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

INTERVIEW OF: JENNIFER MOYER

Thursday, December 17, 2015

Washington, D.C.

The interview in the above matter was held in room 2247 Rayburn House Office Building, commencing at 10:04 a.m.

Appearances:

For the COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

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For JENNIFER MOYER:

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U.S. ARMY CORPS OF ENGINEERS

Mr. McGrath. Okay. Well, thank you all for being here. This is a transcribed interview of Jennifer Moyer. Chairman Chaffetz requested this interview as part of the committee's investigation into the Waters of the United States rulemaking. Would you please state your name for the record?

Ms. Moyer. Jennifer Moyer.

Mr. McGrath. On behalf of the committee, I want to thank you for appearing here today and answering questions. And the chairman also appreciates your willingness --

The Reporter. Sir, if you could move the microphone closer. Thank you.

Mr. McGrath. So on behalf of the committee, I would like to thank you for appearing to answer our questions. And we appreciate you appearing voluntarily. My name is Bill McGrath. I'm staff director with Chairman Chaffetz' staff. And I would like to have everyone else in the committee who's here introduce themselves.

Ms. Aizcorbe. My name is Christina Aizcorbe. I am counsel with Chairman Chaffetz' committee staff.

Mr. Skladany. I am Jon Skladany from Chairman Chaffetz' staff.

Ms. Fraser. I am Beverly Britton Fraser with Mr. Cummings' staff.

Mr. Burns. Sean Burns with minority staff.

Ms. Rother. Katy Rother with majority staff.

Mr. Feeley. Drew Feeley with majority staff.

Mr. McGrath. Okay. With that, I would like to go over a few of

the ground rules and guidelines that we'll follow during today's interview. Our questioning will proceed in rounds. The majority will start and ask our questions first for an hour. And then the minority staff will have the opportunity to ask for an equal period of time if they choose. And we will alternate back and forth until the question interviewing is over.

Typically after each hour, we take a short break. But if you would like to take a break any other time, just let us know. As you can see, there's an official reporter taking down everything we say for a written record. So please give verbal responses to all the questions. Do you understand?

Ms. Moyer. Yes.

Mr. McGrath. So the court reporter can take a clear record, we'll do our best to limit the number of people directing questions to you during any given hour to just the people on staff whose turn it is. Please try to speak clearly so the court reporter can understand and so the folks down at the end of the table can hear you. It's important that we don't talk over each other, interrupt each other if we can help it. And that goes for everyone here.

We also encourage you to freely consult with your counsel if you choose. And you're appearing with counsel obviously. Would you please state your name for the record?

Ms. Navaro. My name is Ann Navaro. And I'm from the Office of the Chief Counsel with the Army Corps of Engineers.

Mr. Boyd. Milton Boyd with the U.S. Army Corps of Engineers

Office of Chief Counsel.

Mr. McGrath. All right. Thank you. We would also like you to answer questions in the most complete and truthful manner possible. So we'll take our time as we go through this. If you have any questions or don't understand one of the questions, just let us know as we go. If you don't know the answer to a question and honestly don't know it, it's not best to guess. Just give us your best recollection. And it's okay to tell us if you've learned information from someone else, just indicate how you received such information. And if there are things that you don't know or can't remember, just say so. And please inform us of who to the best of your knowledge might be able to provide a more complete answer to such questions.

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

Ms. Moyer. Yes.

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

Ms. Moyer. Yes.

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

Ms. Moyer. Yes.

Mr. McGrath. Is there any reason that you would be unable to provide truthful answers to today's questions?

Ms. Moyer. No.

Mr. McGrath. Finally, I would like to note that the content of what we discuss here is confidential. We ask that you not speak about what we discuss in this interview to any outside individuals to preserve the integrity of our investigation. With that, that's the end of the preamble to this. Is there anything minority would like to add?

Okay. So it's currently 10:08. And we're going to get started with the first hour of questioning here.

EXAMINATION

BY MS. AIZCORBE:

Q All right. Thank you, Bill.

Ms. Moyer, you are currently employed at the Army Corps of Engineers. Is that correct?

A Yes.

Q What is your current position at the Corps?

A I am the chief of the Regulatory Program.

Q And how long have you been in this position?

A Since July 2014.

Q Okay. Where were you prior to this?

A I was the deputy chief of the Regulatory Program at Corps headquarters.

Q Okay. When did you begin with the Regulatory Office in the Corps?

A I started with the Regulatory Program in the Baltimore district in November of 2000 -- hold on I'm going to do my math, in

November of 1995.

Q Okay. And was that when you began at the Corps as well?

A No. I began with the Corps in January of 1994.

Q Okay. And can you briefly describe the Regulatory Office within the Corps?

A The Regulatory Program?

Q Yes. Sorry. The Regulatory Program.

A Sure, the Regulatory Program is charged with executing statutory responsibilities under section 404 of the Clean Water Act, sections 9 and 10 of the Rivers and Harbors Act, and section 103 of the Marine Protection Research and Sanctuaries Act.

Ms. Fraser. If I may, can you keep your voice up?

Ms. Moyer. I will do my best, yes. Please just let me know if I'm not talking loud enough.

BY MS. AIZCORBE:

Q And approximately how many employees are employed by the Regulatory Program?

A We have approximately 1,251 regulators that are supported by our appropriation. We then have eight Regulatory Program managers in our division offices. And we have eight of us at the headquarters offices that are supported by our general expenses account.

Q Okay. And these regulators are also employed by the Corps then?

A Yes.

Q Okay. What are your duties as chief and responsibilities

in this role?

A My primary responsibilities are associated with the overall direction of the statutory responsibility, so the overall management and oversight of the program as a whole. And that includes, development and oversight of the execution of the regulatory budget.

Q Okay. And how many employees report directly to you?

A Seven.

Q And are all of those within headquarters?

A Yes.

Q So all of the field or division employees that you spoke of before have managers not in headquarters, they're located elsewhere?

A Yes.

Q Okay. What is the relationship between the Corps and the Office of the Assistant Secretary for Civil Works?

A The Corps of Engineers is responsible for the day-to-day execution of, I'm going to speak specifically to the Regulatory Program, the day-to-day execution of the Regulatory Program. And the assistant secretary's office provides policy oversight of the Corps and is ultimately responsible for the policy decisions pertaining to the Regulatory Program.

Q Okay. Can you provide the names of the staff in the ASA and Corps offices who primarily worked on this rule?

A Sure. This has been a multiyear process. So the staff in the ASA's office who have worked on it, that's been Chip Smith. His supervisor is Let Mon Lee. And so Let Mon has had a role in this.

Certainly Ms. Darcy has participated. Her initial principal deputy was Rock Salt, so he participated in this. And Mr. Schmauder in the Army General Counsel's office has also had a role in this. Towards the end, Mr. Gib Owen was participating as well.

Q Those were all from the ASA's office?

A And Army General Counsel.

Q So Army General Counsel is not within the ASA's office. Is that correct?

A That's my understanding, yes.

Q Okay. And from your Regulatory Program, are there a set of employees there who primarily worked on the development of the rule?

A I don't understand.

Q Besides yourself, who in the Regulatory Program was involved in the rulemaking?

Ms. Navaro. Do you mean at headquarters or regardless?

Ms. Aizcorbe. I mean, if it's a large number, we can certainly start with headquarters. And you can just tell me generally if there are large numbers elsewhere.

Ms. Moyer. Sure. Within my office, through the time period, I mean, I was chief starting in July of last year. So prior to me, Meg Gaffney-Smith was the chief, so she was actively engaged.

The primary staff people were Stacey Jensen and David Olson, both on the Corps headquarters team. We've had developmental assignments who have come through the Corps headquarter staff who have also been involved in providing technical assistance.

BY MS. AIZCORBE:

Q Those were Corps employees?

A Yes.

Q And so Meg Gaffney-Smith, Stacey Jensen, David Olson were all within the Regulatory Program within the Corps?

A Yes.

Q Were there any other Corps employees outside of the Regulatory Program who were heavily involved, in your opinion, in the rulemaking?

A Yes. Within Office of Counsel, certainly there was Lance Wood. And David Cooper who is our chief counsel.

Q Okay. Okay. Great. What is the ASA's role in the Wetlands Program?

A That's the same as the Regulatory Program?

Q Sure.

A So that's providing the ultimate policy oversight to the Regulatory Program.

Q Okay. And is that the way you would also characterize the Pentagon's role in the Regulatory Program?

A Yes. The assistant secretary is the ultimate oversight. So she's in the Pentagon. That's our interaction with the Pentagon, is through the Assistant Secretary for Civil Works.

Q Okay. And so, just so I understand what you just said, regarding the communications that typically flow from the administration to the Regulatory Program in the Army Corps, those would

come directly from the Pentagon through Ms. Darcy to the Regulatory Program? Or are there any other interim steps regarding communications from the administration?

A They come from Ms. Darcy.

Q Okay. Is that the same or typical then that you would receive instruction directly from Ms. Darcy on all Corps rulemakings?

A Yes. I mean, I don't receive them directly from her. They come through our chain of command. They come to, say, for example, General Peabody or General Jackson, that's how they come. Or if I'm in a briefing with her, she may directly communicate them to a larger group.

Q Okay. Who from the ASA's office and the Corps would typically field calls from or participate in meetings with, the Pentagon regarding the Waters of the United States rulemaking?

Ms. Navaro. Can I just clarify, what do you mean when you're saying Pentagon?

Ms. Aizcorbe. Anybody from the administration that would be above the Corps. Any direction, we're trying to understand what the communication structure is.

Ms. Navaro. Are you making a distinction between Jo-Ellen Darcy, who was the assistant secretary for Civil Works, and people above her?

Ms. Aizcorbe. Yes.

Ms. Navaro. You are?

Ms. Aizcorbe. How is she receiving her direction?

Ms. Moyer. Okay. So if that's what you're asking, I don't

have --

Ms. Aizcorbe. If you don't have knowledge, that's fine.

Ms. Moyer. If that's what you're asking, I don't know how she's receiving her direction.

BY MS. AIZCORBE:

Q Okay. Would anybody -- let me back up. Were you ever participating in any meetings or calls with Ms. Darcy on the rulemaking?

A Yes.

Q Would anybody from the executive office of the President participate in or be otherwise represented in any of these meetings? And that would include the Council on Environmental Quality, OIRA, which is the Office of Information and Regulatory Affairs, or any other members of the administration?

A I was not in any meetings where Ms. Darcy was present where anybody from CEQ or OMB was also present. I was in some interagency review meetings where OMB was present, where other agencies were present where we were discussing the rule.

Q Okay. Were you ever invited to provide input in these calls and meetings?

A Well I was in meetings when OMB was there with other agencies and we were talking about the rule.

Q Okay. So you did actively participate in those meetings?

A On three occasions, yes.

Q Three occasions. Do you remember when these occasions were and who participated?

A It was after the rule was in OMB vetting, so after the 28th of May. There were two meetings with Transportation where OMB was present, EPA was present, and David Cooper and I were present, so two occasions. I don't remember the dates. And one with USDA representatives, EPA was there. Mr. Schmauder was at the USDA meeting. He wasn't at the two DOT meetings.

Q And regarding the USDA meeting, Mr. Cooper was also in attendance at that meeting?

A Yes.

BY MR. MCGRATH:

Q Was OMB present at all of those meetings, representatives?

A OMB representatives were at the three meetings I was at.

Q And who was that representative?

A Vlad Dorjets and Erin Burke. Erin was at least at the DOT meeting. I can't recall if she was at the USDA meeting.

Q And were any members of the Council on Environmental Quality at any of these meetings?

A I don't believe they were, not to my recollection, they weren't there.

BY MS. AIZCORBE:

Q Would any technical or policy decisions be made at these meetings?

A No.

Q They were just discussed at these meetings?

A Yes.

Q Okay. Were you ever asked to brief Mr. Schmauder or Assistant Secretary Darcy prior to these meetings?

A No.

Q In a briefing this week, Mr. Schmauder informed the committee staff that throughout the rulemaking, he brought you and Lance Wood in to meet with Assistant Secretary Darcy prior to every decision she made on this rule to get your opinion. Do you feel this is an accurate characterization?

Ms. Fraser. Excuse me, that was not the characterization of the briefing. She was brought into some meetings, not all.

Ms. Aizcorbe. You can address that in your hour, thank you.

BY MS. AIZCORBE:

Q Is that an accurate characterization?

A And I would answer that in the way that I wasn't aware of when Ms. Darcy was making key decisions. On four occasions prior to Ms. Darcy signing the rule on May 28th, I was brought in to brief her on key technical information.

Q So I understand, on four occasions you were brought in to brief Ms. Darcy prior to her signing the rule on key technical decisions?

A Yes.

Q And do you recall what decisions those were? Or was it a large number of technical aspects of the rule?

A We were briefing her on technical aspects as we were working through the interagency discussions in developing the rule to get it

to the interagency review process.

Q Okay.

A But I wasn't aware when Ms. Darcy was getting ready to make a key decision. So I can't really speak to what Mr. Schmauder briefed or didn't brief.

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

A My first line supervisor is Meg Gaffney-Smith.

Q And she reports to?

A Eddie Belk, who is the chief of Operations and Regulatory.

Q Okay. And who does Eddie Belk report to?

A Steve Stockton, who is the director of Civil Works.

Q And then Steve reports to?

A That's a good question. He is the civilian in charge of Civil Works. And at the time of the rulemaking, Major General Peabody is the military counterpart. And what is his title? It was the deputy commanding general --

Ms. Navaro. Deputy commanding general for Civil and Emergency Operations.

Ms. Moyer. -- for Civil and Emergency Operations. I have a hard time getting that title all in there.

BY MS. AIZCORBE:

Q Okay. Thank you. Would you communicate directly outside of these four meetings with Ms. Darcy at all about the rulemaking?

A To whom?

Q Did you communicate directly with Ms. Darcy about the rulemaking outside of these four meetings where you briefed her?

A No.

Q Did you communicate with Mr. Schmauder directly about the rulemaking?

A On occasion, yes. The core group of people, so that would be me, Lance Wood, David Cooper, we would have conversations with Mr. Schmauder. Oftentimes, EPA would be part of those conversations. But we did not, we, as that group, did not have conversations with Ms. Darcy.

Q Okay. What is Mr. Schmauder's role with the Army again? You said he was with the Office of General Counsel?

A Yes.

Q Do you know anything about his background?

A I don't. I don't know what Mr. Schmauder's background is.

Q Okay. Whether he served in the field or has any background in wetland issues or Clean Water Act issues?

A I don't know. I know for a while he worked for the Corps. And then he has worked at Army General Counsel. But other than that, I don't know specifics.

Q Okay. Did Mr. Schmauder make any technical or policy decisions in the rulemaking?

A I don't know.

Q Mr. Schmauder did also inform this committee that he, himself, drafted the Waters of the United States guidance and the rule along with Greg Peck of the EPA. In your time with the Corps, is it

common for an attorney with the Office of General Counsel of the Army to draft major rulemaking such as this?

A In the time I've been at headquarters, I have participated in and have also -- my colleagues have been participants in drafting joint rules. And it has not been my experience that folks outside of the technical staff have drafted major portions. But I don't know if it's an uncommon thing for that to occur.

Q Sure. Did you take part in drafting this rule?

A No.

Q Is it, let me back up. Do you know whether Assistant Secretary Darcy has a background in clean water or wetlands jurisdiction issues?

A I don't know.

Q Okay. Did you make any recommendations to Assistant Secretary Darcy that were, either not adopted, in the development of the rule or in the final version of the rule?

A Yes.

Q Do you know offhand what they are? Or is it too long to list?

A There are several recommendations that were made that weren't adopted when she made her ultimate policy decisions.

Q Okay. And what were those decisions or recommendations rather?

A There are quite a few.

Q Okay. Well we'll get into it later. So if we don't hit

any by the end of our questioning, we can recap.

Do you have, or can you provide, an estimate of the time and costs associated with this rulemaking, including the 2010 guidance and 2014 interpretive rule?

Mrs. Bamiduro. Are you asking her time specifically?

BY MS. AIZCORBE:

Q The Corps and Army in general, have you engaged in any computation of time and/or costs associated with --

A I haven't. I don't know if that has been done.

Q Okay. Do you personally believe that the Waters of the United States rule is an improvement from the existing clean water regulatory scheme?

A I think that policy decisions were made. And in my role as the regulatory chief, it's my job to execute those policy decisions.

Q Do you believe that the rule as it was finalized is more efficient than the existing regulatory scheme?

A I think that in my role as regulatory chief, it's my job to develop tools and technologies to make it as efficient and effective as it possibly can be. And that has been my focus since May 28th.

Q Okay.

Mr. McGrath. So you don't have a personal opinion on this?

Ms. Moyer. I think that as a professional, I'm not worried about what my personal feelings and objectives are. I am working and my team has been solely focused on developing efficient and effective methodologies to implement what the policy decisions that were made

are.

BY MS. AIZCORBE:

Q Do you personally believe that the final rule is clear?

A I think that the language in the final rule is written in a clear manner.

Q Okay. Have your staff expressed any concerns that the rule is not an improvement, more efficient, or more clear than existing rules?

A In my discussions with my staff, I conveyed to them very clearly what my headquarters team already knows, which is that Ms. Darcy has the authority to make these policy decisions, and it's our job to lead our field elements in executing those policies decisions.

Q I'm asking about communications that were made from your staff to you. So in those communications, were there any expressions that the final rule was not an improvement, more efficient, or more clear than existing rules?

