A At least several times I did the presentation myself.

Q You did?

A And occasionally I would annotate mine, either in advance if I wanted to remember to make a particular point, or during the briefing itself if there was a particular point made I needed to jot down.

Q And do you know if those PowerPoints that have been collected is part of the document request?

A I don't know the extent to which that has occurred so far, but --

Mr. Rackoff. If you're referring to the oversight request, I

don't think Mr. Goodin would be involved in --

Mr. McGrath. I just meant whether anyone had come to him asking for documents at this point.

Mr. Goodin. Yes. I'm maintaining all documents related to that.

Mr. McGrath. Okay.

BY MR. HAMBLETON:

Q Let's talk a little bit about outreach. What was your role in conducting outreach for the rule?

A So, I would say that the key areas that I was engaged in and that my staff were engaged in was in helping to discuss and field the many requests that we had for presentation of the proposed rule during the comment period. We reached out to address some 400 different entities over the course of the proposed comment period, which was extended a couple of times. And oftentimes, the requests for outreach would come and we'd talk about them at the AA meeting, the OW, Office of Water meeting, and we'd find out who was available, who could coordinate with the Corps and who would be able to do those presentations. And then we also were engaged in helping to prepare or edit or review materials that were up on our Web site for public consumption.

Q Did you participate in outreach meetings?

A I did in a few, not a whole lot, but I remember participating in at least a couple, uh-huh.

Q How did EPA decide whom to meet with?

A Essentially our approach was to figure out how to accept every offer within the capacity that we had to respond. In some cases, organizations were located in places where it might not be feasible for us to get on notice, or on short notice, but we would often have our regional folks engaged in that process, so we were generally oriented trying to get to as many requesters as possible and that went -- and folks at virtually every level were involved in that at some form or another.

Q Okay. So essentially, correct me if I am wrong, after the proposed rule was released, you had received requests for meetings to provide you information to go back to the stakeholders, and you would try to manage those essentially as best as you could.

A Yes.

Q Is that accurate? It would be local here in D.C. sometimes, there would be regional folks that would do it.

A Yes. And I think, again, it was typically a topic at our Office of Water group. Occasionally we would have scientific organizations. It might be, you know, a good audience for our ORD people, sometimes they were in town, associations or something like that where it would be appropriate for headquarters folks to be engaged, and other times we would be at regular meetings at which they would adjust the agenda to fit those things in. For instance, our states were very interested and active, and that was an agenda item that would appear on regular state meetings.

And then we also -- one knowledgeable person in the Office of

Water, Ellen Gilinsky, was one of our lead folks for traveling to conferences and meetings and things of that nature to help present what was in the proposal.

Q Okay. Did you receive any instruction from the Executive Office of the President about who you should meet with, whether that be OMB or any other part of the EOP?

A I don't recall that.

Q And you don't recall hearing that about anyone else's meetings in regard to this outreach?

A To the outreach that was going on, I don't recall.

Q Okay. Did you or your office discuss these outreach meetings with EOP, Executive Office of the President?

A Not to my knowledge, not at my level anyway.

Q Are you aware of it occurring at other locations in the organization?

A Not specifically. Although I would want to just put down a marker that I know that typically in a rulemaking process, there would be, since we were operating under the relevant executive order, I wouldn't doubt that there was an opportunity for participation in 12866, EO 12866 type meetings, but I'm unaware of those specifically, so.

Q Did you invite any part of the White House EOP to participate in any of the meetings that you were involved in?

A Not to my recollection.

Q And when I say that you were involved in, I guess I would

extend that to you or your staff working on the outreach efforts?

A Not to my recollection.

Q At these, meetings were EPA policy or technical staff invited to present at these meetings? Is that something you would arrange?

A When you say these meetings.

Q The outreach meetings.

A The outreach meetings?

Q Uh-huh.

A Yes, oftentimes staff was the one that was actually doing the presentation.

Q Okay. Were you aware if any of the outreach meetings took place before the proposed rule was published?

A To my knowledge, there was a fairly extensive bit of outreach that happened prior to the proposal. And certainly, some of our concentrated efforts of getting the word out to States, Tribes, local governments, other interested parties, I think there was a fair amount of outreach before the proposal.

Q Okay. Would the Corps join you on these? The Army Corps?

A The Corps was always invited, and they participated by phone or in person when they could. And they, unfortunately, could not come to all of them. They have a lot fewer folks in their headquarters office.

Q Okay. Did anyone from EPA collect comments or recommendations from these outreach meetings?

A In the course -- are you talking about prior to the proposal

now?

Q I guess both.

A So I'm not aware of the processes other than the formal ones that happened prior to the proposal that actually yielded reports from things like meeting with small entities, and to have meetings with tribes and others, and that information was collected and recorded and provided us typically in reports back on that.

I think for during the rulemaking process, we would often introduce our presentations that we were there to describe, to the best of our abilities, what was in the proposal, but that the opportunity for actual comments was provided largely through the formal Federal Register process.

And so in certain circumstances, one example I was engaged in with the States during -- toward the end of the common process roughly September, October, November timeframe. We had a series of conference calls and we put together a compilation of the agendas and one of the State representatives did a summary, and we added that to the record, even though all of the participants indicated that they would be sending in written comments. So in that circumstance, it was understood that that process was going to happen.

Q Let's discuss the common period, and I think you essentially answered this question, but you did review comments received during the public comment period, correct? Or did you?

A Yes. My staff and I were involved in reviewing the comments that were received during the public comment. Many people wait toward

the end of the comment period to send them in, so --

Q When we met last week, you mentioned that the agency hired a contractor to assist in this process. What was the name of that contractor?

A I believe it was Horsley & Witten.

Q Horsley & Witten?

A I believe so.

Q What was the subject matter expertise of this contractor?

A My understanding of the contractor and the contractor expertise is that they had been engaged in similar types of efforts before where they would do this initial phase of processing of the incoming comments.

Q You say somewhat efforts in terms of sort of the logistics of processing comments, or having an expertise in Clean Water Act areas?

A So my understanding is that they had the logistical skills to do that. The agencies, Corps and EPA, were the ones that did the subject matter evaluation of each of the comments.

Q Who from EPA primarily coordinated with the contractor on their review work?

A That would be probably Damaris Christensen on my staff as the technical person.

Q But it was done within your office?

A Yes.

BY MR. MCGRATH:

Q Are they regularly contracted with for this sort of work or

was this a competitively bid contract for the specific review?

A I don't know that for a fact, but I know that the practice of the agency is to --

Q Do you know who would work on that sort of thing? Would it be someone in your office or would there be someone else in the EPA make that decision?

A That would probably rest with our contracting officer.

BY MR. HAMBLETON:

Q Correct me if I am wrong, you would tell someone at the agency that you need this work done, and maybe your contract office perhaps, and then they would set that up for you and send this contract for you to work with. Is that correct?

A I don't know that. I don't know the exact process, but a process, which is consistent with my understanding of how this works is that we would have some form of subject matter expertise regarding if there is a panel or something like that, regarding the capabilities of the folks that put the bids in, but ultimately, the contracting officer is the one that is the one responsible for interactions with the contractor.

BY MR. MCGRATH:

Q Was anyone on your staff part of the decision-making process in it or looking for someone with subject matter expertise?

A I don't know exactly, and I -- part of that may be the timing in which I came on board. It is my understanding is that that process had been initiated.

Q Earlier?

A Yes. Because we wanted to be ready by the time of the proposal. So I don't know for certain.

BY MR. HAMBLETON:

Q Do you go over the work that the contractor engaged in? What did they do?

A My understanding of that is that they took in the comments from the various ways in which they could be submitted. I think we had two or three different ways that were articulated in the proposed rule. And the contractor would review the submissions there. One of their functions was to sort comments that were a part of letter writing campaigns or things of that nature. So if there was a thousand identical comments, but with different signatures on them than whatever then they could handle that and summarize that for us. Say, Here is the sample comment, and a thousand people sent this particular one in. And then, my understanding is that they also were able to help us sort based on an issue outline that we worked to develop for them, so that they could sort comments into different piles basically. And it's not unusual for a commenter to write in and comment on a variety of different elements of the rule, and in those circumstances, they could excise the relevant piece so that we could be reviewing topic by topic, the comments that were received on that. And so they provided that sorting function too.

Q Okay. So would it be accurate to say they would divide them up into positions?

A They would divide them up into the subject matter area. So, for instance, if there was a commentary on an aspect of the rule related to the 100 year floodplain, they would take the comments that were related to the 100 year floodplain and organize those together so that someone from our team could look at those comments, that were all concentrated on the one issue.

Q So you could assign this to a subject matter expert?

A Yes. And that process sometimes yielded places in which certain comments should have been put in a different batch, and so then our subject matter expert could provide that sort of review.

Q Okay. Did the contractor engage in review of substantive comments then?

A No.

BY MR. MCGRATH:

Q Would they then subdivided by kind of opinion, by -- supportive or in opposition for once they were broken down by subject matter, or neutral or something like that?

A There was a general categorization made to try to ascertain that when they were processing.

Q The first time? Above, before it was broken down?

A Absolutely, yes. And that was, you know, roughly three piles of generally favorable or generally unfavorable, can't tell, or neutral.

Q Yes.

BY MR. HAMBLETON:

Q Who made the determinations on that, the agency staff or the contractor?

A On?

Q The categories that we just went over, I guess first being positive, negative, neutral?

A Ultimately, those were determinations that were made by the Corps and EPA. But in many cases, it was fairly self-evident, but if there was any question, then they could float those up and say there's a question on how to do that. That was probably far more common on specific issue areas.

Q Did agency staff look at the chances to view every original comment? I understand some of these are postcard campaigns are essentially identical, but to the extent there was a unique comment?

A Yes. Uh-huh.

Q So we had talked the other day about quality assurance.

A Uh-huh.

Q Can you explain what this involved?

A So to the best of my understanding, the primary QA associated with that was on insuring that the particular issue areas were effectively sorted, and so we -- it's my understanding there were fairly regular, or ad hoc appropriate meetings where if there were any questions from the contractor they could bring those to the attention of folks that were familiar with the subject matter. And then, as a part of contracting duties, it would be typical to take a look at the early sorting and see how that was going, and then, I think, maybe one

or two cases also in which even though we had set an outline at the beginning, we would see a collection of comments that would come in and we'd realize it made more sense to either subdivide or do a different way of organizing them to reflect what's coming in from the public.

Q When did the contractor complete its review?

A I don't know the exact date, but it would be within a matter of weeks, closer to the comment end. Typically, a lot of comments come in toward the end, and so it was a fair amount of work that was going on, towards the close of the comment period, right after.

Q Did the contract end at that point?

A Not to my knowledge. I think that it extended for some months after that.

Q And, so, during that period of time, were they continuing to review comments in that additional time?

A I don't recollect exactly other than maybe just to add two things: One is, typically the performance period is established to give some room. In this case the time period ended up being extended twice, which was, I think, something was anticipated in the original proposal. And so for the contractor that was important for us to have enough cushion if that changed. And if I recollect correctly, following the kind of subject matter review of that, they helped us to kind of compile a single document, or at least by chapter, documents that would have all the relevant substantive comments in one place, and that helped us with an organizational framework to write the responses to the comments.

Q When did EPA begin reviewing substantive comments?

A That -- EPA and the Corps were reviewing comments as they came in. There were a number of organizations that filed comments before the end of the deadline, and so there was review and interest on seeing what those were. And then in earnest, essentially, after the close of the comment period, EPA and the Corps organized -- we actually, at that point, had an influx of staff from our regions and the Corps districts, and worked to develop a protocol for folks to work through the comments in their subject areas, draft and review those comments, trade them with another reviewer, and develop the first draft of the response.

Q So this review is done by -- this review of EPA was done by people in your office and then --

A There were- there were definitely folks in my office and a contingent of folks from our regional office that worked in the 404 program. We also had folks from our 402 program and ORD and OGC also reviewing comments where they were more relevant, specifically to the science, more specifically to the law or specifically to the 402 aspect.

Mr. Hambleton. Off the record.

[Discussion off the record.]

[11:16 a.m.]

Mr. Longani. Let's go back on the record. It is 11:16.

EXAMINATION

BY MR. LONGANI:

Q And Mr. Goodin, it will be the same format as my majority colleagues.

If there's anything I say that you don't understand, if any of my questions need further detail, if you think -- if you are confused by any of my questions, please feel free to ask me to clarify. I certainly don't want you guessing at what I'm asking. Okay?

A Okay.

Q If you can't hear me, you can ask me to speak up. You will be the first person in history who couldn't hear me. I'm generally very loud. But if that, for some reason, happens, please don't hesitate to tell me to increase the decibel level of my voice. Okay?

A Yes.

Q All right. I want to talk a little bit more about your role.

As director of Wetlands Division, what is your role with respect to rulemaking, generally?

A Uh-huh. So in this role, my tasks were to help to organize the relevant staff and others that could participate from our -- our part of the world, the Wetlands Division, both on areas of technical expertise as well as policy and practice of -- of the agency.

We also had a fair role in the logistics of the process, both in terms of the rule work group meeting and communications with our

regional staff and others. We were also engaged in bringing others to bear in activities that required more people to analyze comments or things of that nature.

Q In your tenure at the EPA, approximately how many rulemakings have you been involved with?

A I would say maybe half a dozen.

Q And how many joint rulemakings have you been involved with?

A I can at least think of the three that I've mentioned so far: the dredge material rulemaking, the fill rulemaking, and this one.

Q Okay. So all of them involve the Army Corps. Is that correct?

A Those three involve the Army Corps.

Q From a process perspective, would you agree that the joint rulemaking that took place for the Clean Water Rule, there was nothing unique about the process for the joint rulemaking for the Clean Water Rule?

A I would say in terms of the types of things that we did to raise issues, to develop options, to brief senior leaders, to comply with the various Federal acts and things of that nature, that was all very consistent. I would say this one was the biggest rulemaking that I've ever been involved with; and so there were some differences of scale, certainly, on this one.

Q But in terms of process, did you follow the same process that you did with respect to the prior two joint rulemakings that you were involved in with the Army Corps?

A To the best of my recollection, yes. The key pieces are all there: working on the subject matter, briefing up, doing the required executive orders and other compliance. Yes.

Q Were you instructed in any way, shape, or form to treat this rule differently than you were any other rule that you have worked on?

A Not to my recollection.

Q Okay. So to be clear, in terms of the Clean Water Rule, you were involved after the proposed rule was published. Is that correct?

A That's correct.

Q Okay. Now, as you know, the Clean Water Rule and its -- the Clean Water rule has been in development for several years. Correct?

A There were many activities leading up to the proposal, and based on what I have read, those started as early as 2010 or earlier.

Q But you were not involved in that process. Is that correct?

A Correct.

Q Okay. You briefly discussed the public comment period in the last hour with my majority colleagues. What's the purpose of public comment in the context of rulemaking?

A The purpose of public comment is to be transparent about what the proposed changes or new regulations would be and to solicit anyone who is interested in commenting on those provisions and what the implications might be; and in a number of circumstances, including in this rule, the agencies also specifically sought comment on specific areas where we were asking for input.

Q Over what period of time did the comments come in?

A During the proposed rule and -- the comment period was open for more than 6 months.

Q And I believe you said in the last hour that was extended twice. Is that correct?

A Yes. Uh-huh.

Q Did the EPA feel it was important to extend the comment period so as to enable every stakeholder the opportunity to make their comments known?

A I think that was the case that was made by not only many stakeholder groups, but I think both the Corps and EPA recognized that there was also interest in the SAB evaluation, the science report, and so we also extended the comment period to accommodate that.

Q Now, in the last hour, you told my majority colleagues that there was a contractor hired during the public comment period. Is that correct?

A I --

Q Or they were involved. I don't know -- let me rephrase that. That a contractor was involved in categorizing the public comments. Is that correct?

A Yes. Uh-huh.

Q Okay. But in terms of review, substantive review of the comments, did the contractor have any role?

A The substantive review was done by the agencies, the Corps and EPA.

And just to be clear, by that definition, the contractors did read

the comments so that they could categorize them, but they -- but the agencies were the ones that digested the comments and drafted responses.

Q Is it unusual for the EPA to hire a contractor to review public comments for purposes of categorization?

A Not to my knowledge. I think we have done that in a number of cases before.

Q Okay. So just to be clear, the contractor would place these comments into different categories for ease of processing for the EPA. Is that correct?

A For EPA and the Corps. The topics were the primary basis for that, essentially an outline of subject matter topics.

Q And how are you receiving -- how are the EPA and the Corps receiving these comments in terms of timeframe? Are they coming in every few months or are they coming in all at once after the public comment period has closed?

A My recollection was that they were being digitized on an ongoing basis, and so there was an opportunity for us where we didn't -- some stakeholders also just sent, in addition to the docket, would send comments to our office or the Corps office directly, and we would make sure they got into the docket. But we would also take advantage of looking at what is said at that stage, so --

Q How did the Corps and EPA communicate about public comments and what should be done in response to those public comments?

A The initial organization of that process, to the best of my

knowledge, was handled by points of contact at Corps headquarters in my division; and to the best of my knowledge on that, they coordinated on the frame for those comments, how they would be sorted, the kind of substance of the categories. And then I think most significantly, the Corps headquarters brought in a number of detailees from their district offices to spend concentrated periods of time, weeks at a time when they were assigned to headquarters to help review the substance of those comments and draft responses to those comments along with EPA regions and others from EPA.

Q Okay. So just so I understand, how are the two agencies -- is there a working group between the two agencies, an interagency working group, for example?

A Yes. So in terms of comment review, we organized at least one session where the Corps and EPA staff were jointly trained in terms of the evaluation process and the format and what would happen over the course of the weeks that folks were there; and then folks were assigned different topic areas, and the folks would then read and digest those comments that came in. They would draft a response to comments on them, and then they would also, if there were issues that were potentially unique or hadn't been previously alluded to in the proposal or elsewhere, then they could bubble those issues up to be talked about in some of the other forums that we had.

Q Okay. And so at this initial meeting where the Corps and the EPA were present, were the comments divided at that point between the Corps and the EPA?

A I can't recollect exactly on that. I went to help open that session with my counterpart at the Corps and welcome people to D.C. and get them started on that effort, and then they proceeded to do that. For at least some period of time, they all were in the same room; for some period of time, once the issues were sorted, they were working in cube space as available in both agencies.

Q Okay. And when did this meeting take place, to the best of your recollection?

A It was in the winter of that 2014-2015 timeframe. So I -- it was either late December or early January, maybe.

Q Okay.

A Plus or minus. I'm not exactly sure.

Q So late 2014 or early 2015. Is that fair?

A Yes.

Q Okay. So after the public comment period closed?

A Yes. Uh-huh. Although I think, for clarity, I would just add that my staff certainly had discussions with Corps staff regarding the nature and organization of how that process would work, and I would understand that those would have taken place, you know, well prior to that meeting to ensure that they were ready.

So, for instance, with respect to the potential areas of expertise, so we would have multiple categories of comments on what made sense for who to work on, what issues, and that would not have necessarily been limited by -- or started after folks were actually gathered. I'm sure there was a fair amount of prep work there, so --

Q Okay. You had mentioned you had a counterpart in the Army Corps. Who was your counterpart in the Army Corps?

A So mostly I interacted with Jennifer Moyer.

Q Okay. So she was your primary point of contact for the Army Corps. Is that correct?

A I would say yes.

Q Okay. And how often would you say you communicated with Jen Moyer throughout the rulemaking process once you came aboard in late May, early June 2014?

A I would say at least weekly.

Q Through the -- through the eventual final rule promulgation?

A Yes. Certainly, on average, I guess there were -- there were times when both of us were gone, but at least weekly, I think, would be a good characterization.

Q Did there ever come a time when you were told not to speak with anyone at the Army Corps?

A I can't recall any specific instance when I was instructed not to do that. And Jen and I communicated fairly regularly throughout.

Q Okay. Did you ever talk to Craig Schmauder at Army headquarters?

A Yes. Craig was a part of our Corps-EPA policy group that was working through the issues that were raised in the proposal.

Q Did you find anything inappropriate about Craig Schmauder being the point of contact for the Army?

A Not necessarily. We each, each agency, designated a point of contact to work through; and Greg Peck, on our side, is probably one of the most knowledgeable people about wetlands issues that there is at EPA. And my understanding is that he and Craig had worked together at least since the development of some previous guidance prior to the rulemaking, and so --

Q Previous guidance as it related to the Clean Water Act?

A Yes, and eventually the Clean Water Rule. I believe it was Craig and Greg that worked on the effort for what's known as the Rapanos guidance after the Supreme Court decision in Rapanos, so that did not strike me as unusual.

Q Did you reach out to the Corps directly with any questions you had during the promulgation, during the Clean Water Rule promulgating process?

A I would say yes. Not -- Jen and I were in fairly frequent conversation, whether it was a part of the policy work group or outside of that or on other issues altogether. The Clean Water Rule was certainly a big focus for both of us, but we had a lot of other program elements; and certainly in 2014, I was introducing myself to all of those other elements, too.

Q Was there an interagency working group between the Army, Army Corps and the EPA during the Clean Water Rule promulgation?

A Yes. And that's the one I referenced, which is -- there were several folks from each agency that convened over a period of weeks and months to talk about the various issues that were raised in the

proposal and the feedback and potential ways forward and potential implications of it.

Q Who was in that group?

A It's my recollection, for EPA, that it was Greg Peck, Gautam Srinivasan, Karyn Wendelowski, occasionally Russ Kaiser, and me.

Q Was Greg Peck involved?

A Yes.

Q Okay.

A He was kind of EPA's designated chair or contact.

Q Okay. And Jen Moyer?

A And then on the Corps side, yes, it was Craig Schmauder, Chip Smith, Jennifer Moyer, Lance Wood, and a division director. They were in the process of changing division directors. I actually can't recall the guy's name now, but there was a division director from the Corps who was there for several meetings up front; and then he retired, and I don't believe we really had another person after that from the Corps, so --

Q Okay. Craig Schmauder told the committee that the purpose of what he referred to as the group of eight was to take the proposed rule, given the fact that they now had comments on the proposed rule and the outreach effort that had been going on, and to start developing a proposed final rule. So from September to around November, Mr. Schmauder told the committee that the group of eight was meeting frequently "to start developing the concept and issues that we would want to take on the proposed final rule." And for the record, it is

page 26 in the Schmauder transcript.

Would you agree with Mr. Schmauder's description of the group of eight's purpose?

A I think that sounds fairly -- fairly similar to my understanding.

Q Okay. Mr. Schmauder also told the committee that interagency meetings stopped between November 2014 and January 2015 because of the holidays and "given the timeframe that we had, we had to kind of start the process of putting some thoughts down on paper in the sense of draft preamble and draft rule text. And so EPA took the responsibility to start drafting the beginning, the early origins of the preamble, and the rule text. And so by January when everybody kind of came back after the holidays and everything at that point we kind of put aside the strategy-type discussions and we were more focused on actual drafting of the preamble and the rule text language."

Does that equate with your recollection of the timeline and the work that the group of eight was doing in late 2014, early 2015?

A I would say, roughly, yes, that's my recollection. Uh-huh.

Q Is there anything else that you would add to Mr. Schmauder's description of what was taking place between November 2014 and January 2015?

A I think -- what I would also say would be that there were -- that, in some cases, we had talked about some issues for which we were ready for some briefing and interaction with our higher agency leadership; so those processes got underway, also, during that time.

Q Okay. Did you ever feel that the Army Corps was cut out of discussions at any point during this process?

A That's not how I would characterize anything that happened then.

Q To the best of your recollection, how often did the interagency group meet during the period post-January 2015, to the best of your recollection?

A Yeah. I would say it was much less frequently than in the fall.

Q Okay.

A And I can't recollect the number of times, but, yeah.

Q And why did those -- the frequency of the meetings decrease?

A My recollection is that the process had evolved at that time once we were -- we had reached the point of briefing our senior leadership on certain issues or areas of the rule, that some of that process then shifted to the senior leadership. I think our group was also focused on working on the drafts of the other department products that would go along with that. And then, at that point that we started crafting some of the rule and preamble language, that became more of the focus of the interaction would be on the substance of the actual rule and preamble language. And we were -- our discussions were less about -- they were less wide ranging than, kind of, the policy options and things like that as we started to close in on more specific possible directions.

Q So would you agree that the issues had been narrowed

as -- post-January 2015 --

A Yes.

Q -- thus necessitating less interagency coordination?

A Yes. The issues were definitely narrowed at that point. I'm not sure I would say it necessitated less interagency coordination. Maybe for our group it did, but I know that that interaction was going on.

Q And let's talk about that.

During the final rulemaking period, prior to submission of the final rule to OIRA, can you talk about the collaboration that continued between the EPA and the Army, to the best of your recollection?

A Well, the best of my recollection includes a couple of different phases, a couple of different avenues in which we were coordinating. The first was on the response to public comments, which was really beginning to pick up speed in the new year, in 2015. And so there was a lot of Corps-EPA interaction on the drafting of those responses to comment.

At that point, we were also engaged in a number of briefings that -- for my assistant administrator for water and, ultimately, the administrator, and there were conversations that were then taking place at those levels in terms of the general direction for the rule.

Q So would you agree that, after January 2015, much of the coordination taking place between the EPA and the Army occurred at the policy level?

A I think that's accurate if you also include, then, the

interaction that was occurring for -- on the ground level in terms of the comment effort to both of those things, it's my understanding. Well, I know about the comment one more so than the policy interaction, but that certainly was -- that certainly was occurring at that time.

Q So you continued discussions with the Army Corps as it related to responses to the public comment through the winter of 2015. Correct?

A Yes. And we were also engaged on some of the other documentation associated with the rule. So for instance, on the economic analysis, we -- one of the ways in which we responded to public comments was to update the data that was associated with that. And so the Corps of Engineers had the data that we were using and they provided that information, and so we were interacting with them on that element as well.

Q You said you were involved in the development of other rules as you were working on the Clean Water Rule. Correct?

A Not at the same time that I was working on the Clean Water Rule, but I have been involved in the development.

Q Oh, okay. So during the time you worked on the Clean Water Rule, that was the only rule you were working on. Correct?

A Yes. And I am just going to slightly qualify that by saying that we had begun rulemaking, in my job of record, which was the chief of the Watershed Branch, and that -- the development of a proposed rule unrelated to this one; and so that had begun, but I was no longer supervising that group of people as a practical matter. So --

Q Okay. Is it uncommon for the EPA to set deadlines, internal deadlines, with promulgating a rule?

A Not at all. In fact, we actually publish them in the regulatory agenda.

Q Why does the EPA need to set deadlines?

A I think there are a variety of potential reasons. Sometimes we have court orders; other times we have workload management issues. There are a variety of reasons. But as a manager, I would probably point to those two as being significant ones.

Q What would happen to the rulemaking process if the EPA didn't have internal deadlines and tried to meet those deadlines?

A I think it would be very difficult to plan for resource allocation and for meeting -- meeting our objectives. That would be one thing. And then I think, as a practical matter, I think the Corps and EPA heard the demand out there from the public to do a rule that would provide more certainty and clarity, and we were certainly motivated to do that as expeditiously as we could.

Q Would you agree that there was broad support for a Clean Water Rule versus a guidance?

A Yes.

Q And what's the basis of your belief?

A Well, for one thing, we had a full range of stakeholders that had been very clear about their desire to move beyond guidance and to have a clarification in the regulation. And I think the basis of many of those interests is the same as EPA and the Corps, which is we had

a regulation that was out there that was not up to date in terms of the Supreme Court decisions and implementation that was happening in the field, and so we -- you know, those were drivers as well.

Q Would you agree that a significant portion of industry supported -- private industry supported the promulgation of a Clean Water Rule?

A That's certainly my understanding. Whether we agreed exactly on what that would look like, I think, is open to a lot of different interpretations.

Q Sure. And we will get back to the purpose of the Clean Water Rule later, but I want to finish talking a little bit about deadlines at the EPA and otherwise.

Would you consider any part of the Clean Water Rule promulgation process to be rushed?

A I'm not sure I would use that word, but I think there were definitely phases of it which were more intense than others.

Q Anything unusual about the fact that certain phases of the promulgation were more intense than others?

A That certainly has occurred in other rulemakings and in other projects that I'm familiar with.

Q From beginning to end, the rulemaking process took approximately 6 years. Would you consider that to be rushed in any way, shape, or form?

A No.

Q Do you have any basis to believe that politics played a role

in the timeline as to when -- as to how long this rule took to promulgate?

A I'm not aware of that.

Q Okay. Mr. Schmauder told the committee that, quote, "Our only charge was to do a rule that was science-based, consistent with the law, and that would bring predictability and commonsense rules to the public. Now, if that's considered political, I'll sign up and say, yeah, that was political. In terms of being a directive as to the outcome of how we would have arrived at a rule, all of the meetings that I ever attended, I never once heard any directives coming from anybody within the administration as to how the rule should and shouldn't come out at the end of the final hour." And for the record, it's pages 126 to 128 of the Schmauder transcript.

Do you agree with Mr. Schmauder?

A I think that sounds about right.

Q Anything else that you would add to Mr. Schmauder's comment regarding the directions you were given in terms of promulgating this rule?

A Just to add that, if I heard that correctly, he cited science, the law, and --

Q Bringing predictability and common sense to the public.

A Yes, as a policy goal. And I would just add to that, the experience of the Corps and EPA in administering the program, too, that we relied on that, too.

Q Are you aware of either the EPA or the Corps being directed by anyone at EOP to promulgate this rule with a disregard for science?

A No.

Q Are you aware of the agencies being directed by anyone at EOP to reach a finding of no significant impact?

A No.

Q Are you aware of the agencies being directed by anyone at EOP to promulgate this rule in violation of legal requirements and regulations?

A No.

Q Any evidence to suggest science was abandoned in considering and addressing -- excuse me. Withdraw that.

Any evidence to suggest science was abandoned in the consideration and promulgation of this rule?