A I think that it has been recognized that since 2001, we needed some clarity. And we all worked very hard to develop something that would be more clear. And I think that any final rule always has areas that could be made more clear. Because this was a joint effort between Army and EPA, there were compromises that were made. So I think when any group of people engage in the Monday morning quarterbacking, especially a group of technical experts, we're always going to find areas that we would change, we would modify, we would polish.

Q So those communications were made to you?

Ms. Navaro. Can you describe what communications you're referring to?

BY MS. AIZCORBE:

Q The communications that the rule was not an improvement, more efficient, or more clear than existing rules.

If none of those communications were made, then -- if that's your testimony here, then we can move on. Is that what you're saying?

A I would say that in internal discussions in the regulatory community, we've had lots of conversations about the final rule.

Q So you're not answering the question. Is that what I understand?

A I think I've answered the question.

Q Okay. The EPA held numerous outreach meetings with outside groups to discuss the rule during its development. What was the Corps' role in these meetings?

A The Corps participated in about 72 or 73 of those meetings.

Q Did you know about these meetings before they were scheduled?

A Some of them we did. We didn't know about all of them. We participated in as many as we could. We were focused on reviewing comments as they came in. It is not Corps standard procedures to participate in these types of outreach meetings in a rulemaking process.

Q Who from the Army or Corps would participate in these outreach meetings that would be standard procedure? Or are you saying

in a Corps rulemaking, nobody from Army or Corps would be involved in an outreach meeting?

A I'm only going to talk about the Corps. I don't know what Army standard procedures are. But when the Corps' Regulatory Program is participating in either just a Corps rulemaking process or a joint rulemaking process, we aren't doing outreach on the rule.

We put it out for public comment. And the public comments. If people reach out to OMB and say we would like to have a stakeholder meeting, we participate in those meetings. But we aren't actively seeking to have outreach meetings and talking about the rule in that broad sense.

Q So for those meetings that you did participate in, were any policy or technical staff invited to present at these outreach meetings?

A We were invited to answer questions. And that was the role that we had in the ones that we participated in.

Q And I'm sorry if you already answered this but did individuals from the executive office of the President attend these outreach meetings?

A I don't recall. And I wasn't the one who was participating in those. That was my technical staff. That was Stacey Jensen who was typically there. And Meg Gaffney-Smith participated in some of them as well. That was when we were transitioning between her being chief and my being chief.

Q So which outside groups, if you recall, did you meet with?

A And as I said, I didn't participate in those. So --

Q So you did not participate in any outreach meetings?

A Right. Not while the rule was out for comment, no.

Q Outside of when the rule was out for comment?

A I've participated in some since the rule has been finalized. And in those, I don't recall that there was anybody from the executive office of the President participating.

Q What about before the rule was put out for public comment, did you engage in any or were you participating in any outreach meetings before?

A No. I did not. That was when I wasn't chief and I was deputy. There's a n awkward transition period there.

Q I understand. Are you aware that any outreach meetings took place, even though you weren't in your current role, are you aware of any outreach meetings that took place before the public comment period?

A I'm not aware.

Q Okay. Was anyone from the Corps ever dis-invited from the outreach meetings?

A I don't know.

Q Do you recall a meeting with any Hill delegations?

A I know that they occurred. The Corps wasn't part of those meetings. And how I know they occur is we, the Corps, would be at meetings at EPA or waiting for EPA and Mr. Schmauder to show up for meetings in our office. And Mr. Schmauder and Mr. Peck would walk in

and say we just returned from a meeting on the Hill.

Q Okay. So no Corps Regulatory Program staff were ever invited to those meetings?

A To the best of my knowledge, no. I wasn't invited. And my technical staff weren't invited in the time I was chief. Meg may have some different information that I am not aware of.

Q Okay. Do you know whether outreach meetings were included in the administrative record for the rule?

A I know the numbers of them were. I don't know if the specific list of the outreach meetings were.

Q Were minutes of all meetings to discuss the rule recorded?

A I don't believe the minutes were. But I'm not certain.

Q Okay. Did anyone from the Army or Corps collect comments or recommendations from these outreach meetings?

A The Corps did not from the ones that we participated in.

Q And you don't know whether the Army did?

A I don't know.

Q Okay.

Mr. McGrath. One question as to the 72, 73 meetings. Were these a whole host of different types of groups? Were they certain State stakeholders? Outside groups? Congressional delegations? Do you have an idea of what types of groups they were?

Ms. Moyer. To the best of my recollection, it was a broad sweep. So it was industry groups. It was some environmental groups. I don't recall any congressional delegation groups. Some of them were groups

that represented some tribal industry groups.

So they were kind of a conglomeration of different types of entities. And we tried to participate in the ones that seemed to be the most meaningful to the issues that were coming up most frequently in the comments that we were reviewing from the docket.

Mr. McGrath. And that was usually Stacey Jensen and Meg Gaffney-Smith that did that.

Ms. Moyer. Yes.

Mr. McGrath. Okay. Thank you.

BY MS. AIZCORBE:

Q Regarding comments received during the comment period for the proposed rule, we understand a team of Corps staff were brought in to review and evaluate these comments?

A Yes.

Q Where did these additional Corps staff come from?

A They came from district offices, so they're regulatory project managers from districts.

Q And is that a common practice to bring in more staff to evaluate?

A Yes.

Q Okay. Who made that decision to bring extra staff in?

A I did.

Q Okay. Do these staff then have expertise or prior involvement in clean water or in clean water rulemaking?

A They have expertise specifically in jurisdiction, not in

rulemaking.

Q Okay. When did you begin reviewing the public comments received during that period?

A In November.

Q November of?

A November of 2014.

Q 2014. And it is this team who was brought in who initiated that review?

A Yes.

Q Was there anybody else within the Regulatory Program at headquarters who engaged in the review of the comments?

A Stacey.

Q Stacey. Did the EPA also review the public comments?

A I don't know. I believe that they, not in that timeframe, I don't believe. But I really can't speculate when they were reviewing them, or how they were going about that.

Q Did you engage in any communications with EPA about the public comments?

A I spoke with Russ Kaiser, who is the chief of their Wetlands and Waterways Regulatory Section. I think that's the name of it. And they, to the best of my, understanding, employed a contractor to sort the comments into categories. And I believe that contractor also then prepared summaries of the comments in those categories.

Q Were you provided any documents from the EPA about these? Or were you provided these summaries from the EPA?

A I think the team was. But my team was charged with reading the comment, the substantive comment letters, so those 20,000, 21,000 comments that we call unique, so the ones that were not the form letters, the chunky ones.

Q Right.

A That's what I call them.

Q Okay. After the Corps review, did your staff then summarize --

A Yes.

Q -- these comments? Were those summaries given to anybody within the Army's office?

A We spoke with Ms. Darcy and Craig about our comment summaries.

Mr. McGrath. Quickly about that contractor, do you happen to know who the contractor was, who did this?

Ms. Moyer. I can't recall. I know I have it somewhere. But I can't recall who the contractor was.

BY MS. AIZCORBE:

Q Did the Corps also share their own summaries of the comments with the EPA?

A We discussed it with them. I wasn't there, I couldn't make the meeting. It was discussed with EPA, with Russ and his supervisor, John Goodin.

Q Did any deliverables or action items come out of either the meeting with Mr. Schmauder and Ms. Darcy or the meeting with the EPA

about these comments?

A No.

Q To your knowledge, was any action taken by the Corps after submitting these recommendations to Ms. Darcy and Mr. Schmauder about the public comments and how they would be incorporated into the final rule?

A We were given no action items. I will say that the comments were informative and informed our comments back on versions of the preamble and versions of the rule text.

Q Okay. Were you given any indication by anyone in the Army's office or EPA, that EPA was incorporating the comments into the final rule?

A It was frequently communicated to me, by Mr. Schmauder and certainly in the occasions that we spoke with Ms. Darcy that it was extraordinarily important to Ms. Darcy and Ms. McCarthy that public comments were considered, and they would be reflected in the final rule.

Q Okay. But nothing about which comments or what subjects specifically were going to be adopted or were not going to be adopted?

A One that was frequently talked about was that the public comments reflected a need for bright-lines. So that was certainly brought up frequently. And I will say that I think that the final rule does reflect bright-lines. So -- I'll just end there.

Q Okay. Do you know when the EPA or Army began drafting the final rule?

A No. I don't.

Q Did the EPA finish drafting the final rule before receiving the Army Corps' summarizations or recommendations regarding the public comments that were received?

A I don't know.

Q Were the Corps' recommendations incorporated ultimately into the final rule?

A Which recommendations?

Q The summaries that the technical staff and the staff who you pulled in to make these or to review the comments and to make the summarizations of the public comments.

Ms. Navaro. Just to clarify, I don't think she said that those were recommendations. She said they were summaries of public comments.

Ms. Moyer. And they informed our ultimate -- they didn't specifically inform every single recommendation because we also received comments from our 38 district offices, recommendations from our Engineer Research and Development Center, our Institute for Water Resources on the body of the draft preamble, on the draft rule, several rounds.

So it was the review of the public comments, it was the review of the preamble, it was the review of the draft rule by many people that informed our recommendations on the rule text.

BY MS. AIZCORBE:

Q So the recommendations then, that we're speaking of, were those recommendations incorporated into the final rule?

A Not all of them, no.

Q Which recommendations were not incorporated?

A So there were several of them. I know you have the memos. There were several recommendations that were made that were not incorporated.

Q Okay. So you can't list them for us?

A If I had it in front of me, we could go through them in detail.

Q Okay. Were you given any reason as to why those recommendations were not incorporated?

A No.

Q Was recirculating the rule for a second round of public comment ever discussed after significant changes were made to the draft?

A Not with me, no.

Q Okay.

A And I have to say, I don't think it -- it wouldn't need to be discussed with me.

Q Are you aware that it was discussed at all with anybody else?

A I think that, if my recollection is serving me, we were told that it had been discussed and it was decided that it wouldn't be recirculated.

Q Okay. Do you recall who you were told by?

A I don't. But there was a lot that was going on.

Q The final rule was sent to OIRA for final interagency review

a mere 5 months after the public comment period closed. It took the Corps 8 months to read, review, and respond to the 2,000 comments received for the 2012 Nationwide Permit Program.

How could EPA and the Corps in this case have read, reviewed, analyzed, and incorporated over 1.1 million, including the 20,000 unique comments that you referenced earlier, into the final WOTUS rule in such a short period of time?

A And I think that that's very challenging. And I would say that that's why I brought in additional staff to review them. And we prepared comment summaries.

Q Were any additional staff brought in for the 2012 Nationwide Permit Rule?

A Yes. We always bring in extra staff.

Q So was the number of extra staff that you brought in for this rule significantly more than the 2012 Nationwide Permit Rule?

A It was about equivalent.

Q Equivalent?

A Yes.

Q So you were essentially doing that magnitude more of review -- because we're talking about 2,000 comments versus 20,000 comments --

A Uh-huh.

Q -- with the same amount of staff?

A Right.

Q Okay. Do you have any indication as to why the EPA and Army

were in such a rush to finish this rulemaking?

Mrs. Bamiduro. Did she characterize it as a rush?

Mr. McGrath. She can answer the question.

Ms. Aizcorbe. You can address this in your hour.

Mrs. Bamiduro. You're putting words in the witness' mouth.

Ms. Aizcorbe. You can address in your hour.

BY MS. AIZCORBE:

Q Do you have any indication as to why the EPA and Army were in such a rush to finish this rulemaking, one which had suffered so many deficiencies and so important that they, themselves, consider it a generational rule?

A I was not part of developing the timeline. And what we did was to deliver technical information to inform decisionmakers.

Q Were you told in any way that there was a certain deadline by which the rule needed to be finished?

A I wasn't told a specific deadline. I was told interim milestones. And I worked with my staff to provide the most comprehensive technical information to our decisionmaker as possible within that timeframe.

Mr. McGrath. Do you know if a timeline existed somewhere as to getting this rule finalized? You're talking about getting interim deadlines. But you mentioned a timeline that was longer. Do you know if there's a document or there was a timeline put together for getting this rule out?

Ms. Moyer. I don't know other -- I mean, I put an internal

timeline together to hit milestones for delivery. So you may see a timeline. And that's when I learned how to make a Gantt chart. And I feel very proud of myself because I had never made one before. But I wasn't shooting for a timeline that I was told was a do-or-die timeline. I certainly heard others speak of this will be done in early spring. So I knew that that was, early spring 2015.

I had heard an earlier timeframe prior to that which was, you know, late winter. And I was understanding that that was the January, February timeframe. So I didn't have a hard and fast date that this would be done by X date in whatever year. But I knew that there was a sense of urgency. So that's what was driving my bringing on additional staff to make sure that the technical information that we were providing to our decisionmaker was as robust and as thoughtful as it possibly could be.

Mr. McGrath. Who expressed that sense of urgency to you?

Ms. Moyer. I was hearing that from Craig Schmauder.

Ms. Aizcorbe. Were you given any timeline for when the review of the comments needed to be concluded?

Ms. Moyer. At that point in time, why I brought the staff in when I did is that's when I was hearing early 2015 was what we were shooting for.

Ms. Navaro. Can I just ask who just joined us?

Mr. Hambleton. Ryan Hambleton with majority staff.

BY MS. AIZCORBE:

Q And so when you say early 2015, is that with regard to when

the comment review period needed to be finished or when you were shooting to finalize the rule?

A I understood that in early 2015, a draft final rule was going to be delivered to OMB.

Q Okay. And were you aware of any efforts to draft the final rule before you had engaged in the review of the public comments?

A There were conversations among, it was called the Team of eight which involved, which involved folks from EPA, Mr. Schmauder, and some of us from the Corps about how the rule was going to be drafted with its preamble, if there wasn't this robust analysis of comments.

Because when the Corps drafts a rule and a draft final rule, we address the comments in the preamble. And there seemed to be a thought that the comments could be addressed while the draft final rule was in interagency vetting. And so we had a lot of conversations about the approach to this. Because from the Corps' standpoint, at least with my experience in rulemaking, those comments needed to be addressed in the preamble.

Q And the preamble is a part of the product that is going through interagency review?

A That was my experience. EPA had a different experience, and EPA and Army were comfortable with addressing them during the interagency vetting. So ultimately that was the decision that was made and with some summary information about the comments in the preamble.

And so that was the process that was followed with a very detailed response to comment included in the final rule package.

Q So I understand, the package that entered the final interagency review included a preamble, but it only had a summary of the public comments there?

A Summary statements about comments that informed the decisions that were reflected in the draft final rule.

Q And the clarifying or adding detail to the comment summaries in the preamble that you were discussing earlier, that happened during the interagency review?

A The very detailed, and I think it's, if I'm remembering right, it's about 13,000 pages, where every single public comment is responded to, is part of the final rule package.

Q And in your experience, that would have happened before the rule --

A How the Corps does it, we respond to the comments in the preamble.

Q Before the rule enters into the interagency review?

A For the final rule, yes.

Q Okay.

Mr. McGrath. Could you just step back for one second. You talked about this team of eight. That's yourself, Mr. Schmauder, and who would the other six people be?

Ms. Moyer. So it was me, Mr. Schmauder, Jim Hennon, who was the chief of Operations and Regulatory at the time who is now retired, Chip Smith, John Goodin, oh, boy --

Mr. McGrath. We're up to five.

Ms. Moyer. It's really bad. Who else was on this team? I need three more.

BY MS. AIZCORBE:

Q Was Meg Gaffney-Smith part of it?

A No.

Q David Cooper?

A Lance Wood, Gautam Srinivasan.

Q Can you provide the name of that --

A I absolutely can. I'm sorry, my brain is very full.

Q That's fine. We discussed the disparity in the number between the comments received for the Nationwide Permit Program and the WOTUS being 2,000 versus 20,000 and that you executed your review of the WOTUS comments in an even shorter period of time.

We discussed a little bit about the rush and the fact that there was a set deadline, that there was a target, anyway, of when this rule was going to be finalized or delivered for final interagency review. Do you personally believe that politics played a role in the rulemaking timeline?

A I can't say definitively that it did, but it appears that it did.

Q Okay. We would like to understand a bit more about the science underlying the guidance documents as well as the proposed and final rule. According to EPA's fact sheet on the Waters of the United States rule, 117 million Americans have not had and will continue to not have clean water without the WOTUS rule. Do you know where this

number came from?

A No.

Q Was this number developed by the Corps?

A No.

Q Had you ever engaged in a discussion about this number with anybody?

A I have not, no.

Q Had you heard of this number before?

A Yes.

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

A No. And I'm a little confused by that statement.

Q Okay. So we are aware of a 2008 guidance implementing the Clean Water Act. And then that guidance was rewritten in 2010. And when committee staff asked Mr. Schmauder in his briefing what the reason was for redrafting in 2010, he said that it was because there were other reports with new science, they had decided that the guidance needed to be rewritten. So I'm just wondering if you were aware of what those other reports were?

A I'm not sure what he was referring to. And I'm wondering if the 2010 guidance, is that the draft guidance that was put out for review? I'm just confused by --

Q I believe so, yes. In 2011, I think it went to OMB.

A Okay. So, it was the first step of this process that we've been in. Okay.

Q Right. So now that you understand what that is, are you aware of the science?

A I'm not aware of the report, the specific reports he may have been referring to.

Q Okay. Or the general new science that was developed between 2008 and 2010?

A I'm not aware of specifically what he's referring to. I know that from 2001 through time, there has been new science or at least new published science talking about the interaction of different aquatic resources on the landscape.

A lot of that was referenced in the connectivity report. And I know there was a desire to provide clarity. And that has been this longstanding effort that the agencies have been engaged in that started with the guidance and went to a rule, went back to the guidance, and has now been finalized in this rule.

Q Okay. And you mentioned the connectivity report. We understand that a lot of this new science was accepted or used in this connectivity report which was ultimately used as a basis of the rule. Are you aware of when the connectivity report was initiated?

A I'm not aware of the specific timeframe, no.

Q Did the Corps request or initiate the report?

A No.

Q Are you aware of when the connectivity report was finalized?

A That was in the November timeframe of last year I believe.

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

A On the draft connectivity report, we provided comments.

But it is an EPA product.

Q So the EPA initiated the report?

A Yes.

Q Were the Corps' recommendations or comments, as you said, accepted into the final version of the connectivity report?

A Some of them were.

Q Were you given any answers as to why those comments that were not accepted, were not accepted in the final report?

A It was our scientists at our lab were in a dialogue with some of the EPA scientists. But, ultimately, it was an EPA product and rightly so. They had complete control of that through their Science Advisory Board and their Office of Research and Development.

Q Okay. Are you aware of whether the Corps' Engineer Research and Development Center reviewed or made recommendations for different or additional science to support the policy decisions that were ultimately in the rule?

A The recommendations I'm aware of that ERDC conveyed were to broaden the included science to support where the direction of the rule was headed in terms of supporting the connectivity between the tributaries and some adjacent wetlands and some more isolated water bodies.

Q Okay. Was the science broadened in the final report per

ERDC's recommendations?

A I think not to the extent that we would have liked it to have been.

Q Okay. Did the Army Corps conduct new science on significant nexus or how to determine the impacts to physical, biological, or chemical integrity of waters?

A No. No new science.

Q Did the Corps conduct new science on the five types of water bodies the EPA determined to be similarly situated in the rule?

A No.

Q Did you ever discuss conducting new science with respect to either of these matters?

A No, we did not discuss conducting new science while we were working on developing the final rule.

Q Okay. In a letter to the Senate Committee on Environment and Public Works, Secretary Darcy admitted that the Waters of the United States rule is not based on case-specific jurisdictional determinations of the Corps, even though the preamble to the rule makes that claim. Were you ever given the opportunity to weigh in on those items in the preamble?

A I don't understand. Which items in the preamble?

Q We're talking about the case-specific JDs, that the preamble of the rule makes the claim that these case-specific JDs came from the Corps. Were you ever given an opportunity or did you ever discuss this claim in the preamble of the rule?

A I'm having a hard time parsing out what exactly you're asking me.

Q Okay. Did you ever discuss jurisdictional determinations with respect to the language that was in the preamble of the rule?

A We discussed case-specific JDs with our EPA colleagues in the course of developing the economic analysis. Specific to the preamble language, we didn't write the preamble at the Corps. So I, that's why I'm having a hard time answering your question.

Q Sure.

A I'm not --

Mr. McGrath. Can you explain what the case-specific jurisdictional determinations, what were they?

Ms. Moyer. The ones that were discussed associated with the economic analysis were associated with isolated waters JDs. And the Corps looked at a body of them. And EPA looked at a body of JDs. And the conclusions that appear to be drawn in the preamble aren't really associated with the JDs that were looked at associated with the economic analysis.

Mr. McGrath. Okay. So what was looked at for the economic analysis specifically are not the same as what you would see in the preamble.

Ms. Moyer. Right.

Mr. McGrath. Okay. Okay.

Ms. Aizcorbe. Do you know why the EPA used a different set of JDs in the preamble?

Ms. Moyer. No.

Mr. McGrath. I want to jump back to the guidance we discussed a little bit earlier.

Ms. Navaro. When you're talking about guidance, can you just clarify like the year? And if it you have the document, that would be useful.

Mr. McGrath. I don't know that I have that document.

Ms. Aizcorbe. We can get it.

Mr. McGrath. We can actually get those.

BY MR. MCGRATH:

Q In 2008, did the Corps prepare any guidance documents in implementing the Rapanos Supreme Court decision?

A Yes.

Q What was your role in preparing that guidance?

A I didn't have a direct role. I had a review role. But I wasn't directly involved in preparing it.

Q Who were the main drafters of that?

A The chief of Regulatory at that point in time was Mark Sudol. And, interestingly enough, Russ Kaiser worked for Corps headquarters at that point. He now works for EPA.

Q Okay. And then was there a new guidance document drafted in 2010 to update and change what was in the 2008 guidance, draft document?

A That was ultimately the draft guidance document that was circulated for public comment in 2011 I believe.

Q Okay. Did you have a role in preparing that guidance document?

A Again, I didn't help prepare it. But I was in a review role.

Ms. Aizcorbe. Who did prepare it?

Ms. Moyer. That would have been David Olson and Meg Gaffney-Smith.

Mr. McGrath. Okay. What would you say -- I don't want to get into that. I have one other very aside question. We're getting close to the end of our hour here. So I have one more question. And then we'll probably go off the record at that point. Are you aware of the EPA working with outside groups to solicit comments for the rulemaking?

Ms. Moyer. I was aware, I was made aware after -- are you talking about the Thunderclap thing?

Mr. McGrath. Correct.

Mrs. Bamiduro. This seems to be outside the scope of what you asked her to come for. According to your email, you were going to ask her about her involvement in the rulemaking. This seems far afield --

Ms. Aizcorbe. That is not what I asked. But we are using up the last few minutes of our time. So I want to move forward.

Mrs. Bamiduro. Let's go off the record for a moment to discuss this.

Mr. McGrath. Let's go off the record.

Ms. Aizcorbe. That's fine.

[Discussion off the record.]

RPTR GENEUS

EDTR HUMKE

[11:05 a.m.]

BY MR. MCGRATH:

Q So as we are talking about your understanding of this so called thunderclap solicitation of comments, were you aware of this at the time that it was being done?

A I wasn't aware at the time. I became aware after, and this was after the rule was finalized and there were requests from Army for us to tweet and put stuff on our headquarters' Facebook page, and it was then that Stacy Jensen mentioned that there had been a request from EPA for us to participate in the thunderclap. And that's when I became aware that this thunderclap effort had happened.

Q Happened?

A Happened. And I didn't know what thunderclap was, so it was an education for me.

Q So Stacy Jensen would have been aware earlier than you were, because you were informed by her?

A Correct.

Q Okay.

A Correct.

BY MS. AIZCORBE:

Q And to your knowledge, did you weigh in on, or participate in any of those efforts?

A No, we did not.

Q Okay.

Mr. McGrath. That's my only question. We can go back off the record.

Ms. Navaro. So can we take a quick break?

Ms. Aizcorbe. Yeah, absolutely.

[Recess.]

Ms. Fraser. It's now 11:19 on the clock. Ready to go forth?

Ms. Moyer, once again, my name is Beverly Britton Fraser. I work with Mr. Cummings' office. I'm the counsel on the committee. Nice to meet you.

Ms. Moyer. You, too.

Ms. Fraser. I want to step back and talk to you -- can everybody hear me?

Ms. Aizcorbe. Now, yes.

Ms. Fraser. Okay.

EXAMINATION

BY MS. FRASER:

Q I just want to step back and talk a little bit more about your background before we go forward into some of the statements that you made earlier.

Now, you mentioned that you have been with the Corps of Engineers since when? 1994?

A Yes.

Q And when did you join the regulatory division?

A In 1995 in Baltimore, in November.

Q Okay. Right now in your position, who do you report to?

A Meg Gaffney-Smith.

Q And who does she report to?

A Eddie Belk.

Q And between Miss Gaffney-Smith and Eddie Belk, how many other people are between them and Ms. Darcy?

A That's a good question. So Eddie reports to Steve Stockton, and Ms. Darcy provides oversight to the Corps Civil Works program, and Mr. Stockton is the director of Civil Works. So she provides that policy guidance and oversight to Civil Works. So I don't know who Mr. Stockton's actual supervisor is.

Q Okay. So there are at least four people and perhaps more above him before you get to the assistant secretary level, right?

A I don't know. I don't know what that reporting chain is.

Q Sure.

A I don't know if she has direct supervisory authority over him in any way, but she's providing that policy oversight to all of the Corps Civil Works programs.

Q Okay. So you are the regulatory chief?

A Yes.

Q So how many people report to you?

A I have one direct report, and then I'm the senior rater for six program managers at headquarters.

Q Six program managers at headquarters. Do your

responsibilities extend outside of headquarters?

A No, not my supervise --

Q In terms of supervision?

A No.

Q Okay. Now, you mention that, you know, you do the day-to-day regulatory work. Could you describe what that entails on a day-to-day basis?

A Certainly. I am very focused on providing support to our districts and divisions in terms of interpretations of our regulations. So, for example, regulatory chiefs in our 38 district offices frequently call me when they have a challenging permit application that they are facing when they have questions of regulation and policy. They will call to say, am I facing this challenge appropriately? Am I interpreting this correctly? I interact with our Federal partners regularly.

So I meet with National Marine Fisheries Service, with EPA, with Fish and Wildlife Service, to work out problematic solutions so that we can be as efficient and effective as possible while also protecting the resources that we're charged to protect.

I develop our budget proposals to move forward and ensure that our districts are appropriately executing their budgets and delivering fair and balanced decisions to the regulated public.

I work with our information technology people to make sure that our Web site has clear information on it. I'm working with our program managers at headquarters as they are overseeing the development of the

training program for our 1,251 regulators.

Q And just let me stop --

A Sure.

Q When you say regulators, you mean these are Corps employees, or do the regulators have a particular function? Is that --

A Yes. Thank you for asking that. These are the employees in Corps district offices that work in the Regulatory Program reviewing permit applications, doing compliance checks on issued permits, working on enforcement activities for activities that someone has done without getting a permit. So then when I refer to regulators, it is those Corps employees that are working within the Regulatory Program in the 38 district offices.

Q And in the 38 district offices besides people in the Regulatory Program, there are hundreds of others that do other things, right?

A Yes.

Q In the Corps?

A Yes.

Q And so do the district offices that -- you mention members of the 38 district offices sometimes call in to you to ask you for interpretation and so on and so forth. Do they ever perform any field functions that feed information to your office? For example, do they perform any, like, significant nexus determinations? Do they do JDs? Do they do any of those things, or --

A That's where all of the work is done.

Q All of the work is done?

A Yes, all the execution of the Regulatory Program is done in the 38 district offices. So that's where the permit application evaluations are done, where the jurisdictional determinations are done. They are done in the district offices.

Q And so headquarters' role in those is just what, an oversight to make sure that those things are done in the confines of the law?

A Yes.

Q And you aggregate the information that they have?

A Yes.

Q Okay. So let's talk a little bit about your involvement in the waters rulemaking. When did you first become involved in the waters rulemaking?

A It's a complicated answer. I, as deputy chief, was reviewing a lot of information and a lot of the draft documents and presentation material that was being developed while the guidance effort was going on in the 2010, 2011 timeframe.

Q Okay.

A I was acting chief from June of 2012 to end of June 2013. So I was engaged at that point in time as acting chief in briefings, in inter-agency interactions with EPA, and then I became much more engaged in the July 2014 timeframe when I became chief of the Regulatory Program at headquarters.

Q Okay. And your position as acting chief, had somebody just

vacated that position, is that why you were acting?

A Meg Gaffney-Smith went on a developmental assignment into the position she currently holds now, and so I then stepped into her position.

Q Okay. So you mentioned that while you were acting and certainly, in your role as chief, you worked with EPA?

A Yes.

Q Could you tell us a little bit about what your work with EPA looks like on a day-to-day basis?

A Certainly. We have conversations about the execution of the Clean Water Act 404 program, so I have frequent conversations with Russ Kaiser, who is the head of -- and I always forget the proper name of the office, the wetlands and --

Q OWOW?

A He's not the head of OWOW, but he's a head of a branch within OWOW. And also with John Goodin, who is his director. Whether those conversations are specific to the Clean Water rule in the timeframe of November 2014 to April of 2015, Russ and I spoke probably not every day, but, you know, four or five times a week about the rulemaking effort. John Goodin and I maybe talked once a week about the rulemaking effort.

Now, on a regular basis, I talk to Russ Kaiser about challenging jurisdictional determinations around the country. We talk about some very high-profile permit actions where an EPA region and a Corps district may not be seeing eye to eye on a specific issue. We also

talk about overall program implementation, what can we work together better on to make things more efficient, what can we work together on to protect the aquatic environment more effectively. So conversations like that is how I partnered with the EPA.

Q Okay. So pretty much every day or on average daily communication?

A I would say it would be uncommon for us not to talk at least every other day.

Q Okay. And outside of Mr. Kaiser and Mr. Goodin, do you interact with anyone else in EPA who has been working on the waters rule?

A It's not common. On an infrequent basis, Greg Peck will send me an email and ask me for information, but it's uncommon for me to interact regularly, with other folks. Sometimes some of Russ' staff may ask for information or want information. Russ' staff interact frequently with members of my team.

Q Okay. And you mention that you have, I think, six people that you said that report to you?

A Yes. I have a deputy, and then I have six program managers.

Q And so would Mr. Kaiser and Mr. Goodin also interact with them, or is he principally communicating through you?

A Sometimes Russ will reach directly to my teammates, my team members, but he primarily interacts with them through me.

Q And, by the way, I'm just curious, what is your background in terms of, you know -- what is your experience

with -- educationally?

A I have a bachelor's degree in biology and a master's degree in botany.

Q In botany. Okay.

Now, in the conversations that you've had with Mr. Kaiser and Mr. Goodin, and certainly among your team, did you talk about, you know, data that was going to be used to support the rule? What did you do, interpret data? What kinds of things did you talk about that impacted the rule on a day-to-day basis?

A We spoke about data and what data would be needed to update the economic analysis. There's an economic analysis done for the guidance. We talked a lot about how to update that economic analysis using the revised rule, and knowing that the rule was being revised, at what point in time were we going to land on the version of that to update on the economic analysis.

Q And in terms of the data, was it something that the Corps was providing? Where was that coming from?

A The data for the economic analysis was, EPA requested data from the Corps. For a lot of that it was mitigation data, it was impact data that the Corps was providing. And then data on -- and this was some of what we got into just a little while ago, was from an analysis of existing jurisdictional determinations that had been completed on isolated waters.

We had agreed between EPA and the Corps to look at a body of jurisdictional determinations. EPA was looking at some. We were

looking at some.

Q Where were they getting theirs from?

A We were both getting them from jurisdictional determinations that were coordinated among our agencies.

Q Okay.

A So we were doing a stratified random sample of these isolated waters, JDs from a discrete time period. We were going to look at ours, they were going to look at theirs using an agreed-upon methodology to determine the change in jurisdiction --

Q I see.

A -- we were going to come up with an answer, they were going to come up with an answer to see if we came up with the same answer for the change in jurisdiction.

Q And did EPA often do independent jurisdictional determinations side by side with you guys? Maybe not necessarily on the same project, but did they always do those?

A No. No. This was just an exercise --

Q Just an exercise?

A -- to look at the rule to sort out what the change in jurisdiction might be with the revised rule on these specific types of water bodies. This was just to inform the economic analysis.

Q Okay.

A So that was the data question.

Q Right.

A I was just trying to answer that, where the data was coming

from.

Q I appreciate it. Okay. Did your conversations with your EPA counterparts also include, you know, gathering information, and what else did you talk about?

A Oh, we talked about the comments and how we were going to approach reviewing the unique comments, and then the subset of substantive comments within the unique comments, so the non-form-letter comments, how were we going to go about that, and then how were we going to talk about the results of all of that. So that was some of the conversation as well.

Q Okay. Let's talk about your counterparts in the Army. Who in the Army did you work with, with respect to this rulemaking?

A Our primary contact within Ms. Darcy's office was Chip Smith.

Q Chip Smith?

A Yes.

Q Okay.

A And, then, certainly Mr. Schmauder was involved in all of this effort as well.

Q So essentially two people?

A Right. Our day-to-day contact, however, is Chip Smith. He is the assistant for regulatory environment and travel affairs, and he is who we coordinate with on regulatory issues on a day-to-day basis, all regulatory issues.

Q Do you have any sense of who Chip's staff was, or maybe

Mr. Schmauder's staff, like, how many people they were working with as they were, you know, relating information to you, and among you, and with the EPA?

A Chip doesn't have any staff. We provide -- we, being regulatory, provide him with a detailee, a professional developmental assignment that we pull from the field to help him.

Q Okay.

A I am not familiar with who Craig has as staff, who Mr. Schmauder has as staff, to help him regularly. So I know some of the names are familiar, but I don't know on a regular basis who he's able to pull from.

Q And so just a few minutes ago, when you were talking about the team of eight, these were some of the people that comprised the team of eight?

A Right. Craig and Chip were on that team of eight.

Q And you also mentioned another gentleman from EPA, Gautam Srinivasan?

A Srinivasan, yes.

Q I'm really bad with names.

A I know.

Ms. Aizcorbe. Is it possible to get a spelling of that?

Ms. Navaro. I could spell Gautam. I'm not sure I can spell his last name.

Ms. Aizcorbe. I am asking for the reporter.

Ms. Fraser. Okay.

BY MS. FRASER:

Q And how often would you interact with those people, the team of eight?

A Sure. The team of eight was stood up in September of 2014. And we were slated to meet every Tuesday, I believe, and we did meet every Tuesday until the beginning of November, and then we stopped meeting.