A No. It was clearly a centerpiece.

Q Would you agree that one of the purposes of the Clean Water Rule was to provide clarity with respect to waterways protected by the Clean Water Act?

A Yes. I would say that was a chief policy objective.

Q And do you believe the Clean Water Rule, indeed, does that?

A Yes, I do.

Q According to the EPA, about 117 million Americans, one in three people, get their drinking water from streams that were vulnerable before the Clean Water Rule's promulgation. Would you agree with that?

A That's my understanding. That was developed prior to my coming to the Wetlands Division, but that sounds like the right figure

to me.

Q Do you agree that both the EPA and the Army Corps sought to ensure that protected waters under the rule were precisely defined, easier for businesses and industry to understand, more predictable, and consistent with the law and latest science?

A Yes.

Q If implemented, would the Clean Water Rule have an impact on the ability to ensure clean drinking water for people in this country?

A Yes.

Q What type of impact would it have, to the best of your knowledge?

A To the best of my knowledge, it would be protecting areas that potentially are important for contributing both quantity and quality of water to areas that are commonly used as drinking water sources, and the certainty provided by the rulemaking would help to maintain and ensure that.

Q So, for example, the rule seeks to preserve protection of rivers for Clean Water Act jurisdiction. Correct?

A Yes. Uh-huh.

Q But it goes well beyond easily identifiable rivers and other known waterways. Correct?

A Yes.

Q In fact, the rule discusses ditches, wetlands, prairie potholes, and other waterbodies to provide clarity with respect to how

these are related to navigable waters and, therefore, subject to Clean Water Act jurisdiction. Is that correct?

A Yes.

Q In an EPA press release dated May 27, 2015, entitled, "Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities and the Economy," Administrator McCarthy said the following, quote, "For the water and the rivers and lakes in our communities that flow to our drinking water to be clean, the streams and wetlands that feed them need to be clean too."

Would you agree with that statement?

A Yes, I would.

Q And would you agree that the Clean Water Rule furthers that purpose?

A Yes, I would.

Q Administrator McCarthy also said, and I quote, "Protecting our water sources is a critical component of adapting to climate change impacts like drought, sea level rise, stronger storms and warmer temperatures which is why EPA and the Army have finalized the Clean Water Rule to protect these important waters so we can strengthen our economy and provide certainty to American businesses."

Do you agree with Administrator McCarthy's statement?

A Yes.

Q Do you agree generally that this rule has an important part to play in ensuring that all Americans have clean drinking water?

A Yes.

Q Do you agree that the rule will have a positive impact on clean drinking water for Americans?

A Yes.

Q Do you agree that the Clean Water Rule continues to exempt several agricultural activities such as planting, harvesting, and moving livestock from the Clean Water Act jurisdiction?

A Yes.

Q And would you agree that the Clean Water Act -- excuse me -- the Clean Water Rule actually provides greater clarity to farmers and does not add an economic burden on agriculture?

A Yes.

Q In terms of process, was this rule treated any differently than any other rule you have worked on -- just in terms of process.

A Not to my knowledge. Nope.

Q Okay. Would this rule have been submitted to OIRA if there were significant concerns at the EPA about the process underlying science or economics that had not been properly addressed internally at EPA?

A I'm sorry. Could you repeat that?

Q Sure. Would this rule -- actually, I will just break it down.

Would this rule have been submitted by the EPA and the Army to OIRA if the EPA, for example, had any concerns about the process by which this rule was promulgated?

A Right. I --

Mr. Rackoff. I'm not sure that Mr. Goodin can answer a question like that because it might reflect a decisionmaking process that would be beyond --

Mr. Longani. Sure. That's fine.

Mr. Goodin. I guess -- it's is also reflecting a little confusion on my part in terms of what exactly the question is there. So --

BY MR. LONGANI:

Q That's fine. We can pass on that.

During a joint rulemaking, is it common for agencies to express disagreements?

A Sure.

Q Did that take place here and during the Clean Water Rule promulgation process?

A Yes, it did.

Q Anything unusual about that?

A I think it's characteristic of a normal dynamic and debate that often occurs in dealing with issues like this, so not unusual.

Q In your experience, joint rulemaking -- in your joint rulemaking experience, does every single recommendation by an agency become adopted and incorporated into the final version of the rule?

A I'd say that would be highly unlikely.

Q Is it your experience that every recommendation of a staff member, any promulgating agency on how to proceed in a specific subject area in a rule will be adopted and incorporated into the final rule?

A That's not my experience.

Q What is your experience?

A There is a lively development of ideas, options, implications. Those are debated and discussed, and a number of those are adopted and a number of those are not. It's a part of the process.

Q Is it your understanding that the ultimate policy decisionmakers have an obligation to accept and incorporate every single recommendation that is made by a career staff person?

A No.

Q What is your experience?

A I think my experience in this rulemaking is that certainly my ultimate boss was very interested and engaged in hearing what those recommendations were from the first-level staffer all the way up, and that she was very interested in discussing and understanding, as best as she could, what those implications were and how to make a good decision as a result.

Q Any evidence to suggest that this rule was forced upon the Army by the EPA?

A I'm not aware of that.

Q Just a second.

[Discussion off the record.]

BY MR. LONGANI:

Q How closely did you work with Greg Peck during the development of the final Clean Water Rule?

A I would say pretty closely.

Q How often would you all meet -- and let's be clear here -- during the time period between the close of the public comment period and the submission of the rule to OIRA?

A I would say multiple times a week, if not daily.

And by "meet," there, I would just clarify: phone call, email, discussion in person, et cetera.

Q Sure.

Were you involved in the interagency review process?

A In terms of getting the document ready for review and then also responding as a part of that, then, yes. But as the submitting agency, our role is a little different, so --

Q Right. So let me be more specific.

Were you involved in responding to comments provided by agencies during the interagency review process?

A Yes, I was.

Q Okay. In your experience at EPA, during the interagency review process, is it uncommon for agencies to ask for more time to review a rule?

A I'd say that probably happens more often than not.

Q In your experience at EPA, are differences of opinion amongst the interagency participants common?

A Yes.

Q In your experience at EPA, is it common that, during the interagency review process, the agencies express views that are subsequently not incorporated into the final rule?

A Yes.

Q In fact, is it fair to say that, in most rules, particularly joint rules, there are bound to be differences of opinion both between the reviewing agencies themselves and the reviewing agencies and the promulgating agencies?

A I'm not sure I can speak to most -- most rules just given my familiarity.

Q On the rules that you have worked on.

A Things that I have been involved with, I think that variety exists, yes.

Q On March 18, 2015, Ken Kopocis, the Deputy Assistant Administrator for EPA's Office of Water, testified at the hearing at the Water Resources and Environment Subcommittee. During that hearing, he said, and I quote, "Quite candidly, I will tell you that there is not a lot of new in the way of issues that are being raised. Many of the issues that are being raised are the same ones that have been raised for several years."

Would you agree with Mr. Kopocis that, because of the 6-years process that the Clean Water Rule had been through, that all of the significant issues related to the rule had been raised by relevant agencies on several occasions by that point in time?

A I would say so, for all of the big ones, yes. Uh-huh.

Q At the end of the review process, was there any significant issue about the process itself that concerns you?

A Not that I can recall.

Q If you had had any of those concerns, would you have brought those concerns to the attention of Greg Peck or Administrator McCarthy?

A Yes.

Q Okay. Just a couple of clarification questions.

During the last hour, you mentioned that there was a working group within the EPA as well as a final group. Is that correct?

A Yes. So there were -- there were several, and the -- and the rule work group, it is the one that's composed primarily of staff that spanned every office and region that has an interest in that group. And then our -- we had -- just as is inherent in a multilevel bureaucracy, we had several other groups within EPA that were working on elements of the rule; and that, in most general terms, bubbled up from the rule work group to the Office of Water, to our agency work group, or agency -- yeah, I guess you could call it a work group, too.

Q So how many working groups were there?

A There were at least three within EPA, and depending on how you parse it, there were some other smaller ones as well that were focused on more particular topics or policy issues, et cetera. And then there were interactions with the Corps of Engineers in the manner in which I previously described that -- what you called the group of eight, so those were the major ones.

Q Okay. And who chaired those working groups, if there was a chair?

A Yeah. So at the staff level, that was Donna Downing, who works for me in the Wetlands Division; at the Office of Water level,

that was Ken Kopocis, who was the acting AA at the time; and then at the agency level, that was Arvin Ganesan, and then Matt Fritz, subsequent to Arvin.

Q I'm sorry. Who came after Arvin?

A Matt Fritz.

Q Okay.

A And then for the -- the interagency group, there was Greg and Craig.

Q Right. Co-chairs?

A Correct.

Q How would you describe the collaboration between the Army and the EPA during the promulgation of the Clean Water Rule?

A I would describe it as dynamic and frequent and useful in framing the issues that were ultimately briefed and made a part of the rule. I think the discussions were wide ranging, and we covered a lot of territory.

Q Okay. With respect to the outreach meetings, the Corps was always invited to those outreach meetings. Correct?

A That was my experience, yes.

And I will just add on that one. In some cases, there were organizations that made a specific invitation to specific individuals to attend, and so I am less able to respond in those circumstances.

Q And during these outreach meetings, would the EPA or Corps make a presentation to the relevant group?

A The ones I'm familiar with, that was a common way to do it

is to present the basics of the proposed rule.

Q Okay. Who would make those presentations?

A It varied, from staff all the way up to Ken, depending on the audience, and it would be from EPA and then from the Corps. It was, oftentimes, Stacey Jensen or Jennifer Moyer.

Q Thanks.

Mr. Hambleton. All right. So usually around this time we will break for lunch if that's something you would like to do. Usually we do 45 minutes, also up to you.

Mr. Goodin. Fine with me.

Mr. Hambleton. Great. So why don't we try to be back here at 1.

[Recess.]

[1:06 p.m.]

BY MR. HAMBLETON:

Q Welcome back.

A Thank you.

Q We're going to pick up where we left off before with the review of comments. And I'll also note that it is 1:06 p.m.

And just to dive back in, so during the comment and review process, when did EPA complete its review of substantive comments?

A I think, in terms of a first run through them, it was probably in that spring timeframe, maybe March, April, for kind of a complete run-through, but we were working on the documentation through to the end of the process.

Q When you say "documentation," what do you mean?

A So it is the relevant pieces of the rulemaking that includes the record documents. For instance, in this case we had something called a technical support document, which explored in more detail the science and the law that were associated with the rule. And there was review that was occurring on the comments document and much of the other documentation up until the end.

Q Okay. Do you know whether EPA finished this review of substantive comments before the final rule was sent to OMB?

A By the definition of our review for purposes of providing the rule, yes, it was done; but we continued to work and edit on those documents following interagency review and up until the final

promulgation.

Q So the documents were synopses of the comments. Is that true or accurate or not?

A We provided those, but we're also working on detailed ones as well. So both were there, but the fact of the matter is, on these rulemakings, we work on that documentation through the time period of OMB review because there's often interagency review comments and other things that are associated with finalizing the record.

Q Okay. So in the rulemaking, EPA addressed comments in a separate response as opposed to the preamble. Were you a part of that decision?

A So there were actually three places in which there were responses. One was the preamble, where we captured the main or the major comments that were received. We also had a technical support document that included legal and technical areas that were addressed, in some cases, in comments. And then we had a very, very extensive response to comments document, which was also a part of that record.

Q Okay. Is that a normal process to have these three things sort of spread out throughout the rulemaking?

A Yeah. It's certainly not unusual. In some rulemakings, if there are very, very few comments, you can perhaps address them all in the preamble. But typically, to the extent there are either large or complicated issues that are raised, it's a pretty standard practice that you'd have a separate response to comments document and maybe one or more technical documents and then a preamble.

Q Is this a process, you know, with a preamble and then technical support documents that you've encountered in other rulemakings that you've worked on at EPA?

A I can't say specifically, but I can say that there are -- that other rulemakings have had technical documentation that's been a part of it. It may or may not have been in the same format here. I think the idea here -- I think the technical support document was somewhere around the order of about 300 pages or something like that.

And so that level of detail -- an approach to that level of detail was placed as an appendix in the first -- in the proposed rule and published, and I think that for transparency and efficiency and readability, the decision was made to capture the main points in the preamble, have that documentation, and then the response to comments.

Q Okay. Were you engaged in how to respond to substantive public comments?

A Yes, in the context of at least several issues. I was not someone that was working on a lot of different substantive comments, just given my role, but I did review and edit some sections of the response to comments, and I certainly was a part of the preamble and rule writing, which involved those sorts of responses at the larger level.

Q All right. Were you engaged in how to revise the proposed rule to address public comments?

A Yes. I'm having trouble distinguishing between the last two questions, but --

Q Sure.

A -- we certainly made certain items a part of our proposal that then, based on comment -- public comment, changed in the final, and so, yeah.

Q So, yeah, my question is a continuation on the first one --

A Okay.

Q -- in that I first asked you if you had engaged in how to respond -- or if you had engaged in how to respond to these comments. And then the follow-up question being, you know, once you had those comments, were you engaged in how to incorporate them into the final rule -- or excuse me --

A I do --

Q -- yes, and how to revise the proposed rule to the final rule, so --

A Uh-huh. Yep, certainly, for several of those, yes.
Uh-huh.

Q Okay. In your involvement in this rule, did anyone at EPA discuss needing more -- discuss, you know, a need to -- for more time to complete the review before submitting the final draft to OMB?

A I don't recollect any specific conversations on that, but I do know that the extension of the public comment period did change our schedule and there were concomitant requests for time associated with that.

Q We -- my colleagues discussed the team of eight, I guess, for lack of a better term at this point, or the interagency group, as

you referred to it --

A Yes.

Q -- and we're going into some detail about that.

During the time when these meetings would be occurring, do you ever hear or were you aware of Mr. Peck and Mr. Schmauder meeting in private or over the weekends to discuss the rule?

A My understanding was that they had a number of interactions outside of the context of the actual work group meeting. I would be made aware of phone calls that Greg and Craig had regarding the rule, and so that -- I'm sure that those types of discussions occurred.

Q Okay.

BY MR. MCGRATH:

Q Those sort of calls and things, were you then made aware of the results of those discussions? Or I guess what I'm kind of trying to get at there is you know that they happened, but were those communication -- were decisions made on those discussions then integrated into what the rest of the team was doing? Were you told about them? How did that work?

A Oftentimes we would hear the results of those in the context of our meetings, typically at the OW level meetings, and they range from the -- everything from scheduling and coordination issues to the implications and frame of briefings going up the respective chains and things like that.

Q Were there things like -- do you feel like there were decisions made at their meetings or calls that were outside of the

regular process?

A I would not say that it was outside of the regular process. The two of them were charged by our senior leadership to do that sort of coordination, so I assume that that was a regular part of what they were doing.

Q Okay. All right.

BY MR. HAMBLETON:

Q Regarding some questions about the drafting of the final rule, quite simply, who drafted -- who did draft the final rule?

A Well, there were several sections of it. I think the rule language itself was done as a part of our group that was working on it. The rule language itself is not particularly extensive. And then the preamble pieces, there were lead authors on different parts of the preamble depending on the topic area.