Mrs. Bamiduro. 2014?

Ms. Moyer. 2014, right. And then we stopped meeting, and then we -- until, I would say, mid-January, and then we had sporadic phone calls after mid-January.

BY MS. FRASER:

Q So from November until about January you had a good two solid months of --

A Of no meetings.

Q Oh, so that's when you stopped meeting?

A We stopped meeting after the 6th of November. There were no meetings, then, until about the middle of January.

Q Okay. What's the reason for that?

A I don't know.

Q Okay.

A I don't know. The meetings just would be canceled every week.

Q I see. Middle of January. And then you picked up the meetings again?

A There would be phone calls. They were face to face before, and then there were sporadic phone calls. And in that timeframe, I would say towards the end of January, early February is when Mr. Schmauder shared with us a draft of the draft final rule --

Q Okay.

A -- that had been developed. I would assume in that time period. I'm not sure when it was developed.

Q So just stepping back a bit, the purpose of assigning the team of eight was for what, exactly?

A It was my understanding -- and this was communicated to us by Mr. Schmauder and Mr. Peck -- was that this team of eight was going to discuss technical issues and concerns and considerations that then would be raised to the policymakers. And we would try to come to a series of options and recommendations that would be the minimal number that would, then, be considered by the policymakers themselves for decision into the draft final rule. So we would resolve as much of the technical issues as we possibly could in this team of eight.

Q Okay. And as far as you can tell, did you?

A I think that it would be fair for me to say that in our initial conversations we had very robust conversations about what concerns had been raised by the public comments that we had already seen and the ones that continued to come in. We were talking about them.

A series of option papers were being developed both by EPA and by the Corps, and we were talking about them. We clearly were having

necessary and robust disagreements at that inter-agency table as you would in the development of a final rule --

Q Right.

A I would say we were getting to the point where we were going to start to resolve some of them, and we stopped meeting. So I think we had resolved the low-hanging fruit we had resolved, and we were putting some fine points on the issues that we really needed to start the work.

Q Right.

A So --

Q And so you mentioned option papers being developed by both sides. Were you writing any of those, or were other people charged with writing those?

A No. I would characterize it that Lance Wood and I were writing together the Corps' option papers. And we had split up among the Corps and EPA the issues that we were each writing on.

Q Okay. And you exchanged those and discussed those at the meetings, those robust meetings?

A -- well, what I would say -- and I'm sorry this gets real confusing -- is that towards the middle of November we had been charged to write the option papers. We sent them forward, and then we just -- we didn't really get to the point where we discussed them at any length.

I think it was very clear to everyone our points of disagreement with one another. And then when we started meeting again was when there

was a draft draft final rule to discuss.

Q And you said that meeting, the set-up meetings, picked back up again sometime after mid-January?

A Right, when there was an actual -- when there was actual rule text to discuss. And it was -- that rule text, I would presume, and I'm speculating when I say this, was developed based on the option papers that we hadn't fully --

Q Discussed --

A -- discussed all the way through. That's from where I sit.

Q So based on the information that you put in your option papers and some of the language that you ultimately saw in the draft proposed final rule, would you say that any of the options that you proposed made its way into any of those drafts?

A I would say that the draft rule text certainly reflected discussion points that had come up among the agencies. I wouldn't say that the points that the Corps was extraordinarily concerned about were reflected in that draft text. But it wasn't a surprise what we saw, but I think that it's fair to say that we were surprised that there was draft rule text when we hadn't completed the conversation, and that we weren't part of drafting the rule text.

Q So who did you understand to draft the rule text? Who was responsible for that?

A I believe EPA drafted the rule text. That's my -- that's what I believe occurred. And we weren't --

Q Do you have any basis for believing it was just them, or

could it just have been someone else?

A I suppose it could have been somebody else. That's a fair statement.

Q And that somebody else could have been from anywhere, right?

A True. That's very true.

Mrs. Bamiduro. Could it have been from the Army?

Ms. Moyer. I don't know.

Mrs. Bamiduro. Is it possible?

Ms. Moyer. Anything is possible, yes.

BY MS. FRASER:

Q So once you started discussing the draft proposed rule text, you said it was a series of phone calls that you had with the EPA?

A Yes. We were primarily on conference calls. In January and February of last year, we had a lot of snow days, and on most of those snow days we were on the phone. And it was Army, EPA, and Corps folks who were on those calls discussing the rule text and potential modifications to the rule text.

Q And, of course, you were part of those phone calls, and you were raising all of your concerns?

A Yes.

Q And how would you say the Army and the EPA responded to those concerns that you raised? Do you think you were taken seriously?

A I think in some sense, yes. I think that one of the primary concerns that we raised was the identification of the A-7 waters, so those were the isolated waters, identifying them by HUC-10s and the

huge list of HUC-10s. That was removed from the rule text. And I think that that was a very positive thing. That was a robust conversation then. And so, in that sense, I think it was a very beneficial conversation that we had on these conference calls.

So, absolutely, I think that the technical conversations in some areas were very beneficial. I think in other areas there was a very dismissive, "we're not talking about this" piece. "We're done with that conversation. We're moving on."

Q And when you say "we," are you talking about both the Army and the EPA? Was that their approach?

A I think that oftentimes there was -- that Mr. Schmauder wanted to understand and he would request from me to explain what my technical concern was, and he would ask EPA to explain their technical concern, and then the discussion would move on.

Q Okay.

A And when there was a desire in the next call to discuss it again, this is my perception -- there was irritation expressed by my colleagues at EPA that it was even coming back again. It's like, we discussed this; we're moving on.

And I believe that resolution wasn't reached on some of those things, and it wasn't communicated to me clearly on those calls that a policy decision had been made, that that particular issue was off the table. And this is myriad issues, that's why I'm not identifying a specific issue.

So, and I will say, when a policy decision is made, a policy

decision is made, and we move on. I don't have a problem with that. But this is kind of how I would characterize those conversations. They were clearly still on the table, because no one had communicated, Ms. Darcy and Ms. McCarthy had made a decision.

Q Right. So at this point you are sort of speculating that there was a policy decision made because they were irritated having to revisit it in the conversation?

A Right, or a policy decision hadn't been made, but there was still irritation that we were still bringing up issues that --

Q Right.

A -- that was no longer a desire to talk about.

Q That hadn't been discussed.

Now, I'm sure that as you were going through this with them, in as much as they were irritated with you, did you find yourself irritated with them as well at some of the points that you were raising?

A I wouldn't say irritation.

Q What would you call it? Disagreement?

A I think that it's fair to have technical disagreements. I think that in the development of any rule, you are always going to have disagreements. I think that it's disappointing when common ground can't be found.

Q Right. And not just in rulemaking, but in life, right?

So I want to talk to you specifically about how the public comments figured into your discussions once the January period, when you started talking about figured into discussions once the discussions resumed

in January.

Tell me how those went. Tell me, what did you see as the trends that were developing in your discussions about what the public comments showed?

A From the analysis that our team had done, we reflected that the substantive public comments, so the -- within the 1,000 -- not 1,000, 1.1 million comments, there were about 21,000 unique comments, and then there was a subset of those, around 2,000 or so, 2,000, 3,000 or so that were truly substantive letters that were more than, you know, one-liners that we analyzed.

And in those, there were percentages that we put into various buckets. So they either dealt with ditches, or they dealt with adjacency, or they dealt with isolated waters. And it's difficult to characterize them, although we did, as being positive or negative or neutral or just providing information.

Q Right.

A And even though we did that characterization, I think it's troubling to just say, okay, of the ditch comments -- these are not the numbers, you know -- X percentage are positive -- so I'm not going to use the numbers -- X percentage are positive, X percentage are negative, because I don't think it's informative. But when we would be specifically talking about those, to generally characterize those as the public wants clarity on ditches, and then to link it to, and this is the clarity they want, was troubling for the Corps. Because that's not necessarily the translation when you read the comments that

the public sent in.

Same thing with the public wants bright-lines. Well, when you read the comments, are these the bright-lines that the public has asked for?

Mrs. Bamiduro. Can I just pause you for a second?

Ms. Moyer. Certainly.

Mrs. Bamiduro. You said something was troubling for the Corps. Or was it troubling for you?

Ms. Moyer. When I say troubling for the Corps, I would say the team that we brought in to analyze these comments and summarize them, when I was providing the draft rule text to them to say, does this capture -- and we broke them into teams. So the folks who read the ditch comments, I said, this is how the ditch language was changed. Does this reflect the comments that the public sent?

So they would read it and say, yes, no, sort of, we're kind of getting there, or you guys are missing the mark. And I would take that back to these calls and say, we're not characterizing or we're not capturing what the public has asked us to do. Or we have -- you've gotten it here, you aren't getting it here. So when I say the Corps, that's what I'm reflecting.

BY MS. FRASER:

Q And thanks for that clarification. In terms of the team, I just want to step back. I know you talked about this a little bit earlier. You mentioned the team that was doing the summarization of the comments consisted of yourself and who else?

A And I wasn't on the team summarizing the comment. It was Stacy Jensen, and then we brought eight people in from various districts.

Q And what were their titles or roles? What roles did they play before you brought them in?

A They were regulatory project managers in the district offices. So they were from all different districts.

Q And there were eight of them?

A Yes.

Q And I think earlier you mentioned that the team took, what, 5 months to go through the comments?

A Yes. And when they returned to -- that was while they were in D.C. When they returned to their offices, we continued to borrow some of their time.

Q And they produced summaries of all of those 20,000 comments with substantive comments within the 5 months?

A Uh-huh. Yes, they did.

Q And were these written summaries?

A They are summaries -- yes. It's not written summaries of each comment letter, but it's overall summaries of buckets of comments. So if there's a -- there are various bucket of comments of ditches and adjacency, and --

Q Right. So some of those summaries would, then, interpret the information they saw in the actual comment and then put it in this document?

A Yes.

Q And those summaries were generated and given to you?

A Yes.

Q Now, as far as you know, the same thing was happening at EPA. Is that right?

A I believe so, by their contractor.

Q So the EPA also had its series of people providing summaries of the same comments that you were looking at?

A I believe so, yes.

Q Did you ever get a chance to look at what those summaries were?

A No.

Q Did you ever discuss it with your counterparts at EPA what was in those summaries?

A No.

Q Do you know who was involved in creating their summaries for them?

A I believe it was their contractor.

Q Contractor. But you don't know for sure?

A I know they had a contractor summarizing the public comments. I know they also had some of their field folks -- some people in from their regional offices. I don't know those individuals' interaction with the contractor.

Q Did you ever discuss with your EPA counterparts what the contents -- what their interpretations or their summaries revealed

about what the public's comments says?

A I didn't have that conversation. Stacy Jensen may have, but I did not.

Q So while you were having conversations with the team of eight on the phone, these didn't come up, these comments, public comments, and whatever trends you were seeing --

A I was raising what our folks were saying, and EPA was suggesting that what they heard in their outreach meetings, and what they were reading in public comments was reflected in the rule. So, yes, we were having that conversation.

Q You were having the conversation. So it appears as though the interpretations of the public comments just fell along different lines from what the Corps summaries were and what the EPA summaries were?

A That may be an accurate statement, and I believe also that one of the key pieces that was brought up was what was heard by EPA in the outreach meetings.

Q What did they say they heard in the outreach meetings with respect to major issues that you saw in the comments? Like, pick one, for example.

A I think bright-lines and a need to do something with ditches.

Q And you mentioned that the Corps didn't do any outreaches as a general course of your work, right?

A I said that we participated --

Q You participated, but you didn't initiate any outreaches?

A Correct.

Q When you say participated in the -- I think you mentioned about 70 -- well, the Corps participated in about 70 outreaches?

A Yes.

Q You mentioned that you personally didn't participate in many of them?

A Correct.

Q Do you have a sense of what your staff member or any of the Corps participants or presenters at these outreach meetings might have heard with respect to those comments?

A I didn't review of any of that, so I can't reflect what they may have heard.

Q But when your staff came back from some of these outreaches, they certainly touched base with you to let you know, you know, what their day was like or what their meeting was like, right?

A I just can't recall that right now.

Q Understood.

BY MS. BAMIDURO:

Q Can I just ask a point of clarification? Are there two teams of eight?

A No.

Q It's just one team of eight?

A Right. There's the inter-agency team of eight and then we had eight people in our detail.

Q So there are two teams of eight?

A Right. Sorry about that. That got confused. There's one that we refer to as the team of eight, and that's the inter-agency team of eight, and then there are detailees, yes.

Q Okay. That is not called the team of eight?

A Yes. Sorry.

Q Got it. So the team of eight, that is the inter-agency folks that were meeting every two weeks and then stopped for a period, and then there were calls to discuss the language of the rule. Is that right?

A Yes.

Q Who put together those eight people?

A It's my understanding that that was a discussion among EPA and Army and that included Ms. Darcy, and I believe she coordinated that with General Peabody and Mr. Stockton who the Corps attendees would be in those meetings.

Q And as a member of the team of eight, did you expect that you would be a final policymaker?

A No.

BY MS. FRASER:

Q Did you expect any of the other members of the team to make final policy decisions?

A No.

Q Was it understood that all of you, as members of the team, would help inform those who would make that final policy decision?

A I'm reflecting on what my thoughts were that that team of eight would do, thinking back to the first meeting. It was conveyed at that first meeting that our job was to develop options and recommendations for the final policymakers.

Mrs. Bamiduro. Options?

Ms. Moyer. Yes.

Mrs. Bamiduro. So was it understood or did you have any expectation that every recommendation that the team of eight made would, in fact, make its way into the final rule?

Ms. Moyer. No.

BY MS. FRASER:

Q Now, earlier you talked about some -- you said you made some recommendations as to what could be included in the rule, and you were pretty strident about certain thoughts. For example, you said that one of the things that made it into the rule was -- let me step back for a second.

You said you didn't make any recommendations but comments, right, as far as recommendation -- as far as the proposed final rule, and that Mr. Schmauder told you that it was important that public comments be considered and respected, right? Is that right?

A Right, Mr. Schmauder conveyed to us that Ms. Darcy felt that it was very important that public comments were considered and included in the final rule, yes.

Q And that one of the frequent comments that the public gave was this bright-line rule, or this need for a bright-line?

A Uh-huh. Yes.

Q And you just mentioned that when your team looked at what that comment was, it didn't necessarily gel with what the language of the final rule said about what that bright-line should be, right?

A That's not what I said. What I said was, as we were going through iterations of the final rule, I would give it to the team to say -- and this was through time. There were lots of versions of the rule through time.

Q Right.

A So I would ground truth it with them to say, how does this version look? How does this version look? How does this version look? So that when I was participating in those team of eight meetings, I could provide that feedback based on the folks that had looked at those public comments.

Ms. Navaro. And not just on the bright-line rule, correct, on the various issues?

Ms. Moyer. Right. Right. Yes.

BY MS. FRASER:

Q I'm interested in knowing, when your team looked at the public comments about this -- I'm sticking with the bright-line issue for the moment. When they looked at the public comments about need for a bright-line, and then you looked at the language that had been presented to your team sometime after January of 2015, what was your team's interpretation of what the bright-lines meant?

A I think that it's fair to say that in many different comment

letters there were requests to define ordinary high-water mark this way, define ditch like this. That would be a very clear definition and would provide clarity. And so to provide a bright-line -- and I didn't read all the comment letters, so I think it would be interesting to know, and I don't know this, if any letter said, please provide us a bright-line.

So I don't know if that was in any specific comment letter, or if that is just a way that we have characterized the request for this extreme clarity in the rule.

So what I would suggest is that my team looked at the bright-lines that were defined in the rule and compared it to the body of comments that they have received to say, well, I had 15 comments that said they wanted this type of clarity, that wanted a definition that reflected this, this, and this, for bed and bank and ordinary high-water mark, and we defined it this way. It's not reflected what they are requesting. So that's kind of the granularity that they were looking at.

Q So it seems that what you are saying is that your team felt that the public was looking more for clarifications on definitions of things?

A Or they may have been looking for a bright-line in terms of adjacency or what have you that was at a different distance threshold than what was in the rule. I mean, a bright-line is a bright-line, whether it's at 50 feet or whether it's at 50,000 feet.

Mrs. Bamiduro. But you said you didn't read the comments, right?

Ms. Moyer. I did not read all of the body of comments. I read a certain subset of comments in each category.

Mrs. Bamiduro. Okay.

BY MS. FRASER:

Q So if you were to -- and we are using this word bright-line because it's shown up in a lot of the discussion about this rule.

A Right.

Q So if you were to interpret what bright-line meant, what I'm getting from you is clearer definitions of various items that are significant in this rule?

A That's one way to interpret it. Another way to interpret it is there needs to be a bright-line between what is jurisdictional and what is not jurisdictional, but there are lots of opinions that have been expressed by commenters about where that line should be.

Q About how many different kinds of opinions would you say have been expressed by where that line should be, about what that line should be?

A I would have to speculate about how many. I mean --

Q So at some point, because we have so many different interpretations of what that line should be, whether it's a linear line, definition line, or something else, at some point someone has to strike what that is? Is that right?

A I believe it should be supported by science, and science doesn't draw a line on the landscape.

Q Setting aside science for a moment, whether or not it's

supported by science, the decision has to be made what the bright-line is, right?

A I think that how we've defined it in the past is that if there is a connection to a water body, a surface connection, or shallow surface connection, that is a different type of bright-line.