BY MR. MCGRATH:

Q Which group are you talking about? Are you talking about the group of eight or one of the other groups within the Office of Water?

A So in -- to the best of my recollection, after we had talked about the basic policy directions and things like that, I think it was largely EPA that took the first shot at text.

Q So EPA did the text drafting?

A We -- yes, for most of the preamble. But, again, for the rule text itself, a lot of that was actually -- if it was small enough that there was a lot of discussion back and forth on that, and so that was, you know, usually the product of our -- of some discussions back

and forth.

BY MR. HAMBLETON:

Q And you said -- I believe I heard you say "our group." Do you mean the wetlands, your team?

A No. I'm talking about the -- for --

Q On the rule itself.

A On the rule and preamble, we were primary drafters: OGC, Greg, our Office of Wetlands folks, and ORD.

Q What were your duties with respect to drafting or finalizing the rule?

A We -- for me personally or for --

Q Yeah. I think you as the head of your group, but to the extent that --

A Right. So I think there were a couple of different things that were related to that. One was to be a participant in discussions regarding the framing of rule text or organization of preamble text.

Secondly, we were also engaged in crafting the descriptions, many of which flowed from the technical support document and the response to comments work.

Yeah, so those would be the principal ones, and then having those discussions with our senior management.

Q When did EPA begin drafting the final rule?

A To the best of my recollection, we were starting with the proposed text and how it might change in that winter of 2014 and 2015. So December/January timeframe, roughly, I think.

Q The team of eight or interagency group, was that group given any opportunity to further discuss or present options on the rule after the draft final rule was presented?

A I am not aware of that occurring. I think we had -- individuals that were involved in that team of eight certainly did, but I'm not aware of our group -- that particular group coming together at that late stage, so --

Q Okay. Were you aware of any discussions to recirculate the draft rule for second round of public comments after changes had been made to it?

A That I -- it's possible that that came up and there was discussion, but I can't recollect a specific time. But the general notion of the relationship of the final rule text to the proposed text was certainly something that we were aware of through our attorneys in particular.

Q Okay. Were those discussions with the interagency working group, or EPA, or both?

A I am only -- to the extent that we had those emerge in our discussions, I'm familiar with them only in the context of the EPA group.

Q Okay.

A But --

Q Only internally in EPA as opposed to the group you worked on with the Corps?

A Right. And I think part of the reason of that was just the

timing of that group's existence in the overall process. We were the first out of the chute to try to coalesce around the format of a final rule, what issues would be briefed, what options were available. And then once that -- once those efforts began to be briefed up to our senior leadership change, then the process evolved from that. So that kind of group of eight was less engaged as an entity when the process evolved to briefings for senior leadership.

Q Okay. To the extent that you know based on your recollection of conversations about the notion of recirculating a draft rule for a second round of public comments, who made the decision, I guess, not to do that, if there is someone?

A Yeah. I --

Q If you know.

A -- I don't know. Yeah, I think the -- by that point we had felt that there was a lot of opportunity made available for public comment, and I think the general consensus was that the evolution of the rule from the proposal to final was consistent with other rulemakings.

Q Okay. Who set the timeline for promulgating the rule? Let's take the final rule.

A I am not aware of who specifically would have done that, but I was generally made aware of trying to target a year between the proposal and the final. So that was kind of the general direction that we were working under.

Q Okay. Was there a deadline to submit the draft final rule

to OMB?

A Again, for scheduling purposes, we definitely were working toward target dates for that, particularly working back from the target of a year. Typical OMB review times can be 30 to 90 days, and so we certainly were aware of targeting that as a necessary prerequisite to going final.

Q Okay. Again, to the extent that you know, can you discuss any changes made to the draft final rule to address any concerns raised by USDA or the Department of Transportation?

A I'm not sure I'm specifically aware of the source of specific requests or changes, but I do know that we were -- there was a fair amount of discussion on ditches and exactly how to capture the nature of the continued exclusion of ditches from regulation. And I had a general understanding that that was of interest to USDA and DOT.

Q Who decided what changes to make in the final rule to address those concerns?

A I think ultimately it was the senior leadership at the Corps and EPA, but we certainly were providing material background, implications, options when those concerns were raised.

Q In terms of timing, when were these changes made to the final rule?

A I don't know exactly, but it was roughly that -- I'm sure that final, you know, 6 to 8 weeks maybe, something like that.

Q Okay. I guess just to try to clarify, near the end of the process, then?

A To respond to interagency review comments, yes.

Q Yeah. That's when those changes were then incorporated into the rule, at the end of the process?

A Any of that came from -- as a result of that.

Q Okay. Did the Corps or EPA study those changes? Did you evaluate options or alternatives before the -- those changes were incorporated into the final rule?

A I can tell you that those types of things did happen. I can't recollect if there were any specific changes on provisions that were at issue at that juncture, but we did, for instance, look at other data and information during that time. I think one example of that that was -- that stood out for me was the notion that the proposed rule had a definition of riparian area and 100-year floodplain definition that did not rely on the FEMA 100-year floodplain maps.

And we received many comments, including comments from States and others, that that would be a good way to go in the vein of certainty and providing more predictability because States, local government, regulated community, folks are familiar with those maps. And so that was one thing that we looked at in more detail than after comments had come in.

How available are these maps? Over what percentage of the country are they available? And, therefore, what might be the implication to adopt in that as a way of going forward?

Q Okay. In the last hour, my colleague brought up the notion of this number of 117 million Americans that would be affected by -- or

wouldn't have access to clean water. And do you know where that number came from or who developed it?

A I was not there when that number was developed. It was available at least, I believe, a year or so earlier. And if my recollection is correct, there was an evaluation that was done that looked at the location of drinking water sources and the types of water bodies that were associated with feeding into those sources.

Q Okay. But you don't know who worked on it or who pulled that together?

A I don't.

Q Okay.

BY MR. MCGRATH:

Q Do you know the timeframe that it was put together?

A I believe that it was put together in the year leading up to the proposal, is my best recollection.

Q And do you happen to know what office might have worked on it if you don't know what person?

A I think it was the Office of Wetlands, Oceans, and Watersheds.

Q Okay. So --

A They were at least partially engaged. We also have the drinking water office, and I assume that they were engaged in that, too.

Q Do you know someone who would be more likely to know who would have worked on this fact? Your predecessor maybe?

A Perhaps my predecessor, yep. Uh-huh.

BY MR. HAMBLETON:

Q On the connectivity report, when was it initiated?

A It was initiated before I started at my position. I don't know exactly when that was, but I believe it was at least a couple years in advance of the proposal.

Q Okay. When was it finalized?

A It was completed as a part of the -- following the SAB review. So I think the final, final, final was January 2015.

Q Okay. Understanding that it was initiated prior to your tenure, do you know who started the report? Do you know who initiated it?

A It was primarily driven by our Office of Research and Development, but I'm sure in consultation with the Office of Water.

Q So is ORD responsible for its development?

A It's my understanding that they had the lead, yeah.

Q Okay. To the extent that you know, did you or anyone in your office review the connectivity report?

A Yes. My understanding is that we had a couple of staff that did review it.

Q Was that staff in your office that were there prior to you, or was this when you were there, or both?

A Probably both. I don't -- but I don't -- I can't speak for when I got there, but we have a couple of scientists that are in our division, and I'm familiar with the review of that report occurring

with one of them after I took over.

Q Okay. Did you or anyone in your office review any comments from the Corps on the report?

A I'm not personally familiar with that.

Q So you don't know if that happened or not?

A I don't.

Q Okay. We had talked a little bit before about the technical support document. When did you first see the final technical support document?

A Well, I know that it was being drafted and compiled in the early part of 2015. And so the technical support document was not final until the entire rule was final by definition. And so all of those documents were considered complete and a part of the record at signature of the rule, but certainly there was material comprising drafts and things like that months earlier.

Q Okay. And I guess the same question for the economic analysis: When did you first see that, if you did?

A Yes. So that was probably also the winter of 2014/2015 timeframe. There was a draft economic analysis that was completed as a part of the proposed rule, and so that had been available for some time. And then the -- there were a variety of updates and improvements that were made to that document up until the end of the rule.

Q Did you work or people under your charge in your office work on the final economic analysis or the TSD?

A Yes. Uh-huh.

Q Okay. Could you summarize the involvement of the Army Corps in the development of the economic analysis and the technical support document?

A The Corps was engaged in the work on the draft report before I got there, and publication of that is part of the proposed rule. My familiarity with their engagement during the final rule process was as a part of providing the raw material for the analysis.

One of the comments that we had received was that the data that was used to do the draft economic analysis that was a part of the proposed rule was from 2008/2009 time period, and a number of commenters and others suggested that that would be a period of economic depression and might not reflect the full number of activities that were going on with respect to jurisdictional determinations.

So we updated that data with information from FY13 and -14, and all of that information came from the Corps of Engineers.

Q Did the Corps have access to -- at what point did the Corps have access to these -- you know, your -- EPA's completed work on the EA and the TSD?

A Well, I don't know the exact nature or timing of that. But by the EA, if you're referring to the economic analysis --

Q Uh-huh. Yes.

A -- that was something that the agency was taking the lead on in crafting. And so I know that the -- that our sister agency had drafts and write-ups associated with that certainly in the weeks and months leading up to the final rule.

BY MR. MCGRATH:

Q But that did rely on the Corps' data, correct?

A It did.

Q But wouldn't it make sense for them to see it earlier if it was relying on their data to make sure it was being used correctly, if you know?

A We had already used the identical methodology for purposes of evaluating the proposed rule, and so I think there was probably less difference at that point in time. But my understanding is the -- that the Corps and Army were familiar with the approaches that were being used and the types of comments that were coming in. But largely the economic expertise rested at EPA, who took the lead for that document.

Q One last question on that. Why is the economic expertise in EPA and not the Corps but it's the Corps' data being used? It's economic data you're using from the Corps, right? It's not --

A It was actually data regarding jurisdictional determinations, and so EPA has a fairly decent size cadre of folks that do economics work for rulemakings and for other activities. The Corps does not have that same expertise. However, the Corps has all of the raw material that were -- that was used in the analysis. And the fundamental analysis that we used as our starting point in the economic analysis was what would be the change in jurisdiction that would occur under, first, the proposed rule, then the second one. And so the raw material of that were actually collections of jurisdictional determinations that the Corps field offices had compiled.

Q So it's the jurisdictional determinations of the data you're talking about --

A Correct.

Q -- not any economic data coming from them? You're only talking about it's going to affect this much land, and then that the calculations would all be done EPA?

A Correct, as a -- yes.

Q But at any point was the Corps asked to -- for information about what their expectations of costs might be on people in, for instance, new areas of permitting, those sort of things? Was that something that was ever discussed with the Corps?

A I don't recollect specific conversations, but certainly the majority of the folks that or the -- rather the majority of the information that was associated with that was information that was either publicly available, these published reports, or was a part of the programs that EPA operated.

So, for instance, the 404 program is just one part of the Clean Water Act. And our economic analysis included data and information and costs on 402, storm water, CAFOs, other aspects of the Clean Water Act which are solely in EPA's purview.

Q But do they have any 404 economic data coming in on cost related to that? Was that also included or was it just jurisdictional information?

A Yeah, my understanding is that -- I can't say for sure, but my understanding is that -- because a certain element of the economic

study was also based on mitigation and mitigation for wetlands, that that is another program that is jointly administered by Corps and EPA, and it's quite possible that that data was also derived from Corps figures. I would -- that would be the logical place.

Q Okay. Thank you.

BY MR. HAMBLETON:

Q So the rule is classified as economically significant. Do you know why the agencies did not prepare a regulatory impact analysis?

A My understanding is that the agencies were following the guidance of OMB and others with respect to what documentation needed to be prepared. And at the proposed rule stage, if my recollection is correct, is where the agencies first broached the notion that, strictly speaking, the rule, in being compared to the previous regulation, would actually shrink jurisdiction. And so the conclusion there would either be, you know, no effect or not any greater effect than the current rule.

But out of an abundance of interest in being transparent, the agencies knew that since the Supreme Court rulings had added a lot of confusion, that it would be appropriate to also undertake voluntarily an analysis that looked at the change from current practice. And so we also, then, essentially based the economics work on indirect costs and indirect benefits. And the RIA standard and the economic standard are kind of ones that I understand to be the same. You look at the underlying regulation.

BY MR. MCGRATH:

Q So you looked at -- so essentially you're talking -- was this -- this decision was made at the OMB level, that they provided guidance on whether this was necessary?

A I think that, if my understanding is correct, at the proposal stages, the agencies, Corps and EPA, proposed this as a way forward, and OMB thought that that was consistent with the guidance.

Q Okay. So they just reviewed it of what the proposal was?

A That's my understanding, yeah.

Q And then so -- and it was the understanding of the agencies, Corps and EPA, that it was based on the previous regulation, not the previous regulation as limited by the Supreme Court decision. Is that accurate?

A That's my understanding of what was required, and then the agencies did do more. That's my understanding. So --

Q Okay.

BY MR. HAMBLETON:

Q Are you familiar with the so-called or what's coming to be called Peabody Memoranda?

A I am aware of it, yes.

Q Have you read them?

A I have not.

Q When did you become aware of them?

A I think I was forwarded a Trade Press article some weeks after the publication of the rulemaking.

Q Okay. Did you ever discuss these memoranda with anyone at

EPA?

A Certainly we were not aware of -- I was not aware of -- and I don't think any of my colleagues were aware of the memos and -- until they appeared after the rulemaking. But I do remember there -- you know, after they appeared that there was some discussion about that in perhaps a couple of different forums, so --

Q What was the -- to the best of your ability to characterize it -- the general opinion at EPA of the Peabody Memoranda?

A I think the only thing that I could say that would be a general characterization of that was surprise when it came out.

Q Let's talk a little bit about adjacency limits that were added to the final rule. How were these limits determined?

A I'm sorry?

Q Distance limits for adjacent waters --

A Yes.

Q -- were added to the final rule.

A Yes.

Q How were these distance limits determined?

A So the Corps and EPA sought comment on ways to develop more bright-line limitations to the final rule. And we relied on the general information from the science that we had, talking about the proximity of waters and their relationship to connectivity. And we also reviewed the agencies' field experience with previous jurisdictional calls that were made relative to distances.

Q Okay. When you say "the agency," you mean EPA or both

agencies? Just unclear.

A Both agencies, yeah.

Q Okay. Who decided on these limits ultimately?

A I think ultimately it was the signers of the rule, but we certainly evaluated options that were associated with providing bright lines, and this notion of a linear limit rose to the surface as being one that had attractive policy objectives that still was consistent with the science and the law.

Q So these limits that were decided upon, were these arrived at by EPA, or EPA in consultation with the Corps, or anything else?

A I think that the -- one of the primary drivers was the experience of Corps and EPA field folks in making jurisdictional determinations under the previous then-existing regulatory regime. We had essentially every determination being made on a case-by-case basis, and it would require the Corps to make jurisdictional calls by doing these individual analyses.