Q I know. We're going to get into that a little bit later. Right now, at this moment, but let me just put it this way, at some point Assistant Secretary Darcy and the administrator of the EPA made a decision or came to an agreement on a decision of what the bright-line would be. And in this case, they defined it as a linear bright-line. Is that right?

A That is the decision they made, yes.

Q Would you say that it was within their parameters, as policymakers, to do so?

A Absolutely. They have the policy authority to do that.

Q And would you say they have a right to rely on those people who they employ and who they look to for guidance in making that decision?

A Ms. Darcy was provided the best technical advice that she could be provided, so she made her decision based on that technical advice and potentially a whole lot of other information.

Q That's right. So if the technical advice that she received and decided to use included making a bright-line a line, a literal line, 4,000-foot line, then that's within her right under the scope of her duties to do so, right?

A Absolutely. She has the ultimate policy authority.

BY MS. BAMIDURO:

Q Were you aware of all of the information that Ms. Darcy was provided in her ultimately reaching her decision?

A No. I only know what the Corps of Engineers provided her.

Q Okay. And can I just step back for just a second. So going back to the official team of eight that were having the meetings every Tuesday, I think you said it was?

A I think it was Tuesdays.

Q And then you said they stopped on November 6th; is that right?

A Yes.

Q Are you aware whether inter-agency meetings involving other folks were taking place after November 6th but between January, in the middle of January?

A I'm not aware that they were. I have heard references to them.

Q From whom?

A Mr. Schmauder has referred to meetings that he has with Mr. Peck -- has had with Mr. Peck, but I wasn't there, so it's only what Mr. Schmauder has referred to.

Q And Mr. Schmauder referring those meetings to you, was it for the purpose of discussing the rule?

A That's what he would say.

Q Okay. So you were not privy to the contents of those

meetings?

A Correct.

BY MS. FRASER:

Q Is it possible that besides your office that anyone else in the Corps could be participating in those inter-agency meetings?

A I wouldn't know.

Q So if someone from one of the field offices or a number of people from field offices were tasked with providing information either to the Army or to the secretary, you wouldn't know independently?

A I wouldn't know if they were told not to tell me. I wouldn't imagine that they would be told not to tell me, but if there was some activity going on, I suppose anything is possible. But I have not heard that that has occurred, and I was in close coordination on the rule with the field, so I was seeing their comments on versions of the preamble.

Q And just to make the record clear, when you talk about the Corps' position, are you talking about the position that was developed by you and your team, decisions that were made by you and your team, or are you going beyond yourself and your team and speaking for everyone in the Corps who worked on this rule?

A I'm talking about the Corps' Regulatory Program position when I'm talking about the Corps' position.

Q Regulatory Program?

A Right. Right.

Q How many other programs within the Corps are there beside

yours? I know we mentioned this earlier. I forgot.

A Well, that's a really good question. I can probably speak more handily to the Civil Works program, knowing that we have a military program and real estate and all sorts of things. So we have an environmental restoration program; we have planning; we have engineering and construction. So we have many programs. We have about, I don't know, 32,000, 33,000 employees delivering the work of the Corps of Engineers.

BY MS. BAMIDURO:

Q Going back to the weekly meetings that took place among the team of eight, the information that was discussed in those meetings, do you know what would happen with that information after those meetings? Was it sent up the chain in your respective organizations?

A I know that the Corps participants in those meetings, we would discuss that information, and we would make sure our senior leadership was aware of those discussions. I am not aware of what the other participants in the meetings would do.

Q So was there standard practice for -- this is my word, not yours -- a debrief of your senior management after these weekly meetings?

A No, there was not a standard for that. As we moved further along in the rulemaking process and things were accelerating at points where there was -- it appeared as though Ms. Darcy had a need for information or was going to reach to our senior leaders, or we anticipated that she might, we made sure that they were aware of the

types of discussions that occurred, but there wasn't a standard, you know, we had a call and, you know, the next morning we debriefed the senior leaders.

Q So can you just explain for us how it worked, then? So you had a Tuesday meeting, and then would you go back and talk to -- was it Meg Gaffney-Smith, your direct supervisor?

A No.

Q Would you -- okay.

A And one of the other participants in the team of eight -- as I sit here and talk about it, the names are coming back to me. So it was me, Lance Wood and Jim Hannon, who was the chief of operations and regulatory, so he retired and then it was his replacement, and Eddie Belk. So since Eddie is my supervisor, since he was there, I wouldn't debrief Meg, because her boss was already there.

Q Okay.

A So since Eddie often was participating, and if he wasn't participating, David Cooper was participating, and both of them are senior executive service individuals. One of them was always on, and they would, then, make sure that Mr. Stockton and General Peabody were aware of the discussions points.

So often, but not always, I was in those conversations with Mr. Stockton and General Peabody. Sometimes I was not. So it was a very brief, this is where we are with the Waters of the U.S. rulemaking effort. You know, this is what may happen. Ms. Darcy may ask for information, she may not. There may be a briefing, there may not. So

it was more of a status temperature check, sort of, update. So it wasn't a standard.

Q I guess I'm trying to understand. If there were meetings that were taking place above the level of the folks in the team of eight to discuss what was discussed in the meeting of the team of eight --

A And there weren't at the Corps.

Q Okay. But do you know if that was happening at EPA or at Army?

A I don't know.

Q Okay.

BY MS. FRASER:

Q And do you have any sense of what someone at the level of General Peabody or Mr. Stockton would then do with the information once you briefed them or were part of the conversation in which you made a summary of your team of eight meeting?

A I don't know. I mean, we would have conversations at that point in time, if we were at a point where it appeared as though we needed to engage Ms. Darcy. I don't know, then, if they would have a conversation. I mean, that was way above my head at this point in time or not. I don't know what they would do with it.

Q Did you ever feel a need to, at any time during your discussions either with the team of eight or otherwise, that something was urgent enough that you needed to get to Ms. Darcy's level to deal with a concern that was serious to you?

A I don't know how to answer that one. We were working

in -- within a process, and so -- and I am -- I've worked for the Corps for nearly 23 years, and so I'm a very process oriented person, and I respect the chain of command. And so I had faith in my senior leaders to engage appropriately. So no, I didn't feel the need to --

Q Isolate anything?

A Correct.

RPTR YORK

EDTR SECKMAN

[12:15 p.m.]

Ms. Moyer. So I was raising my issues as the regulatory chief through the appropriate chain of command.

Ms. Fraser. That's it for now. Thank you.

Ms. Aizcorbe. Lunch?

Mr. McGrath. Do you want to try to start at 1 p.m.? Is that enough or --

Ms. Navaro. How about 1:15?

Ms. Aizcorbe. We're good.

[Recess.]

Ms. Aizcorbe. So I guess it is 1:15. So we will begin our hour.
Thank you for coming back.

We'd like to start off with addressing what we'll be calling throughout the questioning Peabody memoranda. This was several memoranda that were signed by Major General Peabody, Deputy Commanding General for Civil and Emergency Operations at the Corps, including attachments to these memoranda, which we have here as exhibits, and we'll refer to, like I said, as the Peabody memoranda moving forward. So we'd like to mark one of these. And I can share a copy so that you can follow along. I'm sure you're familiar, but so you have a copy.

Ms. Navaro. Do you have a copy that Milton and I can share?

Ms. Aizcorbe. Sure. Absolutely. We have plenty of copies.

Ms. Navaro. Great. Thanks.

Ms. Aizcorbe. So starting off --

Mrs. Bamiduro. Did we mark it as an exhibit? I'm sorry.

Ms. Aizcorbe. Yes.

Mr. Skladany. Exhibit 1.

Ms. Aizcorbe. It's exhibit 1.

[Moyer Exhibit No. 1

Was marked for identification.]

Ms. Aizcorbe. John, do I need to do anything else?

Mr. Skladany. That's it. Is the sticker on there?

BY MS. AIZCORBE:

Q What led you to execute your April 24, 2015, and May 15, 2015, memoranda included in the Peabody memoranda?

A General Peabody, after discussions with the internal team -- so that would be Lance Wood and I and David Cooper -- requested that I draft the 24 April memo, that Lance would draft his April 24 memo, and that I draft my 15 May memo.

Q So these all came at the request of Major General Peabody?

A Yes.

Q And were those -- the three of you, Lance Wood, David Cooper, and yourself -- were meeting with the Major General Peabody about the concerns that were ultimately included into these memos?

A Yes.

Q Was there any other reason why he asked for them?

A No. Not that I'm aware of. I mean, we were discussing the concerns that we were having in the interagency review process. And we felt that it was as -- we felt as a staff group, and then in discussions with him, that it was necessary to ensure that Ms. Darcy had all of the technical information from the Corps of Engineers as she went into making her final decision.

Q So these memoranda were executed while the interagency review was ongoing?

A Yes.

Q Okay. After issuance of the Peabody memoranda, were you consulted about your memos by any Army or Army Corps staff?

A We weren't -- we did not have specific conversations with

anyone at Army about the contents. I did not have any conversations with anybody at Army about the contents of either one of my memos.

Q Did you have conversations with anybody at Army about the memos in general, not necessarily of the contents?

A No.

Q Of the existence, the issuance? No?

A Not -- not before the rule was finalized.

Q Okay. Did you have any conversations with the EPA about the memos?

A No.

Q Okay. Did you consult with anyone about the Peabody memoranda or their contents after the memoranda were issued? Did you reach out to speak to anybody, any Corps staff, Army staff, EPA staff?

A Not -- we didn't discuss the contents of the memo with Corps staff other than discussing them with General Peabody and Eddie Belk. And so the group of people that knew of the contents of the memo and were aware of the memos and their awareness of them being delivered to Ms. Darcy. So, I mean, we weren't discussing them with staff internal to the Corps.

Q Were you approached by anyone external to the Army or Corps to speak about the memos after their issuance or after their existence became public?

A No. I guess I'm not understanding the question. After they became public?

Q Sure. After the existence of the memoranda became public,

were you approached by anybody external to the Army or Army Corps about the memos?

A No. I haven't been asked to talk about the contents of my memos publicly. Certainly regulatory chiefs have asked: Why did you write them? And I have told them the same reason that I've told you, which is to inform General Peabody so he could provide them to the ultimate decisionmaker.

Q So you had no conversations with Ms. Darcy or Mr. Schmauder about the memos?

A No.

Q Okay. In your May 15 memo, you state that the Corps had, quote, "no role in selecting and analyzing the data and information for the economic analysis of the proposed final rule and no role in actually performing the technical analysis of the rule or in drafting the technical support document."

Did you express these concerns directly to Assistant Secretary Darcy at any point?

A No. We were not provided the technical support document until after it had been sent to OMB as part of the interagency review process.

Mrs. Bamiduro. Can you keep your voice up?

Ms. Moyer. Yes, ma'am.

BY MS. AIZCORBE:

Q Did you express the concerns about not being a part of the development of these documents to Mr. Schmauder at any point?

A Throughout the development of the preamble, when we would receive drafts of the preamble and the preamble referred to the technical support document, we would ask in our interagency discussions: What is the technical support document? Are we going to see a draft of it? So he was aware of that. We asked him that. We asked our EPA -- I asked my EPA counterparts that.

Q So maybe let's go back. When did you know of the existence of the technical support document?

A We knew that it was being developed. We weren't quite sure what it was. But we knew it was being developed when we saw the first version of the preamble that was shared with us. And I'm going to say that was in the March timeframe. I'm not specifically sure of when in that timeframe that was.

Q So it was before the document was sent through interagency review?

A Yes. Yes. We saw several drafts of the preamble.

Q Okay. And is that also when you saw the economic analysis?

A No. We saw the economic analysis -- a draft of the -- a revised draft of the economic analysis after it was provided to OMB within the interagency review process.

Q Okay. So you only saw the revised draft of the economic analysis after the interagency review had begun?

A Yes.

Q Okay.

A Same thing with the technical support document.

Q Okay. So if you hadn't seen it before they entered into the interagency review, does that mean that the Corps was not involved in their drafting?

A Correct.

Q Were you given any opportunity to weigh in on aspects of either the technical support document or the economic analysis before they were included in the final draft version?

A Initially there's -- I have to deal with them separately.

Q Okay.

A On the economic analysis back in the November, December timeframe --

Q And that's of 20 --

A Of 2014.

Q -- 14, just to be clear. Okay.

A We were working collaboratively with EPA on methods to update the economic analysis. We were having conversations on how to best gather data and analyze it to determine how -- the difference in jurisdiction of existing practices and -- existing then practices and then under the new rule. We had conversations about what data EPA might need to assess costs and benefits. We provided some of that data to them, and then those conversations stopped occurring at a productive level. And when we saw the revised draft after OMB vetting was going on, and that revised draft was provided to us, it wasn't reflective of the data that we had provided, and we had the collaboration on the information used on -- to determine the change in jurisdiction

wasn't -- they had not used the data that we had developed, and they had used their own data. So that's the answer for the economic analysis.

The technical support document, we were not part of the development of that document.

Q Okay. But you said you were aware that it was being developed?

A It was referred to in the drafts of the preamble. So we knew that something was being developed. We gained the understanding that it was a combination of the appendices that were part of the proposed rule, plus other information that was being developed.

Q Okay. When you say that the meetings with EPA stopped occurring at a productive level regarding the economic analysis, what do you mean by that?

A We -- and this was at a staff level. I wasn't in these meetings, but they were conversations surrounding the data that we were providing on mitigation. So cost data for mitigation. So the specifics of that cost data, we were providing it when the discussions would occur. It would be the -- and this was between the Corps and EPA. The EPA staff would say: We're going to extrapolate that data that's specific to these mitigation types and say that it can be used for all of these mitigation types because we have specific data. There was a need to extrapolate it, and that was making us uncomfortable. And so the productivity of those conversations was decreasing because we're very -- we, as the Corps and especially in our regulatory program,

want our data represented for exactly what it is. And I understand that there was a desire to be very inclusive and use that data to represent a lot of different things. And so that was the productivity of the conversation declining that I was referring to.

Q Okay. So did those meetings, after they reached this point where the productivity was declining, did they continue?

A Not to my awareness they did not. It was -- and I would characterize it as there was a decision that on -- and I would suggest that this was made on EPA's part, that we have the data that we need. We're going to use this to do the analysis that we need to do, and we'll come back to get additional data when we need it. And our folks were standing ready -- I was standing ready -- to provide additional data where it was necessary.

Q Sure. Did they ever come back to you for additional data?

A Not that I'm aware of.

Q Did you receive or provide any instruction on how to review the economic analysis or technical support document in any way?

A To my staff and to the individuals at ERDC, the Engineering Research and Development Center and the Institute for Water Resources, I asked them to look at both of those documents with their technical review eyes to -- on the economic analysis to assess if the documents were technically sound from their expertise; if the economic analysis document had corrected concerns that we had identified from the draft; if those concerns that we had previously identified had been alleviated; and if it was sound from their economic expertise

standpoint.

From the technical support document, we had previously reviewed a draft connectivity report, and I asked them, our ERDC scientists, to assess, were the concerns that we had been expressing previously, had they been alleviated or had they not?

Q Were you told in any way or did you receive any instructions about how the Corps should treat their review of these documents or to give EPA's analysis or conclusions any deference?

A No. I was not told that. Comments from the Corps were not requested on either of those documents.

Q So comments were not requested, yet you still provided comments to the EPA on both of those documents?

A We provided our technical comments. I provided our technical comments to General Peabody, and he provided them to Ms. Darcy so she would have our technical expertise as she was making her final decisions.

Q So are you aware whether Ms. Darcy communicated those concerns or comments or recommendations, whatever they were, to the EPA at any point?

A I'm not aware.

Q Okay. Did you take any meetings with the EPA on the economic analysis or the technical support document?

A No. Not after we were provided the drafts that were in the interagency review.

Q Did you take any meetings with OIRA on these documents?

A No. Not after they were in interagency review.

Q Before they were in interagency review?

A No. They were not points of discussion.

Q Okay. We know these meetings happened. So are you aware of who in the Army or Corps attended these meetings?

A I'm not aware. We were not --

Q The Corps was not --

A The Corps was not part of those meetings.

Q Okay. In your May 15 memo, you state that some parts of the economic analysis and technical support document have no information on how the EPA obtained their results, including that the EPA grossly overestimates the amount of compensatory mitigation required under section 404 of the Clean Water Act, and such benefits should have been described as costs.

I know you mentioned the mitigation issue earlier. Did anyone at the Army or Corps raise this miscalculation of benefits to the EPA specifically?

A In our initial discussions with our EPA counterparts, we talked about the extrapolation of Corps data that was proposed. So, yes, this was raised. I don't know if Army raised it --

Q Okay.

A -- after they received the memo or not. I don't know.

Q Did the EPA change their characterization of these amounts from benefits to costs in the final rule?

A In the final economic analysis?

Q Correct.

A I don't believe they did.

Q Paul Scodari echoed these concerns in his May 11 memo that was also attached to the Peabody memoranda stating that the Corps has always recognized that section 404 benefits analysis is meaningless, and from the beginning, EPA was intent on including a benefits analysis that would show that the rule's benefits outweigh costs.

Finally, he provided that the Corps, quote, "is just going to have to live with it and leave responsibility for defending it to EPA and OMB."

Have you or any of the Corps been involved in justifying the EPA's economic analysis or technical support document?

A No. I have not. And as far as I know, the Corps has not been part of defending the economic analysis.

Q Okay. Or the technical support document?

A Correct.

Q Do you know whether the Army has engaged in defending it?

A I don't know.