And we looked at ways to shrink the number of times in which you'd have to have these individual analyses, and so this notion of some distance limits were ones that rose to the surface of being a good candidate. And the data and information and evaluation that we had from the connectivity report pointed to the active connected nature of, first of all, the floodplain as being the key feature, and then also the relative proximity of waters to rivers and other downstream waters as being a key feature as well.

And then the agencies overlaid their experience and looked at the

distances, and we found that in -- there were waters that were being determined to be jurisdictional beyond 4,000 feet and there were waters that weren't being captured inside of 4,000 feet. But it seemed like that was -- the vast majority were, you know, being captured by that as a potential limit to look at for evaluation.

Q For the EPA, did your office head up this process of looking at the jurisdictional limits -- or excuse me, the adjacency?

A Yeah. So we -- my recollection is that we had staff that worked with our regional staff who were more familiar with the on-the-ground situation and that they were the ones that helped to feed into that process.

BY MR. MCGRATH:

Q Just quickly to continue, so these adjacent waters as we call it, we're talking about wetlands largely, right? We're not talking about navigable waters?

A We're not talking about traditionally navigable waters, but the waters that previously were evaluated under the adjacency provision under the old guidance needed a significant nexus analysis. So they could be either wetlands or other smaller streams or different non-wetland water bodies.

Q Understood. But they're not traditional navigable waters, as you talk?

A Correct.

Q This is talking about the significant nexus analysis you're talking about, correct?

A So, yes. So, yes. But those -- the waters that could be linked through significant nexus include wetlands and other waters.

Q Yeah. So then it's a 4,000-foot limit that was put in. You said there were some situations where that was -- as you were doing your analysis, that was jurisdictional. Sometimes it would be -- lower levels would not be nonjurisdictional because it wouldn't have significant nexus. Sometimes it would be larger than that. And is that correct?

A Yes. It was our analysis that the large majority of waters were captured inside of that limit and a small minority were not.

Q But there was some -- there would be some areas where in an area less than the 4,000 that might be captured under the current rule the 4,000-foot limit would not have a significant nexus to navigable waters. Is that the situation that could happen, right?

A That's my recollection, yes.

Q Okay.

BY MR. HAMBLETON:

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

A I don't recall specific conversations with the Corps about that, but we absolutely did talk about in our group of eight the notion of linear distances and the implications of doing that. That was a topic I do remember in interagency discussion.

Q So the connectivity report recommends against using line and distance limitations to establish jurisdictional boundaries. Can you

explain why, then, these appeared in the rulemaking?

A Well, the agencies definitely were guided by the science and the law and our field experience in this regard, but our larger policy objective was to provide a bright line and to shrink the areas of concern. And we did that in a number of different places in the rule both with respect to tributaries and adjacency and other waters.

And what the connectivity report told us was that the connection of these head water and beyond areas is located on a continuum, and that it is difficult for scientists to determine what that -- you know, that continuum is essentially infinite. And with that infinite continuum, that's a very difficult policy prospect.

So we looked at not only what the science told us about those close linkages to riparian areas, floodplains, and generally distance as being a surrogate for those connections. And we looked at our field experience, and then we looked at the opportunity to provide more clarity in that regard. So it was a combination of those factors.

BY MR. MCGRATH:

Q What do you mean by "areas of concern"? Do you mean areas -- I guess, like, the way you used it, I'm not sure which -- what you meant by that.

A Areas of interest. So if we were looking at the potential significant nexus of wetlands or other water bodies in certain of the particular areas that we'd ask for comment on, too, like prairie potholes or vernal pools or some of these other areas, also the nature of floodplains was an area of interest for us, too, because when you

get down to the coastal areas, floodplains can widen out quite a bit.

And there was a policy-level concern about having this be completely open-ended for making a demonstration of significant nexus when in some cases floodplains could extend for miles. So there was a desire, is there a logical way to provide a brighter line in those circumstances that shrinks the gray area for the public.

Q So by area of concern, you mean the gray area you're talking about here, right? Not area -- I guess my -- you didn't mean area of concern for commenting parties or people applying for permits being worried about that?

A No, that's not --

Q Okay.

A Yeah. Uh-huh.

Q Okay.

A Yep. I meant, yeah, area of focus or area of interest, which varied depending on what piece of the rule we were considering. In some cases, floodplains; in some cases, these other water areas, et cetera.

BY MR. HAMBLETON:

Q Let's talk a little bit now about Tribal consultation. Who normally engages in this practice for EPA rulemakings?

A We have a tribal office that is -- has been historically located in our Office of Water, and we have a coordinator there the agency reorganized some time ago, and that, I think, has been consolidated in our Office of International and Tribal Affairs. But

we have folks in the Office of Water that are active in that area when it comes to water issues and the tribes. And so they were engaged, as were program folks, in the various consultations that occurred in the run-up to the proposed rule, and then in meetings and other efforts that occurred during the comment period of the final rule.

Q Okay. So this office is housed in Office of Water?

A So there are at least a couple of staff that are in Office of Water, but the larger office is in a different part of the agency.

Mr. Hambleton. Okay. Let me introduce an item into the record. This will be exhibit 1, and this is the "Final Summary of Tribal Consultation for the Clean Water Rule: Definition of 'Waters of the United States' Under the Clean Water Act; Final Rule."

[Goodin Exhibit No. 1

Was marked for identification.]

BY MR. HAMBLETON:

Q Who drafted this document, to your knowledge?

A I don't know.

Q Okay. So then does that mean that you are not aware of who made any of the determinations found in this document?

A I was aware that documentation was being prepared, but I was not aware of the authors.

Q So you didn't then -- did you perform any work or review this document?

A I don't recollect doing that.

Q You can put that aside.

A Okay.

Q In terms of State outreach, did EPA conduct outreach with all 50 States?

A We certainly were available for that. I don't know what the final total was, but we invited that and we were very heavily interested and engaged with the State and local government input.

Q Okay.

BY MR. MCGRATH:

Q So was it less than 50 States, then?

A I don't know. I don't know. I think that the total was pretty high, and I know that it was offered to all.

BY MR. HAMBLETON:

Q Was your office involved in any efforts to conduct outreach with State and local governments?

A Yes. Uh-huh.

Q Okay. So when you said you offered it, what does that mean to offer? How do you offer outreach?

A So normally the EPA Office of Water is engaged with State organizations and States directly in a variety of forums and areas given our joint administration of the Clean Water Act. And so opportunities such as the meetings of ECOS, the Environmental Council of the States; ACWA, the Association of the Clean Water Administrators; ASWM, the Association of State Wetland Managers, they typically have at least two meetings a year, annual meeting and a D.C. meeting, and this rule was of interest to them. We were in front of them a fair amount, and

that offer was something that was always presented.

We had a lot of takers on that. Including during the public comment period, all three of those associations were interested in having a more -- you know, an additional opportunity to interact with the Corps and EPA on the development of the final rule.

And so one thing that I was directly involved in was hosting. The agencies hosted, I believe it was four calls in the fall of 2014, at which point we invited the State organizations to pick folks that they wanted to participate in this, pick agenda items, issues, et cetera, that they wanted to talk with us about. So that's one area that I was more familiar with than others.

And then in our regional offices and in district offices and other settings outside of Washington, our regions were active in responding to individual State requests for briefings and things of that nature.

Mr. Hambleton. Okay. All right. We'll go off the record.

[2:17 p.m.]

Mr. Longani. Let's go ahead and go back on. It's 2:17.

BY MR. LONGANI:

Q Mr. Goodin, are you familiar with the Government Accountability Office, otherwise known as the GAO?

A Yes.

Q What's your understanding of their role as a Federal agency?

A That they're often asked to evaluate specific questions regarding the performance or activities of the agencies, of other Federal agencies.

Q They were not a party to this rulemaking, correct? And by "this," I'm referring to the Clean Water Rule.

A I'm not aware of any role that they played.

Q Would you agree that they are an independent agency?

A That's my understanding, yes.

Q Were you aware that, following the completion of the Clean Water Rule, the GAO conducted a review of the agency's compliance with all relevant administrative requirements, including the economic analysis and the Administrative Procedure Act?

A Yes.

Q Were you aware that they concluded -- they, the GAO -- concluded that the agencies, the Army, as well as all promulgating agencies, met every requirement with respect to the promulgation of the Clean Water Rule?

A Yes.

Q I'll introduce exhibit 2.

Mr. Rackoff. Sorry, are these multiple documents?

Mr. Burns. No, just one.

Mr. Rackoff. Okay.

Mr. Longani. Mr. Goodin, I'm just going to ask you to peruse pages 2 and 3 of exhibit 2, the second and third page.

Mr. Goodin. Okay.

Mr. Rackoff. Could you refer to the identity of the document by its title?

Mr. Longani. Exhibit 2 is "Department of Defense" -- it's the GAO report on promulgation and compliance of the Clean Water rulemaking.

Mr. Rackoff. Okay.

Mr. Longani. You should have multiple copies of the same document.

Mr. Goodin. I don't. These are different here.

Mr. Longani. Can you hand those back? Why are they not -- take us off the record.

[Discussion off the record.]

Mr. Longani. Okay. We'll now introduce exhibit 2, which, again, is GAO report 15-750R.

[Goodin Exhibit No. 2

Was marked for identification.]

BY MR. LONGANI:

Q Specifically, the report reads at the top, under the title, "GAO reviewed the Department of Defense, Department of the Army, Corps of Engineers and Environmental Protection Agency's (collectively, the agencies) new rule on the Clean Water Rule and the definition of 'Waters of the United States.'"

"GAO found that (1) 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 (2) the agencies complied with the applicable requirements in promulgating the rule."

Mr. Goodin, I want to focus you on the second part of that, which indicates that the agencies complied with the applicable requirements in promulgating the rule. The report includes an assessment of the regulatory requirements and concludes, first of all, that as to the cost-benefit analysis there was a finding of compliance.

Would you agree with the GAO's conclusion that the promulgating agencies complied with all regulatory requirements as it relates to the cost-benefit analysis?

A Yes.

Q The GAO also concluded that the promulgating agencies complied with the regulatory flexibility analysis. Would you agree with that?

A Yes.

Q The GAO report also concludes that the promulgating agencies

complied with the Unfunded Mandates Reform Act of 1995. Would you agree with that?

A Yes.

Q The GAO report concludes that the promulgating agencies complied with all requirements of the Administrative Procedure Act. Would you agree with that?

A Yes.

Q The GAO report concludes that the promulgating agencies complied with the Paperwork Reduction Act. Would you agree with that?

A Yes.

Q And the report finally concludes that the promulgating agencies and OIRA complied with Executive Orders 12866 and 13563. Do you agree with that?

A Yes.

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 of the Clean Water Rule?

A No.

Q Would you agree that conducting a cost-benefit analysis in the Clean Water Rule case was not an easy task?

A It was a --

Q Or that it was a complex task?

A It was a challenge, yes.

Q And why was it a challenge?

A I think there were challenges regarding the availability of

some data. There were challenges regarding the overall structure and format.

And then I think another area is that, because the basis was meant to be a comparison of rule to rule, that the agencies went and performed it based on the application of existing guidance as practiced at the time. And so there were challenges to get the right information to make such an analysis.

Q Okay.

I want to ask you a few questions to follow up on some of the things that my majority colleagues talked about in the last hour, okay? So I'm going to jump around a little bit.

You indicated to my colleagues that Greg Peck and Craig Schmauder met outside the group of eight at times. Is that correct?

A Yes. That's my understanding.

Q As the point of contact for their respective agencies, was there anything irregular that they met or spoke outside of the group of eight meetings?

A No.

Q Why not?

A I think they had a charge of working together to advance the rulemaking process and to lead in the coordination of the efforts associated with it. So it would not be unusual that they would have multiple conversations outside of a formal meeting.

Q In fact, would you expect them to have multiple conversation outside of the group of eight meeting?

A Yes, I would.

Q Mr. Goodin, were you kept in the loop as to those conversations?

A I can't speak to whether I was in the loop for all of them, but I certainly was aware that those conversations were happening, and frequently that would be a topic at one of our larger meetings.

Q My majority colleagues also talked about the fact that a second round of public comment was talked about at the EPA. Is that correct?

A That's my recollection.

Q Okay. In light of the fact that this rulemaking took over 6 years, would it have been highly unusual to have submitted the rule for a second round of public comment?

A I think that was part of why the agencies concluded that we did not need to go back out for comment, because of how extensive the preliminary work was leading up to the proposal and how significant the opportunity for public comment was.

Q Do you agree with that?

A Yes. I think it was the right path.

Q You also said that the evolution of the Clean Water Rule from the proposed stage to the final rule was consistent with prior rulemakings that you had experience with. Is that correct?

A Yes.

Q How so?

A Because there comes a point in time when the analysis, the

data, and the other work that's compiled for decisionmakers is largely complete and that's presented to the decisionmakers. And there are opportunities and sometimes we're asked to go back and investigate additional angles. But, largely, we get decisions and we move the process forward, and that eventual agreement works its way up to the final signatories.

Q And is that what happened in the case of the Clean Water Rule?

A That was my experience, yes.

Q You also indicated that you were given a deadline of 1 year between the time of the publication of the proposed rule and the submission of the final rule to OIRA. Is that correct?

A If I recall correctly, it was to have the rule be final within 1 year.

Q Okay.

A And that was the target that was presented.

Q Anything irregular about that timeframe?

A No. I think it was certainly -- it was certainly, you know, a big effort, but it was not unusual.

Q As to the connectivity report, it underwent two peer reviews. Is that correct?

A My understanding is it underwent two peer reviews and an SAB review.

Q Do you know who Jim Laity is?

A Yes.

Q Jim Laity works at OIRA, correct?

A Yes.

Q And the Jim Laity had a significant role in the promulgation of the Clean Water Rule. Is that correct?

A I couldn't speak exactly to his engagement, but my understanding was he was definitely involved.

Q He was involved. Okay. Jim Laity told the committee that the peer-review process -- he described the peer-review process that the connectivity report went through as gold-plated. Would you agree with that?

A Yes. My experience on the rule started in May, and, by that time, it had already had the two peer reviews. And then it was furthermore submitted to SAB with all of the attendant public transparency features associated with such a review. And so it was very significant.

Q You also mentioned during the past hour that the EPA took the lead on the economic analysis. Is that correct?

A Yes.

Q Is there anything irregular about the fact that the EPA took the lead on the economic analysis for purposes of the Clean Water Rule?

A No.

Q Why not?

A I think for a couple of reasons.

One, the Corps and EPA divided up workload on the rule, and EPA took the lead for some things; the Corps, the lead for some other things.

Secondly, I think the expertise is strong in EPA for that. I'm

sure the Corps has economists too, but for this task there was strong expertise at the agency. And I don't know what happened at the proposed stage, but we had already crafted a draft and worked through it at that proposed stage in that same manner.

Q Okay. Would you agree that the EPA, generally speaking, as to the Clean Water Rule, was the lead agency?

A I think it's fair to consider the agency was -- took a leadership role in that, in collaboration with the Corps, but, certainly, EPA was in a leadership role.

Q Okay. And, again, was there anything irregular about the fact that the EPA took the lead role with respect to the Clean Water Rule?

A No, not irregular at all.

And one thing I would add is that the agencies generally divide roles in the implementation of Clean Water Act section 404, and one role that is a longstanding lead for EPA is geographic jurisdiction of the Clean Water Act. And so it would be entirely expected that EPA would take a lead role.

Q I'll introduce this as exhibit 3.

[Goodin Exhibit No. 3

Was marked for identification.]

BY MR. LONGANI:

Q I'm showing you now what's been marked as exhibit 3 for purposes of this interview. It's titled "Section 404 of the Clean Water Act. Memorandum of Agreement: Exemptions Under Section 404(F)

of the Clean Water Act."

Specifically, I'm going to direct your attention to section 1, which is "Purpose and Scope," paragraph 2. If you could take a moment to read that.

A Okay.

Q The first sentence of the second paragraph under section 1 reads, "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 Yes.

Q I'm going to ask you to turn to page 2, and I'm going to ask you to look at the second full paragraph, last sentence, please, that starts with "All future programmatic guidance."

A Uh-huh.

Q And, again, the full title of this, while Mr. Goodin reads this, is "MOA Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act."

Have you finished reading that, Mr. Goodin?

A Yes.

Q That last sentence says, "All future programmatic guidance,

interpretation, 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."

Is that consistent with your understanding of the relationship between the EPA and the Corps as it pertains to joint rulemaking as it relates to the Clean Water Act?

A Yes, as it pertains to geographic jurisdiction and activities jurisdiction, yes, uh-huh, it is.

Q Okay. Do you believe it is appropriate that one agency take the lead in a joint rulemaking?

A Yes. Uh-huh.

Q Anything irregular about the EPA taking the lead in this case?

A No.

Q Okay.

I'm going to move on. You also mentioned to my colleagues in the last hour that the EPA was surprised when the Peabody memos came out. Is that correct? Or you were surprised, to be more specific.

A Yeah, I was surprised, and I think at least for a number of my colleagues it was also surprising.

Q Why was it surprising?

A Because we were unaware that those documents were in existence.

Q Now, after the public comment period ended, did Jen Moyer ever express any concerns to you about the final rule?

A I think that the Corps and that Jen, as a representative of the Corps, indicated that she had at least some frustrations with some of the process and the discussions. But that was not unusual.

Q Okay. And why was that not unusual?

A I think in a rulemaking of this complexity that there's bound to be issues on which staff and others disagree and have professional differences of opinion on.

Q Is the fact that a team member's recommendation was not adopted in the final rule a sufficient basis to say that the rulemaking was flawed, in your opinion?

A I think not. That seems potentially a significant response, to do something like that.

Q Did Jen Moyer's concerns that she expressed to you get elevated to the appropriate people?

A To the extent that the memos contain concerns that she raised in some of our interagency discussions, they did.

Q Okay. And is that why you were surprised when the memos came out?

A I think that was partially my surprise, but I was also surprised because I had not seen something like that in my experience that I could recollect in government.

Q And by that, what do you mean?

A The extensive nature of the documentation and having that publicized after the rule came out.

Q Okay.

Did you continue to speak with Jen Moyer through the final rule stage, even after it had been submitted to OIRA?

A We were in fairly regular contact throughout the process of the rule, and we still are today.

Q And when she expressed concerns to you, some of which were in these so-called Peabody memos, you, in turn, took those concerns to the relevant people at the EPA. Is that correct?

A Yes. And not only that but they were known among -- at least, again, to the extent that they were raised in our interagency discussion, they were known to the participants in those discussions, as well.

Q Is it your understanding that the Assistant Secretary of the Army for Civil Works, in this case Jo-Ellen Darcy, ultimately represented the Army's policy position with respect to the Clean Water Rule?

A Yes.

Q Do you believe that the Assistant Secretary is the appropriate decisionmaker as opposed to, for example, Army Corps staff?

A Yes.

Q Approximately how long was the rule under review -- the final draft rule under review at OIRA?

A I don't know the exact timeframe there.

Q Would you agree that it was less than 90 days?

A I honestly can't remember --

Q Okay.

A -- the exact timeframe, but -- yeah.

Q For purposes of this discussion, I want you to assume that the Clean Water Rule was under review for approximately 6 weeks, the final draft of the Clean Water Rule was under review by OIRA for 6 weeks, okay?

A Yes.

Q Understanding that you do not have personal recollection of that, or at least of the precise dates.

A Correct.

Q But for purposes of these questions, I would ask that you assume that to be the case, okay?

A Okay.

Q Jim Laity told this committee that there was nothing atypical about the fact that the Clean Water Rule took 6 weeks to review in its final stage. Would you agree with Mr. Laity?

A Yes. The review at OMB can be quite variable in time, so yeah.

Q In your experience, in your rulemaking experience, is there anything unusual about a rule's review taking greater than or less than 90 days, the time period set out in the relevant Executive order?

A Not necessarily. And, in fact, in my experience, it's often at the proposal stage where that review can be more lengthy.

Q A couple of more questions for you about the joint rulemaking process generally.

A Uh-huh.

Q Are you familiar with the Administrative Procedure Act, generally speaking?

A Generally speaking, yes.

Q As you know, the Administrative Procedure Act, or APA, governs rulemaking, correct?

A Yes.

Q It lays out the applicability requirements for a notice of proposed rulemaking, requirements for public comment period, publication requirements, and the right to petition for issuance, amendment, or repeal of a rule, correct?

A Yes.

Q Are you aware of any provision in the APA or any other regulation that governs how often agencies must communicate with each other on a joint rulemaking?

A No.

Q Are you aware of a provision in the APA or any other regulation that requires interagency co-rulewriting in a joint rulemaking process?

A No.

Q Are you aware of any APA provision or other regulation requiring agencies to get together on a prescribed basis to talk about how to respond to public comments?

A No.

Q Are you aware of any provision in the APA or any other regulation requiring that the rulemaking process should begin with an

initial meeting with principals and key staff to discuss the issue and study it and assess recommendations thereafter?

A No.

Q Are you aware of a provision in the APA or any other regulation that mandates agencies must brief OIRA together on a joint rulemaking?

A No.

Q Are you aware of a provision of the APA or any other regulation that dictates parties in a joint rulemaking must notify each other when they begin drafting the rule?

A No.

Q Mr. Goodin, my colleagues talked to you a bit about the Regulatory Flexibility Act in the last hour. Do you remember that?

A Yes.

Q Now, the decision that the rule would not have a significant economic impact was made prior to your involvement in the Clean Water Rule, correct?

A The initial determination was made as a part of the proposed rule, correct.

Q Okay. So you do not have any firsthand knowledge of what took place at that time, correct?

A Correct. Just what I've read in the proposal and relevant documentation.

Q Okay. Is it your understanding that the agency certified that the Clean Water Rule would not have a significant economic impact

on a significant number of small entities?

A Yes.

Q Okay. And from the point you became involved with the Clean Water Rule, did you have anything to do with that analysis?

A No, but I had -- well, maybe I should rephrase. I was aware that the agency reengaged with small entities and that we held additional sessions with small entities. But, given the breadth of the process for managing that, it was actually my predecessor that participated more directly in that process during the final rule. My understanding was he had been engaged in that effort at the proposal stage, and for some efficiencies he took up that role during the final rule even though I was now in the director job.

Q Okay.

I'm going to show you -- I'm going to mark this as exhibit 4.

[Goodin Exhibit No. 4

Was marked for identification.]

BY MR. LONGANI:

Q This is the "Final Report of the Discretionary Small Entity Outreach for the Clean Water Rule: Definition of 'Waters of the United States' Under the Clean Water Act; Final Rule."

I'm going to direct your attention, Mr. Goodin, to page 19, the penultimate paragraph. If you could take a look at that briefly.

A Okay.

Q And just look up at me when you're done reading it.

A Okay.

Q And could you read the last paragraph, as well?

A Yes, I will.

Okay.

Q The second sentence in the last paragraph says, quote, "Given the vital role small entities play in implementation of the CWA, the agencies decided to solicit technical input through outreach."

Did I read that correctly?

A Yes.

Q Was that your understanding of how the process took place?

A Yes, it was.

Q So even though, under the Regulatory Flexibility Act, the agencies were not required to engage in this type of outreach, the EPA agreed to do so anyway. Is that correct?

A Yes. And I was familiar with that aspect of our actions during that time.

Q Okay. How were you involved?

A I was involved in initial discussions about undertaking this effort again and going back out to small entities. And I was involved in some discussions on who might be appropriate representatives or representative entities to be involved in that. And then, at some point, passed the baton to my deputy office director, who chaired those meetings.

Q Okay.

A And I think, if I recall correctly, I may have even sent some of the initial invites or inquiries to some people to see if they were

interested in participating.

Q And were those meetings well-attended?

A My understanding is that they had close to two dozen organizations -- I mean, participants there.

Q Okay.

I'm going to ask you to turn to page 3 of that same exhibit 4.

A Okay.

Q And I'm going to direct your attention to the end of the first paragraph on this page --

A Okay.

Q -- right before the bullet points. And I'm going to read the sentence out. This is, again, on page 3, for the record, from exhibit 4.

Quote, "The agencies conducted outreach meetings in 2011 and 2014 designed to exchange information with small entities interested in this action."

Are those the outreach meetings that you were referring to in your last answer, Mr. Goodin?

A Yes. That's my understanding.

Q Were the Department of the Army or Army Corps involved in these meetings, to the best of your recollection?

A I recall that they were invited, and I don't know -- and that they were certainly involved in the --

Mr. Longani. Let's go off the record for a minute.

[Discussion off the record.]

Mr. Longani. Let's go back on.

BY MR. LONGANI:

Q Sorry about that.

A Yeah, so my understanding was that they were invited, and I can't speak to 2011, but I know that they were invited and engaged in the 2014 meeting. But I was not at that meeting, so I can't speak to their attendance there.

Q Okay.

According to this report, the comments received during these outreach meetings were considered in the development of the final rule. Do you agree with that?

A Yes.

Q Mr. Laity told the committee that part of the discussion about whether the EPA would certify the rule or not included a commitment by the EPA to conduct a SBREFA-like process and to make it as much like a full SBREFA process as possible and, in fact, OIRA and the SBA Office of Advocacy participated in this process. Is that correct?

A To the best of my knowledge, yes, uh-huh.

Q Mr. Laity also told the committee that the decision to accept EPA's determination to certify the rule was largely a legal determination that turned on the discussion of what a direct and indirect effect was and what was the appropriate baseline.

Is that consistent with your understanding, Mr. Goodin, if you have knowledge to that effect?

A Yeah, I'm not sure I have direct knowledge of the exact basis. But, yeah, doing the analysis consistent with a SBREFA-like process was certainly anticipated and done.

Q I want to go back now to some specific concerns that my colleagues addressed in their last hour about the technical support document and specifically Jen Moyer's concerns about them, and I'd like to ask your opinion on those comments, okay?

A Okay.

Q If you have knowledge to respond to them.

First of all, Mr. Goodin, there are a number of concerns expressed by Jen Moyer as it pertains to the technical support document. Is that your understanding, as well?

A I am not specifically aware of concerns with the TSD.

Q Okay.

A But --

Q Well, let me -- Ms. Moyer has said that Corps data was also used by the EPA when crafting the technical support document, but the Corps also had no role in actually performing the technical analysis or drafting the TSD.

What's your response to Ms. Moyer's comments?

A I am not familiar with any specific references that she's made to the TSD, to the best of my recollection.

Q Okay. Would you agree that -- and I think you said this in the last hour -- that the EPA used certain Corps data for purposes of the TSD, correct?

A Well, for the economic analysis.

Q Excuse me. For the economic analysis.

A Okay. And so, I'm sorry. Were the previous questions on that also?

Q No. The previous questions related to the TSD.

A Okay.

Q So let me be clear. I'm going to be switch over to the economic analysis.

A Okay. Uh-huh.

Q The EPA used data relating to jurisdictional determinations from the Corps. Is that correct?

A Yes. Uh-huh.

Q Okay. What was your role in the economic analysis?

A I had some staff that were engaged in helping to draft that, and I also was involved in reviewing the document when it was put together.

Q Okay. Is it typical for changes to occur to the final economic analysis in response to public comments?

A Yes.

Q Is that what happened in the case of the Clean Water Act -- the Clean Water Rule? Excuse me.

A Yes. There were a number of changes.

Q In your opinion, was the methodology used in the economic analysis appropriate?

A I'm not an economist, but it seemed to make logical sense

to me.

Q Do you have any reason to challenge the ultimate analysis and conclusions that were reached in the economic analysis?

A No.

Q Would you have recommended the rule, the final draft rule, be submitted to OIRA if you had significant unresolved concerns about the economic analysis?

A I think if I had significant concerns that I would raise that to the attention of my manager.

Q Uh-huh.

Craig Schmauder told the committee, quote, "The Army stands behind the economic analysis of the document that was prepared on behalf of the rulemaking effort. I'm not an economist. I do know that our economists looked at it. I know EPA's economists looked at it. I know EPA, they have an independent board that looks at economic analysis. I believe they certified that the economic analysis as well as the document was reviewed at OMB and OIRA. So a lot of people have looked at the economic analysis and gave their support for its conclusions."

Do you agree with Mr. Schmauder?

A Yeah, I would not disagree with that characterization.

Q Now, as discussed in the last hour, with respect to the 4,000-foot bright-line rule, the EPA's connectivity report for the proposed rule recommended against using a linear distance to establish jurisdictional boundaries.

Was the boundary ultimately determined by balancing

considerations of the science and the agency's technical expertise and experience in making significant nexus determinations with the goal of providing clarity to the public while protecting the environment at the same time?

A I'd say that's accurate.

Q In fact, during the public comment period, were there any comments that related to asking for bright lines?

A Yes. There were many. They weren't just associated with the linear distance, but they were associated with many facets of the rule.

Q The Corps believes that the 4,000-foot distances would not be adequate to protect waters that in practice have been determined to have a significant nexus on a case-by-case basis. What's your reaction to that assertion?

A My reaction is that I am aware that there are instances in which jurisdiction was determined to be found beyond 4,000 feet by the Corps, operating under our previous rules, and that the agencies made an informed decision that those areas would no longer be jurisdictional, or areas like that, as a part of this consideration of having bright lines and having more certainty for the rule.

Q Did Jen Moyer ever bring back a specific issue to your attention?

A My recollection was that the linear distances, as it related to adjacency, were discussed in our interagency group. And so that was an issue that I'm definitely aware of that was talked about by her

and with our group.

Q Okay.

In fact, in one of the Peabody memos, she states, "It was unknown to the Corps until early February that the Army and the EPA were considering a bright-line cutoff of CWA jurisdiction either 5,000 or 4,000 linear feet from the OHWM/HTL. And a robust interagency discussion of the potential effects of the bright line on currently jurisdictional water bodies has continued since that time."

How do you respond to that?

A That statement specifically references 4,000 and 5,000 feet. Those numbers may not have been numbers that were a part of the interagency discussion that we were engaged in, but definitely some form of linear distances were absolutely a part of my recollection of our discussion of what may constitute adjacent.