Q Okay. Have you been asked, you or anyone -- are you aware of anyone else in the Corps that has been asked to provide support for the ongoing litigation?

A Yes. We are -- me personally and my team is providing technical support to briefs to ensure that specifics are represented in defense of the rule.

Q Okay. And that would include the economic analysis and the

technical support document.

Ms. Navaro. You know, I think, obviously, we're not very comfortable talking about how the litigation's being conducted --

Ms. Aizcorbe. That's fair.

Ms. Navaro. -- and what kind of internal work --

Ms. Aizcorbe. I'm getting at staff resources. So what staff resources are being used right now to defend the economic analysis and the technical support document? Because that claim was made in these memoranda. So she said that the Corps was not engaged in defending them.

So my question is: Are you engaged in defending the rule, which, from what I am hearing, is yes because you're supporting the litigation, supporting the rule in defense of the rule, as she said it.

Ms. Navaro. Absolutely. Right.

Ms. Aizcorbe. Okay. So that's a yes.

Ms. Navaro. Right. But I would say that if you review the public filings in the litigation, I don't believe the economic analysis has yet come up. So --

Ms. Aizcorbe. But the economic analysis is the basis of the rule.

Ms. Navaro. Right. Okay.

Mrs. Bamiduro. Is this the witness' testimony? I am just confused as to the exchange that just happened.

Ms. Navaro. I just wanted to clarify that we're not comfortable in discussing the litigation. That was the purpose of my comments.

Mrs. Bamiduro. I just want to make sure that we're getting the

witness' statement on the record.

BY MS. AIZCORBE:

Q So let's just redirect.

Do you understand the exchange that just happened?

A Yes.

Q Okay. Would that be a fair characterization of the Corps' current engagement or activities with respect to the rule?

A Yes.

Q Okay. You stated in your May 15 memo that the EPA calculated an increase in jurisdiction from 2.7 percent in the proposed rule to 4.65 percent in the draft final rule, but left the cost estimate value blank for section 404 administrative costs?

A Yes.

Q What accounted for this 72-percent increase in jurisdiction between the proposed rule and the draft final rule?

A It's -- and that's difficult for me to say because we are unaware of what version of the final rule they used when they determined that increase in jurisdiction.

Q And by "they," you mean EPA?

A Right.

Q Okay. You estimated that this increase would result in an increase of approximately \$4 million in administrative costs. Did you ever communicate that number to the Army or EPA?

A We were never asked. That's why that line was blank. When that draft economic analysis was shared with OMB in the interagency

review process, we were never asked to provide that number. So in the memos, we shared that our increased administrative costs would be approximately \$4 million.

Q Okay. Was the \$4 million or any other amount of administrative costs ultimately included in the final rule for the section 404 program?

A In the economic analysis?

Q Yes?

A In the final economic analysis? You know, I don't know. I didn't check before I came. And it might be in there. I'm just not certain.

Q Okay. That's fair. In your May 15 memo, you state that the Corps cannot corroborate the numbers or conclusions in the technical support document, that the rule's distance limits for adjacent waters will protect the types of waters that in practice have been determined to have a significant nexus.

How were these distance limits in the rule determined?

A The 4,000-foot distance limits?

Q Yes.

A I don't know.

Q So you don't know who proposed the limits?

A The 4,000-foot limit was in a draft of the rule that we received. Mr. Schmauder transmitted it to us. I don't know who drafted what he transmitted to us.

Q But it was a draft of the rule --

A Correct.

Q -- where these were located?

And that was the first time that you had seen them?

A Correct. We had received a previous version that had 5,000 feet.

Q Okay. So you are unaware of who decided those limits, then?

A Correct.

Q Okay. And are you aware of the bases underlying the distances that were set?

A No.

Q Were you ever consulted about the distances that were set?

A No. I was not.

Q Okay. Were public comments on specific distances sought, received, or considered?

A A specific distance was not specifically -- public comment on a specific distance was not solicited. It certainly was referred to that a proximity was in the proposed rule as something the agencies would consider as setting a distance threshold. But specific distance thresholds were not put out as something for the public to comment on.

Q Okay. Did you ever meet with or provide examples to Assistant Secretary Darcy on how these limits are incongruent with existing jurisdictional determinations?

A In a briefing, we did share with Ms. Darcy a series of maps and representative examples of approved jurisdictional determinations for aquatic resources that lay outside of these distance thresholds

so that she was able to visualize aquatic resources that were currently jurisdictional that would no longer be jurisdictional as a result of setting distance thresholds as articulated in the final rule.

Q And how were these comments or information received by Ms. Darcy?

A She was very open to hearing the information. I think that I would characterize her reaction as bothered that jurisdiction would be lost over resources that we currently had jurisdiction over. And she wanted to talk about how we were asserting jurisdiction over those resources; and what we saw as the functions and values that those resources were providing; and what the impact of losing jurisdiction over those would be on the overall aquatic resources of the Nation.

Q After that briefing, did you provide any guidance or further comment to the EPA or anybody in the Army on these limits?

A We continued to have conversations within that team of eight in our sporadic conversations that we had about our concerns that we would be losing jurisdiction over these resources.

Q So in none of the team of eight meetings where you were discussing these limits did you ask where they came from?

A Oh, we repeatedly asked. And Mr. Schmauder asked, what is the scientific basis for establishing these limits? And there were some very dynamic conversations about how we were asserting jurisdiction beyond them and whether or not there were ways in which language could be tweaked to ensure that we wouldn't lose jurisdiction. So it was a very dynamic conversation.

Q And specifically regarding the team of eight, just so I understand, I understand we will get a list from you later just to confirm who was in there, but it was EPA, the Army, and Army Corps. Correct?

A Correct.

Q No other organization or office was represented in those meetings?

A Correct.

Q Okay. In your April 24 memo, you provide that the guide book accompanying the Rapanos guidance states that it is not appropriate to determine significant nexus based solely on any specific threshold of distance.

Do you know why these distance limits were included in the final rule despite this assertion?

A I think that a lot of the discussion was that we were needing to provide additional clarity. We were moving beyond what we had provided in the Rapanos guidance. And I think there was a recognition among those of us that had regulated under the Rapanos guidance that there are different ways of thinking about jurisdiction. It's very complicated. And there are benefits to having distance thresholds. It's very easy for the public to understand. It's very easy for a regulator to measure a distance. But it is very difficult to figure out what that distance should or could be, and to be able to support a specific distance threshold with science. And I think the charge in this rule -- I don't think. I know the charge in this rule was to

develop a rule that's supportable by sound science and the law. And so it's difficult to do that.

So the quote is exactly on point. The Rapanos guidance didn't allow us to rely solely on proximity as a determinant for asserting jurisdiction. But I think we were trying to include some piece of that to provide that crystal clear clarity -- that's hard to say -- so that an average person could sort out if the waters on their property were or were not jurisdictional.

Q Okay. In your May 15 memo, you provide that EPA's own connectivity report, the scientific basis underlying the rule, recommend against using line and distance limitations to establish jurisdictional boundaries. Can you again explain why limits were then included, seemingly by EPA, in the rule despite this recommendation in its own report?

A I can't. I can't explain it. Other than it's a policy decision and the policymakers made a decision based on information that may not have been before me but was before them.

Q Okay. You continue in your April 24 memo that to verify the exact portion of waters lost to Federal jurisdiction under these limits, the Corps would need to complete a robust analysis of its data that would yield statistically significant and reliable results and that this is precisely the type of research and analysis that would be undertaken in completing an environmental impact statement.

Did the EPA, Army, or Corps consider this concern in its determination to execute an environmental assessment in lieu of an EIS?

A I don't know what Army considered in their determination to complete an EA versus an EIS. That decision rested with Ms. Darcy. In my suggestion and recommendation of the data, I want to talk about the fact that the Corps doesn't track and didn't track, under the Rapanos, guidance the distance that an adjacent water body is from a downstream traditionally navigable water. And so, therefore, we aren't able to -- we weren't able and still are not able to say, how far those water bodies are away from where we're determining they have a significant nexus to. So that's why without that robust analysis, we can't definitively say how many aquatic resources would be lost to jurisdiction or would be retained within jurisdiction based on this 4,000-foot threshold.

Q So you're saying in an effort to comply with providing the science that underlies this rule and determining exactly how much jurisdiction may be covered by this rule, without the EIS, you really couldn't fully do that. Is that correct?

A We couldn't definitively say -- knowing that up to 10 percent could be lost, we couldn't make a determination of significance.

Q Do you believe that Ms. Darcy understood that concern when she made the decision to execute an EA?

A I think that she understood the data concern. It was certainly conveyed to her. I don't know what else was before her when she made that decision.

Q Okay. And to be clear, then, this type of robust analysis

that you're talking about never -- was not conducted before the rule was finalized?

A It wasn't. That data analysis was not conducted.

Q To your knowledge, did the EPA engage in a NEPA analysis, National Environmental Policy Act analysis, for its own programs under sections 401, 402, and 311?

A They didn't. I believe they're exempt from NEPA.

Q But they could voluntarily conduct an analysis. They didn't engage in any that you know of. Did they?

A I don't believe they did.

Q Okay. In your May 15 memo, you close by saying: The economic analysis and technical support document should not be characterized as anything other than the analysis performed solely by the EPA, and that the Corps should not be identified as an author, co-author, or substantive contributor to either document, and that all references to the agencies should be removed as well as references to conclusions drawn based on the Agency's experience and expertise.

Is this still a fair characterization of the Corps' involvement in the analysis underlying the rule?

A In those two documents, yes.

Q Okay. Moving on, we're going to speak a little bit about the tribal determinations for the rule.

In your May 15 memo, you provide that the statement in the economic analysis that this action does not have tribal implications, as specified in Executive Order 13175, is patently inaccurate, and that

the effects have not been identified and evaluated.

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

A It was not the Corps.

Q Were you given the opportunity to weigh in on this decision?

A No. I was not. My office was not.

Q Okay. Are you aware of who drafted the final summary of tribal consultation for the Clean Water rule, published in May of 2015?

A I'm not aware who drafted that, no.

Q Okay. Were you given an opportunity to review this document?

A No.

Q You also state in your memo that the affected tribes were not consulted as a part of the analysis, which appears to conflict with the EPA and Army's characterization in their final summary of tribal consultation for the Clean Water rule.

Were any tribal consultations conducted in the course of this rulemaking?

A Tribes weren't consulted following the Corps' tribal policy, to my knowledge. We did not engage in any government-to-government consultation with tribes on this rule.

Q Is that something that the Corps typically engages in on rulemakings?

A Yes.

Q Are you aware of who conducted them if they were conducted?

A I'm not.

Q Who within the Army Corps usually conducts the tribal consultations under this executive order?

A We're undertaking a rulemaking right now on the Nationwide Permit Program, and our district offices will consult with the tribes within their areas of responsibility.

Q Okay. And then their recommendations or comments are sent to you?

A Yes.

Q Okay. So in the course of this rulemaking, the Waters of the United States, you did not receive any comments from your district offices regarding tribal consultations?

A No. And they wouldn't have done it on this one. I would have presumed that it would have been Army or the Corps working with EPA with each of the federally recognized tribes.

Q Okay. The EPA and Army Tribal Summary, which I have as an exhibit -- I'll just do this so we can get it --

Mr. Składany. We'll mark this exhibit 2.

[Moyer Exhibit No. 2

Was marked for identification.]

BY MS. AIZCORBE:

Q As exhibit No. 2. You can have a copy too.

The summary states that: "In the course of this consultation, EPA coordinated with Army, and Army jointly participated in aspects of the consultation process."

Do you know what aspects this document is referring to?

A I'm not aware.

Q Okay. Is this the first time you're seeing this summary document?

A The cover looks familiar to me. But I'm not familiar with the contents of this.

Q Okay. But typically in a rulemaking where the Corps engages in Tribal consultations, you would have a part in drafting such summary to satisfy the executive order?

A That is -- yes. That would be my expectation, yes.

Q Okay. Regarding State outreach, did the Corps conduct outreach with all 50 States regarding this rule?

A The Corps did not, no.

Q Are you aware if the EPA conducted outreach with all 50 States regarding this rule?

A It's my understanding that EPA worked -- and I participated in some of this, not all of this, worked primarily through the State organization so -- ASWM. So that is the Association of State Wetland Managers, ECOS [Environmental Council of the States] -- oh, gosh. And I'm not going to know what that stands for right off the bat. And ACWA [Association of Clean Water Administrators]. So that's the association of -- I'm not going to know -- I can get you what they stand for. So we have relied on the associations that -- the State water quality agencies and wetland managing agencies bring together those State folks.

Q Okay. So you or the Corps did not meet with them, though. The EPA did?

A I participated in some calls with them talking about the rule and soliciting their feedback. I did not participate in all of the discussions with them.

Q Okay. Did you summarize those comments received by the States or share them with anybody in the Corps or Army?

A We discussed State -- I didn't -- there are some of them are written down, but we discussed State input in some of the team of eight meetings. And as we were drafting the rule, some of that came up. But it wasn't a formalized writing down on my part of those meetings.

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

A No.

Q Are you aware of who made the decision that the rule would not have a significant economic impact on small entities?

A No. The SBREFA stuff is an EPA responsibility. It's not a Corps responsibility.

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

A I was aware of that letter, yes.

Q Okay.

Ms. Aizcorbe. We also have a copy of Advocacy's comment letter, which we will submit as exhibit 3.

[Moyer Exhibit No. 3

Was marked for identification.]

BY MS. AIZCORBE:

Q Did you review Advocacy's comments after they were submitted to Major General Peabody?

A I read them, yes.

Q Did you make any recommendations based on Advocacy's comments?

A General Peabody and I discussed them. And I don't recall that we made any recommendations. What I discussed with him is that the SBREFA issue is an EPA issue. But we definitely had a discussion about this, and we talked about how this may be being handled moving forward.

Q Were those comments shared with Ms. Darcy?

A I don't know what he did with that conversation.

Q In its comment letter, Advocacy states that the agencies used an incorrect baseline for determining their obligations under the RFA, that the rule imposes direct costs on small businesses, and the rule has a significant economic impact on small businesses.

Were you aware that the 1986 regulation was used as a baseline for this certification, which results in a narrowing of the Clean Water Act jurisdiction; whereas, the economic analysis used current practice

and results in approximate 3 percent increase of jurisdiction?

A Yes. I was aware of that.

Q Did you have any discussion with anybody about the difference of the baselines between?

A That was part of what our concerns were with the economic analysis.

Q Had you had any discussions about the use of that baseline for purposes of the RFA determination before it was made?

A I don't recall discussions on that point, particularly to the SBREFA issue.

Q Are you aware of why the EPA decided to use that baseline instead of current practice?

A No, I'm not aware of why they made that decision.

Q How was your staff involved in the development of the rule's cost? Were you at all engaged in the process of developing a cost estimate --

A No.

Q -- for the rule?

A No.

Q Okay. Do you disagree with Advocacy that the rule imposes direct costs on small businesses?

A I don't really have an opinion on their letter.

Q Okay. And so you don't also have an opinion that it will have a significant economic impact on small businesses?

A I don't -- and it's been a while since I've read it. So,

I mean, you're kind of hitting me cold with this.

Q That's fine. That's fine. Are you aware of the EPA or Army suggesting that they would use informal outreach to satisfy the requirement to obtain input from the small-business community?

A I wasn't aware that they had made that decision. And this is partly because the small-business lift is an EPA lift. And so the Corps was focusing on things that were our responsibility. So -- and that's partly why you're hearing from me that I wasn't concentrating on this. It's not that I don't think that these issues are important.

Q Was the Corps involved or otherwise knowledgeable of the small-business outreach meetings that were being held by the EPA?

A Many of these were happening when I wasn't chief. So I know that from being deputy, Meg was tracking a lot of this. So she may be better able to speak to some of this than I am.

Q Okay. Did you -- or did the EPA, Army, or Corps consider alternatives when drafting the rule?

A Alternative rule language? Absolutely. And alternative approaches, yes.

Q Okay. Are those documented?

A Yes. As I've mentioned before, there were many versions of the rule with many different -- you'll -- when you can -- when you look at the different versions, you can see there were many different trains of thought that were being pursued.

Q Okay. So those alternatives would be included in the administrative record for the rule?

A I don't know if they're in the administrative -- in the official administrative record or not. But there were many drafts.

Q Okay. Now let me change gears. Understanding the communication structure at the Corps and ASA's office, I'd like to ask a few questions about the process engaged during the rulemaking.

Were you ever told that your communications regarding the rule would have to first be reviewed by certain staff?

A No.

Well, let me ask a clarifying question. What do you mean by "communications"?

Q Any communications with respect to the rulemaking, either internally or externally. Were you ever given any direction as to how you were to communicate about the rulemaking? Or that it would have to go through some sort of clearance process before you made a communication externally or internally?

A Not during the process. After the rule was sent to OMB, we did receive a message to -- from Ms. Darcy that said that her office would be communicating with Congress, with the other agencies -- and I don't think she said the public -- but with Congress and the other agencies on the rule. General Peabody sought clarity or clarification on her message, meaning: Do you mean the Corps can't speak at all? And she provided that clarity to say: No. That's not what I meant. And we were able to continue to engage in interagency conversations as appropriate on the rule as it was in OMB vetting.

It was definitely suggested that the messaging documents on the

rule itself were the ones that we needed to use. And we did to the maximum extent that we could. We also developed Corps documents so that our field elements could pull from those the salient points to the regulatory program. The messaging documents that were developed were definitely for the general public. And the regulators in the field, the individuals executing the program, needed things more -- of a more technical nature.