Q Are you aware of approximately when the Army became aware, Army Corps in particular, about the possibility of a bright line?

A That's in the proposed rule, so I think that a bright line of some sort was always on the table and available since the time of the proposed rule. In the proposal, to the best of my recollection, we didn't suggest a specific linear distance, but that was certainly one of the considerations that we saw public comment on.

Q Mr. Goodin, did Jen Moyer ever express to you her concern that as a result of this bright-line rule, 4,000 feet, that a significant amount of previously covered land, approximately 10 percent of jurisdictional waters, would no longer be covered as a result

of the Clean Water Rule?

A I can't recall if that was from Jen, but my recollection is that the Corps -- Lance Wood was someone that raised that concern in our conversations. I don't recall if he had a specific percentage there, but one of his comments was on the potential loss of jurisdiction outside of a bright-line limit.

Q So the Corps was actually concerned that the Clean Water Rule circumscribed jurisdiction compared to the previous version or implementation of the Clean Water Rule.

A Yes. In that conversation, yes. Uh-huh.

Q So what is your response to that?

A I think they were interested in presenting the experience of their field regulators in that circumstance. And it may seem different or odd that it was the Corps versus EPA raising that concern, but I think it was aired in the context of our discussion to relay that there would be instances in which jurisdiction would be lost if there was a bright-line cutoff.

Q And were those issues fully vetted prior to the promulgation of the final rule?

A That's certainly my interpretation. We had a number of conversations in the interagency forum, and then it was most certainly a conversation that occurred in the EPA discussions that I was familiar with.

Q Jen Moyer also says, "To verify what portion of the 10 percent of the jurisdictional waters would be lost to CWA jurisdiction under

the final rule, the Corps would have to do the type of analysis that would be undertaken in completing an EIS. Without a detailed analysis to assess the impacts of loss of 10 percent, CWA jurisdiction would present the potential for significant adverse effects on the human and natural environment."

The Office of the Assistant Secretary of the Army conducted an environmental assessment prior to the finalization of the rule, correct?

A Yes.

Q Did you or the EPA have any issue with the fact that an EIS was not it done?

A No.

Q And why not?

A The proposal anticipated that an EA would be sufficient documentation. And in the course of conversations on the implications of the final rule, that seemed to continue to be the case, and -- yeah, so that was it.

Q Did you actually work on the EA, or was that a product of the Army?

A The Army had the lead for that document, and I did not participate in developing that.

Q We understand that EPA and the Army examined USDA and DOT interest in the rule. Do you know the nature of the USDA and the DOT's interest in the Clean Water Rule?

A My working knowledge of that was that it was primarily

related to ditches, like roadside ditches and ag ditches.

Q Is it fair to characterize their concerns as economic concerns?

A I think that it was related to the stakeholders that they most interact with. So I'm not sure I would call them necessarily economic concerns, but just for clarity for their stakeholders.

Q Okay.

Any evidence to suggest politics played any role in the EPA and Army's consideration of the USDA and DOT's concerns?

A I'm certainly not aware of anything that I can recall on that.

Q Any evidence to suggest that science was abandoned in considering and addressing their concerns?

A No. And, in fact, I think the principle that we landed on for how we excluded ditches from regulation rose or fell on the extent to which the water was permanent and that the water was in a previous stream. So we were looking to the natural landscape for that guidance.

Q Mr. Goodin, you previously told us you that you felt it was appropriate for Assistant Secretary Darcy and not the Army Corps staff to be the final policymaker on the Clean Water Rule for the Army, correct?

A Yes.

Q Assistant Secretary Darcy testified before the House Transportation and Infrastructure Committee on June 10, 2015, about this rule. And in response to a question about whether or not she responded to the Corps -- "Did you respond to the Corps' serious

concerns about the process of the Clean Water Rule and what is in the Clean Water Rule?" she responded, "We took those concerns and talked through them and walked through them with the Environmental Protection Agency before finalizing the rule." And that's on page 76, for the record, of that transcript.

Any reason to doubt the truthfulness of Assistant Secretary Darcy's statement?

A No.

Q Administrator McCarthy testified before the full committee on July 29, 2015, and was asked about the Peabody memos. At the hearing, Ms. McCarthy was asked whether if it was her understanding whether Assistant Secretary Darcy took the concerns in the memos and walked through them with the EPA before finalizing the rule. Administrator McCarthy responded, "That is my understanding. Yes."

Any reason to believe Administrator McCarthy was not being truthful in her testimony?

A No.

Q Administrator McCarthy was also asked to conclude whether the EPA knew of the concerns expressed by the Corps before finalizing the rule, and she responded as follows: Quote, "In working with Jo-Ellen Darcy on this rule, she indicated that all of the concerns of the Army Corps had been satisfied. In moving forward with the final, I individually had conversations with her about the changes that the Army Corps was interested in making as the proposal moved through the interagency process, and I understood that everything had been fully

satisfied." Page 112 of the transcript, for the record.

Any reason to believe Administrator McCarthy's testimony was untruthful in any way?

A No.

Q Following the hearing, the committee submitted written questions for the record to Administrator McCarthy. In response to those questions for the record, Administrator McCarthy was asked -- first of all, she was asked whether each of the issues and recommendations raised by the Corps in these documents were in fact adopted or otherwise addressed in the final rule.

She responded as follows: "All final decisions made by the Department of Army and the EPA reflect careful consideration of input from Corps and EPA staff and represent the best science agency experience with administration of the Clean Water Act and the law."

Any basis to suggest that the rule does not reflect careful consideration of input from the Corps and EPA staff?

A I'm sorry, the last --

Q Sure. Is there any basis to suggest that the rule does not reflect careful consideration and the input of Corps and EPA staff?

A No. Huh-uh.

Q Any basis to suggest that the rule does not reflect careful consideration of law?

A No.

Q Any basis to suggest that the rule does not represent the best science?

A No.

Q Administrator McCarthy also said, "The final Clean Water Rule is the result of many years of coordination and discussion between EPA and Corps staff, during which time both agencies were involved in extensive evaluation, coordination, and final decisionmaking. During this process, EPA, Army, and Corps staff talked on perhaps hundreds of occasions to share perspectives, provide information, and discuss options."

Based upon your direct experience in this rulemaking, is there any reason to believe Administrator McCarthy's statement is inaccurate in any way?

A No.

Mr. Longani. We can go off the record.

[Recess.]

[3:20 p.m.]

BY MR. HAMBLETON:

Q On the record. Welcome back.

A Thanks.

Q I wanted to kind of get back into the Regulatory Flexibility Act, so I apologize, this is a little bit duplicative, but if you would please bear with me.

So were you involved in any discussions regarding certifying that the rule would not have a significant economic impact on a substantial number of small entities under the RFA?

A I don't recall being directly involved in the certification aspect. I was certainly aware of the activities that we were doing to ensure that we had input from some of the businesses.

Q Okay. To your knowledge who at EPA made the decision that the rule would not have a significant economic impact on a substantial number of small entities?

A I'm not sure of that. I know that the preliminary conclusion was reached with the proposed rule and that was before my time.

Q Okay. 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 that they did submit that comment.

Q Okay. Who in the EPA would have advised the administrator on RFA or SBREFA compliance?

A I'm not entirely sure, but I believe it would be someone in

general counsel, and that's probably it.

Q Okay. Were you engaged in any discussion regarding using informal outreach to satisfy its requirements to obtain input from the small business community?

A Would you repeat that? I'm sorry.

Q Sure. Were you engaged in any discussion regarding using informal outreach to satisfy the requirement to obtain input from the small business community?

A So I was aware that we were doing that, despite the conclusion, regarding the necessity to do that and I was involved in discussions regarding invitations of folks to -- that could attend that discussion. And my deputy office director actually chaired and took the baton from me on that particular aspect of the rule, but -- chaired that meeting when that did happen during the comment period.

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

A So if it wasn't me personally, my staff absolutely.

BY MS. AIZCORBE:

Q Mr. Goodin, hi. I have a few followup questions from what my colleague just asked. You mentioned that you were involved in or were aware of activities regarding small businesses. Could you elaborate on and what types of activities you are referring to?

A So I when I started in May of 2014, I was aware that during the run up to the proposed rule, that there were outreach sessions with small business and at some point, after I started, there were

conversations about the utility of ensuring that we had provided that opportunity again or a similar opportunity again now that the proposed rule was actually on the street and there were specific things to react to.

And so I was involved in that, in those conversations. And then I remember reviewing the previous participants and if I recall correctly, I may have even sent some emails, to some of those participants, to see if they would be interested in attending another session.

And then once it got set up, then that was handed off to my deputy office director who I recall was the one that chaired that for the EPA.

Q And do you recall approximately when that second outreach session occurred?

A I don't recall, but it was during the comment period.

Q And I believe you were discussing earlier that you had sat in on meetings with other EPA staff discussing the RFA or small business implications of the rule. Could you maybe explain the nature of those conversations?

A To the best of my recollection, they were conversations regarding the status of those particular portions of the rule. And I don't remember getting into too much detail on that, but just as part of our rulemaking, we talked about each of the provisions of the rulemaking process and that was -- I recall that was one of them as we were going through that.

Q Is there any particular staff at EPA or office within EPA

that took the lead on that part of the rulemaking?

A I don't recall who was specifically involved in decisions related to that, but those decisions were made at the proposal stage and so I, perhaps, was not as engaged in the followup.

Q You said earlier that you had looked at the participants of the former outreach session. Who determined the groups or individuals who would participate in the later session? Did you consult with anybody or was it just you, sort of, deciding who to reach out to at that point?

A Yeah. We sent either emails or there were phone conversations to solicit whether or not folks would be interested in doing that and we left the representation up to those organizations.

Q Did you consult with anybody at the Army Corps about who they may want to invite to that meeting?

A They were engaged, to the best of my recollection, and --

Q Did you consult with the Office of Advocacy as to who to invite to that outreach meeting?

A I don't recall, but I do recall that somebody at SBA -- I'm not sure if it was the Advocacy folks or not, but somebody at SBA was involved in that.

Q Involved in the deciding who to invite, or involved in the meeting itself?

A At least in the meeting to invite. I can't -- or at least in hosting the meeting itself. But I'm not sure -- I'm just not familiar if it was that level of detail.

Q You mean, you are not familiar if the Office of Advocacy provided any input on who to invite to the meeting? Is that correct?

A Yes, uh-huh.

Q Okay. To your knowledge, what did EPA do with any input that was received during that second outreach meeting?

A To my knowledge, that was summarized, and since that happened during the comment period, we had a presentation on the major issues that were raised in the discussion and so at least in one forum that was presented verbally to the group, what transacted there and then the comments, the specific comments were made a part of our process to provide responses to comments and potential changes. Yes.

Q You mentioned the input from that outreach meeting was summarized and presented to a group. Who summarized the information, and who was the group you were presenting to?

A I don't recall exactly who it was, but I believe it was Dave Evans who was -- who chaired that discussion and my recollection was that, that debrief of that discussion, was presented to the OW level, the Office of Water level group that we had on the rule.

Q Are you aware of whether the administrator was a part of that debrief?

A I don't think that -- I can say with a certain amount of certainty that she wasn't at that debrief that I was aware of. So yeah.

Q Are you aware of any discussions or efforts to reconsider the certification under SBREFA after that informal meeting?

A I was not involved in any of those discussions to the best

of my recollection.

Q And you are not aware that any discussions occurred about reconsidering the certification?

A I am aware that there was a point in the spring in which we reviewed each of the provisions in the rule and so I'm assuming that was a part of that more general conversation of the things like the APA and the other pieces of the rulemaking process. I don't remember it specifically being, but we definitely had discussions about each of those are provisions. So --

Q And when you say "we," I'm sorry if you mentioned this earlier, but who specifically would have been a part of that discussion?

A I think that was also the OW level group.

Q And were you physically a part of that discussion?

A Yes.

Q Okay.

BY MR. HAMBLETON:

Q A couple of quick questions about the Nationwide Permit Program. Does anybody in your office work on the Nationwide Permit Program?

A Yes.

Q Okay. Are you aware of EPA's proposal to include WOTUS language in the Nationwide Permit Program?

A I'm sorry, for EPA to include?

Q Yes. Is the EPA planning to include WOTUS language in the Nationwide Permit Program?

A Not to my knowledge.

Q Not to your knowledge. Okay. And you haven't had any discussions with -- about including it in the Nationwide Permit Program?

A Yes, I have.

Q You have?

A Yes.

Q Okay.

A But the discussions were about whether we -- the discussions were about removing language from the Nationwide Permits.

BY MR. MCGRATH:

Q What do you mean by removing language, specifically?

A So the agencies were working together on reviewing the proposed language to be a part of the preamble for the Nationwide Permits, and there was text that had been drafted that characterized the Nationwide Permits -- I'm sorry, that characterized the Clean Water Rule in the preamble, and it was our recommendation that we remove that text from the preamble.

Q So are there any plans to use the Nationwide Permit Program to expand the jurisdiction, the number of --

Mr. Longani. I'm sorry, Bill. I was just going to say, I think -- are we going beyond the scope of what Mr. Goodin is here for which is to discuss the Clean Water Rule, and not necessarily the Nationwide Permit process.

Mr. McGrath. It is still WOTUS. It's the language we are

looking at so I think it makes sense.

Mr. Skladany. He has been able to answer the questions so far --

Ms. Aizcorbe. Off the record.

Ms. Berroya. I would actually wish to stay on the record. I referred to the witness and the agency, but I know with OIRA and the Army that this was determined to be beyond the scope. So --

Ms. Aizcorbe. It was not actually determined to be beyond the scope. We discussed -- established that there was no germaneness rule when we invite witnesses to participate in transcribed interviews. We clearly communicate that the committee does not have a germaneness rule to its transcribed interviews and that the focus would be WOTUS. And the focus of these questions is still WOTUS, so to the extent that --

Ms. Berroya. But like I say --

Ms. Aizcorbe. I'm sorry -- the witness has been able to answer questions about this and so to the extent that he is comfortable to voluntarily answer questions, we would like to proceed.

Ms. Berroya. Well, I certainly leave it to the witness and his counsel to determine that. I guess what I meant to say was not to make some broad statement about germaneness in the committee.

I know in the discussions in the other interviews, the determination was made that those witnesses wouldn't answer those questions. But I leave it to you.

Mr. Rackoff. And so from the Agency's, counsel's point of view, we have had an opportunity to ask a couple of questions about it. I think that's probably good enough. Why don't we focus on what has

happened in the past and what might happen in the future.

Ms. Aizcorbe. We would like for the witness to be able to make a decision about what he is willing to answer because he is the one we are asking questions of. And so to the extent that you are able and willing to answer questions, we will proceed --

Mr. McGrath. There is just one last question on this, so it is not going to continue. Really, it was my last question.

Mr. Rackoff. Why don't you ask the question and then we will see?

Mr. McGrath. Yeah. So essentially the last question was, is there any plan to use the Nationwide Permit Program to expand waters that are covered under the Clean Water Act in the way that the Waters of the United States rule does?