Q So what was Ms. Darcy's specific instructions regarding the communications?

A And I'm recalling. This was a while ago when the rule -- you mean the media documents?

Q The memo that she executed or issued that suggested that your communications should be treated in a specific manner.

A It wasn't from her. It was from a member of her staff who deals with public relations. It was, here are the messaging documents, the press release, some fact sheets on the rule, after it was finalized. These are for dissemination. These are the documents that will be used. And that's what we used. We also developed internal documents and talking points for our district commanders and our regulatory chiefs to use that were more specific.

Q But you were never told that any of your communications had to go through any clearance of any kind?

A Correct. We were not.

Q Were you ever told or feel pressured to treat your communications in a certain manner with respect to the comments made

to public or that may become a part of the administrative record?

A No. I think that we weren't told that.

Q Were you ever told or feel pressured to treat your communications regarding the connectivity report in a certain manner?

A Yes. There was a memo in I forget when in 2013 -- it wasn't sent to me; I was deputy then, so it was prior to June -- that indicated that any comments on the connectivity report must be sent to Army and Army would share them.

Mrs. Bamiduro. I missed the last part.

Ms. Moyer. That our comments must be sent to Army, and Army would share them.

Mrs. Bamiduro. Thank you.

BY MS. AIZCORBE:

Q Is that common for a rulemaking where you would be asked to send all comments on a scientific product to Army before they're shared externally?

A It hadn't been common in this rulemaking. We had been sending comments to EPA and sharing feedback with EPA. So it was a change in practice on this one for the request to come from Ms. Darcy to General Bostick that the comments come through her office.

Q And that was regarding any communication regarding the connectivity report?

A That's my recollection.

Q So that would mean that any staff who discussed the connectivity report would not be able to engage directly with EPA staff.

Correct? Like the Corps staff would have to go up through the Army before those comments were shared with EPA?

A That's my recollection of the memo.

Q Okay. Were you informed of the dates that the administrative record would cover?

A I'm sure I have that in a memo. But I don't have it in my head.

Q Staff understands that it's from April 2014 on. Are you aware of, for purposes of compiling the administrative record from April 2014 on, with such a limited period of time, do you have any indication why this period would not cover the entirety of the rulemaking?

A No. I don't. Because it's been a long period of time.

Q Is that a direction -- as far as your documents retention for purposes of compiling the administrative record for rulemaking -- is that a direction that would come from Army or from EPA typically in these joint rules?

A My direction comes from my internal counsel about what to retain and how to retain it and --

Q Okay.

A -- my guys are always very inclusive. So --

Q Okay. Were you ever told in any way or feel pressured to conduct your work to achieve a specific result?

A The Corps has never directed me to do anything to achieve a specific result.

Q Okay. Were you ever told in any way or feel pressured to alter the course of your work or data to achieve a specific result?

A The Corps has never directed me to do that. No.

Q Have the Army or EPA directed you to do that?

A No one has directed me to alter my work, and nor would I.

Q Okay. Were you ever told in any way to speed up the process of your work or the rulemaking?

A And I think we talked about this a little bit already. There was talk about we need to be finished or we expect to deliver a product to OMB. First it was in early 2015, and then that shifted to spring.

Q Okay. Were you ever told in any way that certain information would not reach the EPA, the public, or other body as intended?

A No. I was never told that.

Q You were never told that the Peabody memoranda would not be seen, delivered, shared, or released?

A Oh. Thank you for asking -- for clarifying that. Yes. I did hear that the -- that those memoranda would never leave Army.

Q Okay. And who told you that?

A Mr. Schmauder said that. And I will say that they were never intended to go any further than Ms. Darcy.

Q Sure. Was Mr. Schmauder the only individual who communicated that?

A Yes.

Q Okay. Did you discuss that with Mr. Peabody?

A I believe we must have. I don't recall specifically discussing it with him. But I believe we must have because our intent was for them never to go beyond Ms. Darcy.

Q Sure. Were you ever told in any way or feel pressured to achieve the administration's objective in this rulemaking?

A I did not feel that pressure. My sole objective in this effort was to provide the best technical advice and recommendation for options as I could.

Q Did you ever engage in any communications where the administration's objective was discussed in the manner that suggested that your work should work toward what they were seeking out of the Waters rule?

A I didn't feel as though it was ever discussed in an overt way the way that question characterizes it. No. I mean, to me, the objective was very clear, that providing clarity to a rule that is pertaining to jurisdiction and supportable by science and law.

Q Okay. At any other point during your tenure with the Corps, did you feel pressured to direct the Corps' work or data analysis to achieve a certain result?

A No.

Q Were you ever told in any way or feel pressured to avoid completion of an environmental impact statement?

A No.

Q Nobody ever communicated to you that you should conduct an

environmental assessment instead of an environment impact statement?

A They didn't communicate that to me. The NEPA analysis was happening at Army. It wasn't happening in the Corps.

Q The Army executed the NEPA document for this?

A Preparation, yes.

Q Okay.

A So it was not happening in my office.

Q Does Army always prepare the NEPA documents for rulemaking --

A No.

Q -- for the Corps?

A No. This was a unique circumstance. And it was being prepared at Army. Army offered to do this starting further back in the process because we were doing guidance; then we switched to a rule; we were back in guidance; and then we switched to a rule again. Army offered to do this because my staff and I had too much on our plate. So they offered to draft what was an EA and remained an EA because I didn't have the staff to support that effort. And so it stayed there. Normally, we do the NEPA documentation in my office.

Q You mentioned before that you had recommended that an EIS be conducted. Was one ever drafted?

A Not to my knowledge, no.

Q Nobody ever began drafting an EIS?

A To my knowledge, no.

Q And you don't know why an EIS was not pursued by the Army,

despite your recommendations?

A It's my understanding that Army reached a different conclusion.

Q Do you know when that decision was made?

A The --

Q The decision to pursue an environmental assessment versus an EIS.

A It's my understanding that an EA was drafted, and the conclusion was a finding of no significant impact, not that it was a finding of significant impact. So they concluded their EA at the time that the rule was finalized.

Q Who drafted the EA?

A The EA that supported the rule was, I believe, drafted by Gib Owen.

Q Was there another EA that didn't support the rule?

A I believe that there was an initial draft that was -- that was completed earlier on in the process.

Q Do you know who completed that?

A I believe that was completed by Chip Smith.

Q So why was Chip Smith not drafting the second EA?

A I think you'd have to talk to Mr. Schmauder or Ms. Darcy about why there was a change in staff. I'd have to speculate.

Q Okay. Do you know how long Mr. -- you said -- was it Gib Owen who completed the EA?

A Yes.

Q How long did he work on the rulemaking?

A I believe he started working on it in the April timeframe.

Q Okay. So he didn't have much time on this rulemaking at all before he was brought on to conduct the environmental assessment?

A That's correct.

Q How long had Chip Smith worked on the rulemaking?

A Since the beginning.

Q But you said you're not aware as to why he was taken off?

A I'd have to speculate.

Q Are you aware of any other change in duties of Mr. Smith's?

A No. I just -- he no longer works on Clean Water rule issues.

Q Yet he'd work on it since the beginning?

A Correct.

Q Was that -- is his background in Clean Water jurisdiction?

A He is the Special Assistant for Tribal, Regulatory, and Environmental Issues in Ms. Darcy's office.

Q I believe earlier today you said he was the point of contact in the Army office on this issue. So I'm just trying to get a handle on why this was changed, why he was taken off the rule.

A And I would have to speculate about why he was taken off.

Q Okay. To your knowledge, do you know whether Mr. Owen was trained or coached on how to execute the environmental assessment?

A I don't know.

Q Or what information he was provided since he'd only been

working on the rule since April?

A All I know is that I answered a few questions for Mr. Owen. But I did not provide him a lot of information. I don't know what he had available to him other than a few questions that I answered by email for him.

Q Okay. Do you remember what those questions were?

A I provided definitions of what an approved jurisdictional determination was, what a preliminary jurisdictional determination was --

Ms. Fraser. Can you keep your voice up?

Ms. Moyer. Sure. And some information on the numbers of jurisdictional determinations of each type that we do. And some basic regulatory program information.

BY MS. AIZCORBE:

Q This basic regulatory program information and some of the definitions that you were just saying, are those things that your regulatory staff would typically know?

A Yes.

Q So isn't -- in your opinion, is it a little questionable as to why they would be putting somebody in charge of writing the environmental assessment who doesn't know what these basic regulatory terms mean?

A It was interesting to me that those were the types of questions I was answering.

Q Especially in light of your recommendation that a robust

analysis that only an EIS could provide was decided against in the Army?

A And, again, I don't know what other information was before Ms. Darcy when she made that decision.

Q Are you aware of any other staff whose duties changed with respect to their work on the rule, especially somebody who was as focused on the rulemaking as Mr. Smith?

A I don't know. And, again, I'm not in that office. So I don't I don't know.

Q Sure. Are you aware then -- I guess my second question would be -- of any retaliatory measures that were taken on any of the staff who worked on this rulemaking?

A I'm not aware. I would think you'd need to talk to Mr. Smith.

Q Okay. Did the Corps have any -- does the Corps usually receive deadlines under which they perform their EAs or EISs?

A We are usually working to milestones. We don't -- and I don't think this was a deadline that this document was being produced under. I think that Mr. Owen was most likely working to a milestone. So, no, we aren't usually working to deadlines.

Q So you're not aware of any time or deadline that he was given to finish his environmental assessment?

A No. Because he was -- I don't -- I'm not aware of any. He may have had one. I'm not aware.

Q Were either of the environmental assessments circulated for interagency review?

A I'm trying to recall whether the EA was circulated in the OMB process. I'm not being able to recall if it was or was not.

Ms. Aizcorbe. That was all I had, actually, on this. Okay. I think we're ready to switch.

Mr. Hambleton. Go off the record.

Ms. Aizcorbe. Go off the record. Thank you.

[Recess.]

RPTR MAAR

EDTR HUMKE

[2:23 p.m.]

BY MRS. BAMIDURO:

Q It's 2:23 and we'll go back on the record.

Hi, Ms. Moyer.

A Hi.

Q My name is Portia Brown. And I am with Ranking Member Cummings staff -- that's right. My name is Portia Bamiduro. Brown is my maiden name. Thank you.

And I just want to ask you some clarifying questions about some of the testimony that you provided earlier today. And I apologize if I might bounce amongst a variety of different topics. You mentioned before that there was some sort of timing associated to which you were working on the rulemaking. Is that right?

A Yes.

Q Is it uncommon to have some sort of estimated deadline in working on rulemaking?

A It's not uncommon depending on the type of rule we're working on. I was not dismayed that we had some timing expectations. And it was not concerning to me that that timeframe kept shifting.

Q I think you mentioned in the last hour that public comments were not solicited regarding a specific distance for a bright-line rule. Was that accurate?

A Right.

Q Do you know whether, in fact, public comments were received regarding a specific distance?

A I don't recall if we received specific comments that stated certain distances. And that's just because my brain doesn't retain as much as it used to.

Q Sure. But I think you also said in the last hour that you did not review all of the comments. Is that fair?

A That is fair.

Q In the last hour, you were asked about some staffing decisions that were made. Do you know the bases for the staffing decisions that were made on who would be working on what various parts of the rulemaking?

A At Army?

Q At the Corps. So let me be specific. I believe in the last hour, you were asked about the people or the persons who were writing the economic analysis. Is that right?

A Yes.

Q And there were some staffing changes that were made as that was being drafted. Is that correct?

A Right. We didn't draft the economic analysis. So any staffing shifts that were made within the Corps' Regulatory Program, I can talk to. But the economic analysis it's my understanding was drafted at EPA.

Q Do you know the qualifications of the person or persons who

drafted the economic analysis?

A At EPA?

Q Yes.

A No. I do not.

Ms. Fraser. In the last hour, you were asked about an EA. Now, that could be either economic analysis or environmental analysis.

Ms. Moyer. Right.

Ms. Fraser. Now when you were talking about staff changes, were you referring to the environmental analysis or the economic analysis?

Ms. Moyer. I was talking about the environmental assessment that was done at Army.

BY MRS. BAMIDURO:

Q And so for the environmental assessment that was done at the Army, were there staff changes regarding who drafted that?

A That's my understanding, yes.

Q And do you know the bases for those staff changes?

A No. I don't.

Q I believe in the first hour, you were asked about meetings that took place among the "team of eight." And I'm using air quotes for the record. And you said that meetings stopped around November 6th, is that right, 2014?

A Correct.

Q And then resumed again middle of January 2015. Is that right?

A That's right. They were sporadic after they resumed in

January.

Q So during the period of November 6th through roughly middle of January 2015, did all communication stop as well?

A Communications among that group of eight, team of eight ceased. There were still individual communications between me and my EPA counterparts on regular program execution issues. I continued to touch base with them and they with me on general matters and overarching matters pertaining to our efforts at reviewing and categorizing comments and our efforts at reviewing specific jurisdictional determinations to inform the economic analysis.

Q And I believe you said earlier, but I just want to clarify for the record, that you are not aware whether communications above you were still taking place during that November 6th, 2014 to, middle of January 2015 period. Is that right?

A That's right. I do not know.

Q Okay. You've stated that you've been involved in rulemaking prior to the WOTUS, I'm calling it the WOTUS -- Waters of the United States 2015 rulemaking. You've been involved in other rulemaking. Is that right?

A Yes.

Q And you said with regard to this particular rule that technical comments, and correct me if I'm wrong, were to go up through the Army and that the Army would share them with the EPA. Is that right?

A That was a memo that was received from Ms. Darcy to General Bostick, who is the commanding general for the Corps of Engineers,

specifically related to the connectivity report.

Q Okay. In your other rulemaking experiences, have you ever encountered a situation where comments would go up through the Army first before being shared with another agency?

A That hasn't been my experience on the other rulemakings I've been involved with.

Q Do you know why that was the process that was laid out here?

A Specific to the connectivity report, so it wasn't on the whole rulemaking, it was just specific to the connectivity report --

Q Sure. Thank you for that clarification.

A -- I don't know specifically why that directive was given. I don't.

Q Do you have any reason to believe that the comments were not shared with the EPA on the connectivity report?

A I don't have any reason to believe that they weren't.

BY MS. FRASER:

Q So, Ms. Moyer, I wanted to talk to you about some of the comments that you made in your technical analysis that was attached to the memorandum to Major General Peabody. Now, what exactly is a technical analysis as far as the document that you put together?

A Can you tell me specifically which one you're talking about? Is it the May 15th?

Q Yes.

A So this technical analysis is a compilation and a reflection of comments that were received by me from our scientific staff at the

Engineer Research and Development Center and Institute for Water Resources, as well as my staff at headquarters after they reviewed the technical support documents and the economic analysis.

Q So they contributed content to the technical analysis directly to you?

A Yes. They did.

Q Were those contents received in writing?

A Some of them were. And some of them were expressed to me verbally.

Q And you essentially took these comments and compiled them into this technical analysis?

A I did. And I also read the documents.

Q Besides you writing it, who else contributed to the writing of this document?

A Nobody.

Q So you just took everybody's and aggregated the information and put it in this document?

A And included my own analysis.

Q Now, in this memorandum, you said it was unknown to the Corps that until early February that the Army and EPA were contemplating a bright-line cut-off for CWA jurisdiction either at the 5,000 or 4,000 linear feet from the ordinary high-water mark or high tide line and a robust interagency discussion on potential effects of the bright-line and currently jurisdictional bodies have continued on that time. Did you say that in the memo?

A If it's in there, then, yes, I did.

Q Is it possible that even though you did not know that these discussions were taking place, that they were, in fact, taking place and that the content was being shared with Ms. Darcy?

A That is certainly possible.

Q Do you know whether or not anyone else, besides staff of your regulatory shop, was involved in these discussions and provided information to the Army or the EPA?

A From the Corps of Engineers?

Q Yes.

A I think that the probability of that is extremely low.

Q But it's entirely possible, right? It's a question.

A Anything is possible.

Q One of the statements you made in your memorandum was that, and we discussed with you, you testified in the first half of the hour that in order to verify what portion of the 10 percent jurisdictional waters would be lost to the CWA jurisdiction. There would have been a need for a type of analysis that should have been undertaken under an environmental impact statement, right?

A That's what I said, yes.

Q Now, you are aware, and we were talking about this just briefly, that the assistant secretary's office conducted the environmental assessment, right?

A Yes. They did.

Q And you mentioned that two people that you know of

contributed to writing that environmental assessment, right?

A There were two individuals who drafted environmental assessments.

Q Do you know whether or not it was limited to just those two people? Or could there have been other contributors?

A It's my understanding that there were other contributors to both of those documents.

Q Do you know who they are?

A I know that to the initial draft environmental assessment. There were several of our professional developmental assignments who contributed. And then to the second environmental assessment, there were several contributing authors, two individuals from the New Orleans district, and then several of the other staff from the Secretary's office.

Q And the folks who contributed from the New Orleans district, they are Corps staff members?

A I believe they are, yes.

Q What capacity do they serve in?

A I believe they're from our Planning Division in the New Orleans district.

Q And so they would be outside of your regulatory shop?

A Yes. They are.

Q Do you know whether or not the individuals from the Corps were involved in any other aspect of this rulemaking besides offering the environmental assessment?

A I don't know if they were or not.

Q Do you know if anybody else besides those two were involved in any other aspect of this rule?

A I do not know if there were other staff members. I would be curious as to what their technical contributions would have been.