Mr. Rackoff. And I think, I don't know that this -- Mr. Goodin is prepared to speak about what plans may or may not be present.

Ms. Aizcorbe. To the extent that the witness has knowledge and is able to speak on his own behalf, we would appreciate an answer from the witness.

Mr. McGrath. One second.

Mr. Goodin. I'm prepared to offer an answer which is --

Mr. McGrath. Sure.

Mr. Goodin. -- there's -- not only am I unaware of any plans to use it to expand jurisdiction, but that would be essentially impossible in the context of the Nationwides.

The Nationwides are a permit program that govern activities that require authorization, and jurisdiction of where that permit program

applies is a different issue.

Mr. McGrath. I appreciate it. Going to move on to that?

BY MR. HAMBLETON:

Q Yeah. All right, another topic. EPA engaged in social media promotion of the rule during its development. Did you discuss or were you involved in the use of social media including tweeting, production of videos, posting content online, participating in the software Thunderclap, or other media when you worked at the EPA?

A So I was familiar that there were general media strategies to get the word out on the proposed rule when that was issued and to provide information to the public. Our group was -- my folks, in my division, would review fact sheets that would be posted on our Web site and oftentimes work on materials or underlying material that might be used, but our group is not involved in the tweets and things like that that are the social media part of that. We have a communications staff that's engaged in that.

Mr. McGrath. And so the communications staff would reach out to you to review, or not for -- more for being correct?

Mr. Goodin. Yes, mostly. Sometimes. Not always, but they -- we would often get a chance to look at that.

BY MR. HAMBLETON:

Q So they would come to you for content?

A Yes. And by the time of the final rule, a lot of that content was already available on the Web site itself. So --

Q Okay.

BY MR. MCGRATH:

Q And so that's the EPA communications team? Is that -- they are completely separated from your office?

A So they are -- yes, from the Office of Wetlands Oceans and Watersheds. We have a communications coordinator who is in the Office of Water and they work with our communications staff that's based out of -- I think that's the Administrator's office, but I can't remember the organizational chart.

Q Who is the person in your office that would coordinator --

A So in the Office of Water, it's Travis Loop.

Q You said Travis Loop?

A Loop, L-o-o-p.

Q Okay.

BY MR. HAMBLETON:

Q In your work, did anyone ever suggest to you or other staff to treat communications regarding the rule in a certain manner; specifically, those made to the public or that may become part of the administrative record?

A I'm not 100 percent sure I understand the question.

Q Well, why don't we break it up.

A Yeah.

Q Did anyone ever suggest to you or other staff to treat communications regarding the rule in a certain manner?

A Yes. We wanted to make sure that we were coordinating the information that was presented on our Web site, for instance. And so

we made sure that there was review of that prior to being used in different formats.

We reviewed documents and presentations before they were presented to outside parties and then we developed a canned one, so to speak, that was then used by multiple folks in the agencies. So that sort of coordination happened, and --

Q Okay. For you to build on that, the information that you had, were you ever given specific instructions on how to handle that information in relation to somebody getting into the administrative record?

A If I understand your question, I don't -- I don't recall that I was.

Q Okay. Regarding the administrative record, who at EPA is responsible for deciding what is submitted into it?

A I think that is a joint decision between the Program Office and the Office of General Counsel, but the Office of General Counsel is usually the more expert voice there.

Q Okay. So, the Program Offices and, from what you are saying, the general lead from OGC -- is that accurate?

A Yes.

Q And they would have decided what dates the administrative record would cover. Is that accurate?

A Yes. That the Office of General Counsel in conjunction with the Program Office. I think that sounds right. Yes.

Q Okay. All right. Did anyone ever tell you to conduct or

alter your work to achieve a specific result?

A No.

Q Did anyone ever direct you or other staff to speed up the process of work on the rulemaking?

A At various times, I think after the second extension of the comment period, we recognized that the schedule was going to be shorter than we had originally planned to post-comment rule publication. And so we definitely had discussions about the timing there and we were doing our best to still meet the long-term target of the year.

BY MR. MCGRATH:

Q Going back for one second to the administrative record. Is it your office that is working with the OGC to provide documents for that?

A It would actually be the entirety of the agency because many of those administrative record documents would be like the ORD lead on the technical documentation and so, but it's largely --

Q So it would be all of the different program offices that would have a --

A Have an interest in that, yes. And then ultimately the Office of Water and OGC that would be primarily involved in that.

Q All right. Let me go back to one other thing I had. Talking about those presentations you made to the administrator.

A Yes.

Q You have copies of those PowerPoints that you -- that you presented?

A Yes.

Q And electronic copies or do you also have your hard copies that you took notes on?

A I have a hard copy that I used and typically a hard copy was distributed if we didn't project.

Q Okay. I would just like you to take back to your counsel, specifically, this is something we would like to see as soon as possible. I think it would be important for our investigation to see those.

So, I know you are keeping everything, obviously, for other reasons also, but that's something we would like to see as soon as we can.

Mr. Rackoff. Understood.

Mr. McGrath. I just have a few more and we should be finishing up here. So --

[Discussion off the record.]

BY MR. HAMBLETON:

Q Okay. Some, sort of, background questions here. When were you first contacted by EPA to appear before this committee for this interview?

A I want to say approximately 3, approximately 3 weeks ago.

Q Okay. When were you notified that the committee asked for your interview? Was that at the same time?

A Yes.

Q And who informed you?

A I think that was -- I think it was Nichole DiStefano.

Q Have you spoken to anyone at EPA or the Executive Office of the President for that matter, about the other transcribed interviews the committee has conducted?

A No.

Q With the Army Corps or the Army?

A No. But I am aware that there were transcribed interviews.

Q Have you spoken to anyone about how to communicate with or respond to the committee during this investigation?

A I have never done anything like this before and so my colleagues from OGC and OCIR tried to tell me what to expect in this circumstance.

Q We had mentioned earlier about, you know, being requested to produce documents. You had said you had saved them, and you are working with your staff to do that. Were you given any instruction on how to search for these documents?

A I'm not recalling that at the moment, but we were given specific instructions on retaining and not removing or destroying any documents related to the rule.

Q Okay. In terms of the documents that would be responsive have you completed your search inspection?

Mr. Rackoff. Can we go off the record for just one sec?

Mr. Hambleton. Sure, go off.

[Discussion off the record.]

BY MR. HAMBLETON:

Q Okay, we can go back on. Did you receive any instructions in preparation for today's interview?

A Only in the context of what I might expect both for purposes of doing a briefing and to be responsive here. And I think the single most important thing was to tell the truth.

Q And you said that was from OGC's office?

A OGC and OCIR, our Office of Congressional and Intergovernmental Relations.

Q Okay.

BY MR. MCGRATH:

Q One last thing. In your work on the WOTUS rule have you ever used your personal email to do any government business?

A I don't recollect that specifically, but I have occasionally sent things home to print out and work at home.

Q And that would be sent from your official account, so it still would have been a record capture. Is that correct?

A Absolutely.

Q Okay. Are you aware -- have you or are you aware of anyone else at EPA that has used a personal email to communicate with outside groups about the WOTUS rule?

A I'm not aware of that.

Q Okay. And you haven't. Correct?

A No.

Q With that, thank you for your time today. I appreciate it. And we will go off the record.

[Discussion off the record.]

BY MR. LONGANI:

Q All right, back on. Okay, we are back on. Mr. Goodin, it is 3:58. I don't expect us to last longer than another 15 minutes. I'm just going to finish up with a few questions.

Were you involved in the tribal consultations during this rule during the promulgation of this rule?

A Not that I can recollect. No.

Q So while you were involved in outreach, you were not involved with outreach as to tribes. Is that correct?

A Yes. A lot of my focus was on States and the general planning for that.

Q Okay. What department within the EPA handles tribal consultations?

A Right now, it's our Office of International and Tribal Activities and we have an Office of Water, lead that's located in the Office of Water who coordinates those activities for water-related issues.

Q According to the final rule quote, "The agencies began consultation with Federally recognized Indian tribes in the Clean Water Rule defining Waters of the United States in October of 2011, and 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."

Do you have any reason to disagree with that?

A No, that's my understanding.

Q And what is your understanding is based on?

A First of all, the description in the proposed rule and the activities that were conducted prior to proposal, and the documentation of those outreach activities. And then I was also aware that our group, that folks in EPA were continuing to interact with tribes.

It's just, I wasn't directly a part of those meetings, but they were continuing to interact with tribes through a number of different forums and then ultimately, we, I think, got some two dozen comments from tribes as well.

Q Speaking of how, and the method in which, the EPA was consulting with tribes, the EPA's policy on consultation and coordination with Indian tribes which was issued on May 4, 2007, states, quote, "There's no single formula for what constitutes appropriate consultation."

Based on the EPA's policy, is it reasonable to conclude that tribal consultations could include, for example, webinars, teleconferences as well as face-to-face meetings?

A Absolutely.

Q Anything irregular about EPA consulting with tribes via webinars?

A No.

Q Anything irregular about the EPA consulting with Indian

tribes via teleconference?

A No.

Q Anything irregular about the EPA consulting with Indian tribes via face-to-face meetings?

A No.

Q Did you have any role in assessing tribal impact?

A No.

Q In the last hour you mentioned that there was a second outreach meeting as it related to small business entities. Is that right?

A Yes.

Q And that was in 2014 during the public comment period?

A Yes.

Q Okay. Why was that outreach meeting held?

A I think there was a desire to reconnect with the small entities that had been part of the outreach that occurred prior to the proposed rule now that we actually did have a proposal to be more specific about their interest and reactions and comments and thoughts on the proposal.

Q And whose idea was it to have this meeting?

A I think that was just -- I don't know that it was up to any one person, but I think the notion of doing that was something that was anticipated by the agencies given the fact that we now had a proposal to work from.

Q And did you take the feedback that you received from the small

business entities during that second outreach meeting back to the EPA as part of the public comment process?

A Yes. Not me personally, but it was delivered as such and there, I think, there are even examples of issues that were of importance to the small business community that were directly reflected in the final rule.

Q Okay. Mr. Goodin, the committee also spoke with Chip Smith and he told the committee several things and I want your response to a couple of the statements that he made to the committee. Okay?

A Okay.

Q Chip Smith told us, quote, "The schedule, the Clean Water Rule was driven by politics. The policy decisions, some of them in my opinion were driven by politics and in particular, several of the last-minute changes in the last few months in my view were not science or economic based, but driven solely by politics."

What's your response to that, Mr. Goodin?

Mr. Skladany. Can you give us a cite for where that is in the transcript?

BY MR. LONGANI:

Q Sure. Absolutely. Page 41 of the Chip Smith transcript. Sure.

A Yeah, that's not my experience in the development of the final rule.

Q And what would your experience be -- or what was it? Excuse me, wrong tense.

A My experience was that there was a lot of discussion and engagement on the science, experience, the law and how that would be applied in our overall objectives of providing more certainty, clarity, regarding jurisdiction of the Clean Water Rule.

Q During those final months during which the draft final rule was being written by the EPA and the Corps, were you ever told to disregard science in any way?

A No.

Q Were you ever told what conclusion to reach with respect to the science or the economics?

A No.

Q Do you believe that the connectivity report is based on sound science?

A I do.

Q Do you believe that the economic analysis is based on sound economics? Obviously, you are not an economist.

A I'm not an economist. It seems logical to me, so --

Q On page 38 of that same transcript, Mr. Smith said, "The Corps was given an opportunity to see the rule, but no real meaningful opportunity to make any changes. It was made clear to us that decisions had been made and no changes really would be entertained unless we found, like, a technical mistake or something of that nature."

How would you respond to Mr. Smith's statement to the committee?

A I can't speak to whatever the internal processes were for the Corps and Army, but I do know that there were -- there was almost

a continual interaction between EPA and Army at the -- certainly toward the final months of the rule and the deputy secretary, and the administrator were both very comfortable with the final rule.

Q I'm almost done.

Getting back to the outreach meetings, page 96 of the transcript, Chip Smith told the committee EPA, quote, "In outreach meetings, EPA would explain what kind of waterbodies they hoped to regulate or not and mostly they were very general. But once in a while, depending on who the audience was, they might say more or less.

And while it's purely judgmental on my part, those meetings were to farmers, home builders, mineral extraction companies and that sort of thing downplaying the expansion of jurisdiction in meetings that were to environmental groups like Earthjustice, Sierra Club and a whole host of folks.

And they emphasized the expansion of jurisdiction so they would tweak their message based on audience as opposed to what we would do in our meeting?"

You were at these outreach meetings. Is that correct?

A My experience is we had a pretty standard presentation that we gave regardless of the audience. Some stakeholders had questions about some aspects, other stakeholders had questions about different ones, but my experience was we had a common -- common script in terms of that PowerPoint.

Q You also mentioned in the last hour that because the second extension of the public comment period took place, EPA had to speed

up its analysis in order to meet that 1-year deadline. Is that correct?

A I would say that we were -- we were still motivated to try to reach that target. And so that there were, you know, folks were working hard to work through that despite the extensions.

Q Did the fact that the second comment period -- did the fact that the public comment period was extended, did that affect the thoroughness of your analysis with respect to the Clean Water Rule?

A That would not be my judgment. It was -- yeah, it was solid.

Q Just getting back to that 1-year target date. How did you hear about this 1-year target date?

A To the best of my recollection, that was our assistant administrator, Ken Kopocis and he was the one that was probably more often than not focused on, you know, us being timely, consistent with other rulemakings.

Q And based on your experience without rulemakings was that 1-year target reasonable for the Clean Water Rule?

A Yeah, it was not unreasonable. It was a challenge, but it was not unreasonable.

BY MS. BERROYA:

Q Is it fairly common for rulemakings to have a target for which the agency to complete its analysis?

A Yes. And not only is it common, but the agency actually will publish the timeframes in which they think they are going to be working to complete a rulemaking.

Q And what is the mechanism in which the agency publishes those

targets?

A It's the regulatory agenda of the agency.

Q And what is the purpose for establishing these targets and then publishing them?

A I think the key aspects are, number one, to provide transparency to the public that a rulemaking is ongoing or anticipated and when we think it's going to come to completion, so it's that transparency aspect and then, I think importantly, it's also for workload management purposes as well. So --

BY MR. LONGANI:

Q Mr. Goodin, as we talked about briefly in one of my earlier hours, Jen Moyer had indicated to the committee one of her objections to the rule and the bright-line boundaries, you know, 4,000 feet was that approximately 10 percent of the adjacent waters near the Rapanos guidance were adjacent non-abutting wetlands so a certain percentage of those would be outside of 4,000 feet.

Would you agree that had the final rule not adopted a bright line of 4,000 feet that, in fact, the Clean Water Rule's jurisdiction actually would have been expanded?

A Yes. The category of area subject to jurisdiction would be, if there were no lines, then essentially be open-ended.

Q And subject to the significant nexus determination, correct. Is that correct?

A Yes. Uh-huh.

Q I think we are done. Brief indulgence. Thank you.

A Thanks.

Mr. Hambleton. Thank you very much.

[Whereupon, at 4:15 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