Q Now, the two people you mentioned from the Army were Gib Owen?

A Yes. Gib Owen was one. And I believe there were two economists that were involved in the drafting of the environmental assessment, the second one.

Q The second one was dated when?

A That was the one that accompanied the final rule.

Q Is this the one that has the finding of no significant impact, is that it?

A Yes. That one.

Q When was the approximate date of this document?

A I would say it was in the April, May timeframe.

Q You mentioned that the two people in the Army were economists. Are you familiar with what their qualifications would be?

A I would assume their educational background is in economics. I don't have a copy or have reviewed their resumes, no.

Q You say you think they're economists. Do you know their names?

A Yes. Tom Hughes and Maryanne Metheny-Katz.

Q Now, as far as, have you read the environmental assessment?

A I have skimmed it, yes.

Q You've skimmed it. Do you know whether or not, based on what you've looked at, whether or not this document is written in harmony with NEPA?

A It follows the format of NEPA, yes.

Q And what was the purpose of doing the environmental assessment?

A The purpose of doing the environmental assessment was to examine alternatives specific to the 404 program pertaining to this rule.

Q Well, would one of the purposes be to document the potential environmental effects of the rule, including 404?

A Well, it would just be specific to 404, but yes.

Q Would another purpose be to decide whether or not an environmental impact statement was necessary for the proposed rule?

A That is one of the purposes of doing an EA.

Q So this EA, and the EA in this case we're talking about the environmental assessment not economic analysis, they found that there was no significant impact, right?

A That is the conclusion, yes.

Q Once there's a finding of no significant impact, then it means they will not proceed to an EIS, correct?

A Correct.

Q And this was a finding by members of your staff as well as members of the Army staff and their conclusion, right?

A Not members of my staff, no.

Q Well, members of Corps staff, right?

A Correct.

Q And when I say your staff, I mean the Corps.

A Okay.

Q Now, so you're disagreeing with your staff that an EIS was not necessary here, Corps staff?

A It's not my decision to make. It was Ms. Darcy's decision. She signed the FONSI.

Q Well, did you make a statement earlier that you felt that an EIS was necessary here in order to justify loss of 10 percent CWA jurisdiction?

A I said the type of analysis that would be included in the EIS was necessary to sort out what the level of impact was and to make a determination of significance. That analysis isn't included in that EA.

Q So if you're going to do the type of analysis that would be consistent with an EIS, then why not do an EIS? Could you do some lesser type of analysis?

A That environmental assessment didn't look at the data that I suggested needed to be looked at.

Q So you're saying that of the 4 or 5 professionals that created this document, that you felt that something greater was needed than what they did?

A Yes. That was my recommendation.

Q And you made this recommendation clear to Ms. Darcy?

A Yes.

Q And you felt that she was informed by inadequate information based on this document that was prepared?

A My recommendation was that further data analysis was needed to determine the types, the impacts to the types of resources that may be lost.

Q Besides in this memo, did you make an independent proposal to do a more detailed analysis yourself?

A It was included in my memo, the type of analysis that I thought was necessary. I understand that Ms. Darcy made a different decision. It was her decision to make.

Q Now, you mentioned that this rulemaking was going to result in a 10 percent loss of Clean Water Act jurisdiction. How exactly did you arrive at 10 percent?

A And what I put forward is it could result in up to a 10-percent loss of jurisdiction.

Q What are you basing that on?

A What I based that on is, and it's technical and I can point to you where in the memo I talk about it. It might be helpful. What we track is that -- within our program, we don't specifically demarcate how far away nonadjacent or adjacent, non-abutting wetlands are from their downstream traditional navigable water, to which we have to determine significant nexus. So approximately 10 percent of the adjacent waters under the Rapanos guidance are adjacent, non-abutting

wetlands. So a certain percentage of those are outside of 4,000 feet. We don't know what percentage of them. So we have to make an assumption that it could be up to that full 10 percent.

So it's that analysis that we would have to go through and look individually at all of those documentation forms for jurisdictional determinations to figure out what percentage, and then sort out what are the functions being provided by those jurisdictional aquatic resources to determine how significant that potential loss of jurisdiction would be.

Q Right. So by the time you got the 10 percent, you're basically speculating based on what you thought the data would show once the rule got implemented, right?

A What my assertion is is that it could be up to 10 percent.

Q Could be up to 10 percent. And in your estimation, that 10 percent is a line that you have determined would cause a negative impact to the environment and to humans?

A I never even got to the point of suggesting that the impact to those would be significant or not. I can't even tell what that percentage actually is.

Q Can you take a look at your memo, paragraph 7.

A That's exactly where I am.

Q Okay. 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 national environment.

A Exactly. Without knowing what it actually is, we can't say

that they wouldn't be.

Q Now, based on the fact that you've decided that up to 10 percent of the jurisdiction could be lost, you felt that the information that the secretary was relying on in making her decision to go along with this rule was flawed?

A I felt as though she needed this information and she needed specific examples of the types of resources that would be lost with the 4,000-foot threshold. And that's what she was provided.

Q Let's talk about your comments on the tribal consultation. Now, you said that the EPA's representation is patently inaccurate when they said that the economic analysis, I'm sorry, that the expansional loss of waters would not have significant effect on tribes. Now, you said that the EPA was inaccurate when they made that statement?

A You're right. I said that.

Q You also said that you were not privy to the outreach that EPA did with the tribes. Did you?

A I said that I did not participate in the outreach sessions that they did with the tribes. I was aware of the sessions that were scheduled with certain groups that represented tribes. But there certainly weren't individual government-to-government consultation sessions with the 500 and X number of Federally recognized tribes on this rule.

Q How do you know who EPA met with and what they talked about if you were not present in those meetings?

A Well, I can base that comment on the fact that there were

400 outreach sessions and there are over 500 Federally recognized tribes.

Q Is it possible that one tribe could go to more than one outreach? Or more than one tribe could show up at one outreach?

A And I guess I'm basing my comments on the fact of my understanding of the Corps' tribal consultation policy. And that is that outreach sessions don't comprise government-to-government consultation on an action. So to also suggest that changes in jurisdiction don't affect tribes is, on its face, a statement that doesn't make sense.

Q I want to, let's stick with, not with the Corps' position so far, let's talk about what the EPA did. I just want to clarify. You were not involved in EPA's outreach, nor were you involved in any of the EPA's interactions with tribes regarding the development of this rule, right?

A We've already talked about that.

Q I just want to be clear. What was your answer?

A Correct.

Q Okay. And did you read any reports, or documentation, or receive communication, directly from the EPA about what the content of those interactions were?

A There were none provided until this was received.

Q And do you know when EPA started its outreach and interaction with the tribes and when that interaction ended for purposes of developing this rulemaking?

A Other than what is presented in this document, no, I don't.

Q According to what was presented in that document, when did EPA start and when did they end their interactions with the tribes regarding this?

Ms. Navaro. Do you want her to sit here and read the document?

Ms. Fraser. Are you familiar with this document?

She mentioned that other than what is in the document.

BY MS. FRASER:

Q I assume that you read it?

A I haven't read it recently. I mean, I can sit here and read it and recite it to you.

Q I'm not going to ask you to. I'm going to direct you to page 4 of the document. Under the heading consultation. Do you have any disagreement with the statement that EPA began consultation with Federally recognized Indian tribes on this rulemaking in 2011 and continued the consultation and coordination process, including providing information on the development of an accompanying science report on connectivity on wetlands, steam lands, through November 2014? Would you disagree with that?

A I don't know what they did. So I can't agree or disagree.

Q So when you're making statements about EPA's interaction with tribes being inaccurate, what are you basing your statements on?

A My statement was a comment on their statement that it doesn't affect tribes. It wasn't on whether they consulted or didn't consult.

Q You are aware that tribes issued comments to this rule, correct?

A A few tribes submitted comments, yes.

Q Are you aware of what the substance of those comments were?

A I read a great number of them, of the ones that were submitted. I think there were 14 or so comments that were submitted.

Q As far as you can recall, what were the gist of those comments with respect to the rule?

A Those comments were, they were from business councils of tribes, they were, I don't remember the specifics quite frankly. I remember some of them but not all of them. And that's not the point of what I'm saying. It's not whether the tribes that wrote in supported the rule or didn't support the rule. It's the statement that the rule doesn't affect tribes.

Q If the comments from the tribes --

A The few tribes that wrote.

Q The few tribes that wrote, you said 14, would it surprise you if it was more than 14?

A It might.

Q And so how do you come to your conclusion again that this rule affects tribes without having spoken to tribes or the EPA who interacted with them?

A This rule affects every landowner in positive and negative ways. So a statement that it doesn't affect tribes is a statement that doesn't make sense on its face.

Q Now, you talked about, we talked about the 10 percent jurisdiction being lost. Now, you said Ms. Darcy was open to hearing the information she was provided that jurisdiction could potentially be lost. Is that accurate?

A That's how I would characterize her reaction. I don't know what she was actually thinking.

Q So what do you mean characterize her reaction? Did she say something that alerted you that this was a problem to her?

A She was looking at the pictures I was showing her with concern, asking a lot of questions.

Q And what kinds of questions did she ask about the pictures?

A She was saying this is currently jurisdictional, what functions does it provide, it would now be non-jurisdictional if we have 4,000 feet, how far away is it from the 4,000 feet, questions like that.

Q Did you understand when this rule was being drafted that part of providing clarity to the public in terms of what was going to be jurisdictional and what was not going to be jurisdictional waters, there could be a potential that there would be loss of Clean Water Act jurisdiction?

A I think that that's inherent in anything that's developed, yes.

Q The fact that there was some loss of Clean Water Act jurisdiction was not surprising then?

A I think that surprising is not the word that I would choose.

Q How would you characterize it?

A I think that the trade-offs that were being made in terms of the jurisdiction that was being proposed to be gained potentially over categories of waters that we hadn't had jurisdiction over for quite some time, since the SWANCC decision, trading that off for the loss of jurisdiction over waters that we had had jurisdiction over since the beginning of the Clean Water rule was something that was puzzling.

Q But that's not a decision that was up to you to make. Is that right?

A Correct. We've talked about this before.

Q Right. We have. Now, one of the things that you mentioned, one of the trade-offs that you just mentioned was, for example, there was going to be a loss of jurisdiction regarding some adjacent waters, right, some wetlands that are adjacent to territorial waters, right?

A Adjacent wetlands, yes.

Q And one of the ways that Clean Water jurisdiction was lost in some of these adjacent wetlands was by the statement being asserted into the rule that these are now no longer adjacent. For example, land that's typically under farming or silviculture, or something else, those were no longer going to be considered adjacent and, therefore, definitely out of CWA jurisdiction. Is that accurate?

A No. I don't believe it's accurate. I think that that clause that was inserted into the adjacency paragraph means that those waters that would normally be subject to the adjacency clause that are

under agriculture now are subject to a case-specific significant nexus determination under paragraph A8.

Q So that means that the Corps will have to make those discussions once the landowner makes an application to find out whether or not their water is within the United States or not?

A The Corps or EPA if they're subject to another program of the Clean Water Act.

Q And that is what the status quo is now. Is that right?

A Correct.

Q Now, you mentioned that you still hold the position that the Corps should take its name off of this document, off of the economic analysis, and the technical support document?

A The Corps' name was never on the technical support document. It's an EPA document. And the economic analysis is represented as an EPA-Army document.

Q And you maintain that the Corps should not allow its name to remain on that?

A Right. They are not Corps documents.

Q And when you say they are not Corps documents, what do you mean?

A We were not involved in the drafting of those documents. And they don't reflect the Corps' experience and expertise. And they appropriately reflect, especially the technical support document, that it is an EPA document.

Q So did you discuss these concerns with the Army?

A They are reflected in the memos that were provided.

Q I know they're reflected in the memos. Did you have a discussion, verbal discussion, about these particular concerns with someone in the Army?

A Neither of those documents were provided to the Corps to look at until they were sent to OMB for interagency review, which was after the rule was sent to interagency review with OMB. So there wasn't the opportunity to have this conversation with anybody.

Q Do you know whether or not Ms. Darcy or someone else in her office had discussions about these documents with the EPA?

A I don't know.

Q Do you know whether or not anybody in that office agreed to the terms of those documents such that the Army's and Corps' designation was incorporated into those documents?

A I don't know.

BY MRS. BAMIDURO:

Q I just want to take a step back and talk about your expression of your concerns regarding the final rule to folks in your chain of command. Over the course of the rulemaking, are you able to quantify approximately how many times you had occasion to express your concerns about the rule?

A To people within the Corps of Engineers?

Q Yes.

A I need a timeframe that we're kind of --

Q At what point did you begin expressing concern about your

concerns about the rule?

A I would say I started expressing concerns when our team of eight meetings stopped in November. Because I thought that it was important that we continue as an interagency group to have conversations, understanding that in joint rulemakings that we have participated in the past, that although, and in the Waters of the U.S. rulemaking guidance, rulemaking process over the past number of years, that although we don't always have a party when we're in those rooms together, it's important for us to have those conversations.

So I started expressing concerns then. Those, I continued to express regularly concerns once our conversations began again and we were receiving documents and revised documents that were not reflecting, in my view and in my colleagues' views. So my Office of Counsel colleagues' views, the concerns that we were discussing in those meetings. So that was happening on a regular and recurring basis.

Q So for the period of time that you're referring to, are you able to quantify approximately how many occasions you had to share your concerns?

A Within the Corps of Engineers, I would say from the -- I'll pick it up again in mid-January through to when the rule was delivered to OMB, we would discuss this on a weekly basis with General Peabody.

Q So, if I'm following you, on a weekly basis from November, early November to mid-January?

A I would say that was probably on an every other week basis.

Q Okay.

A We'd do a temperature check. And then from mid-January to April, it was on a weekly basis. And then from April until the rule was finalized, I would say it was several times a week we would be discussing.

Q So we're talking dozens of opportunities. Is that fair?

A That we were discussing it with Corps senior leaders, yes.

Q Okay. And then are you able to quantify how many opportunities you had to share your concerns with the Army?

A And I will distinguish between Mr. Schmauder and Ms. Darcy.

Q Okay.

A Mr. Schmauder, we were having conversations with him probably in the November to mid-January timeframe, maybe once a week, maybe once every other week. Then from mid-January to April, I would say most likely once a week, once every week and a half. Between the timeframe of when the proposed rule was put in the Federal register to when the rule was sent to OMB for interagency vetting, I met with Ms. Darcy four times.

Q And let's just break down, let's go through each of those four times. Do you recall when those meetings took place?

A Yes. One was November the 29th, 2014. One was the 29th of January. That was hearing prep for the bicameral hearing that she and Ms. McCarthy did. And there were two in March, I want to say March 11th and the other one was towards the end of March. I'm not quite sure of that date.

Q Who all participated in those meetings?

A That's going to be hard for me to --

Q That's fine. I'll ask another question.

A Okay.

Q Do you recall the nature of the concerns that you raised in each of those meetings?

A The November 29th was getting her familiar with what we were talking about in our team of eight meetings at that time. So that would have been the charge that we all had to develop options for the development of that first draft of the draft final rule.

So we were getting her familiar with where we were in alignment, the Army-EPA team, and where we had points of -- that we were going to work to resolve to bring then a suite of options to her and Ms. McCarthy. As I said, the one right before the bicameral hearing, that was hearing prep, so getting her very familiar with the issues and just getting her ready for that testimony.

So that was Waters of the U.S., but it was also a much larger briefing. The two in March were talking about implementation concerns with the draft final rule that I had circulated to the 38 district regulatory chiefs for their comment, and the preamble language. So I had gotten back from the districts if this was finalized exactly as written, I asked them specifically for their comments of what would you need from us in terms of guidance, what would the regulated public be saying to you about implementing this. So where do we need to tweak in terms of clarity, in terms of implementability, in terms of what

does this do to you, regulatory chief, for implementation.

So it was those sorts of things, where do we need to add definitions, tweak definitions, do those sorts of things. So that was that briefing. And that was also when we first talked about the bright-lines. The second briefing that month was an additional briefing on the bright-lines and with the representative examples so that she could see what we were referring to in terms of what would be lost, what would be gained. And we talked about that data analysis piece that would be required, in our mind, in order to be able to definitively tell whether the impact would be significant or not from this rule.

Q Would it be a fair characterization to say that the Corps' concerns were presented to Ms. Darcy and those in her office?

A I would say that in the times that we had with her, we were able to present our largest concerns. I would say that there were a lot of ancillary concerns that we didn't get a chance to talk all the way through because we had some big pieces that we wanted to make sure she understood fully.

Q But the largest of the Corps' concerns were sufficiently presented to Ms. Darcy and those in her office, is that fair?

A She certainly was able to hear and ask questions about the biggest pieces, yes.

Q And do you know, and I apologize if this has been asked already, it's been a long day, and I don't also retain everything that we've talked about either, but do you know who from the Army had an

opportunity to present their data and concerns to Ms. Darcy?

A Outside of the meetings that we were in, I don't know who else she was coordinating with. I do know that in our briefings, Craig Schmauder was a person who was also contributing to our discussions. Chip Smith was there and was contributing as well.

Q Do you know the frequency with which those meetings were taking place with Ms. Darcy?

A I don't.

Q Do you know the time period over which those meetings were taking place with Ms. Darcy?

A No. I only know the ones that I was at.

Q Okay. And I believe you stated earlier that one of the objectives in setting out to undertake this rulemaking was to come up with a rule that could be supported by science and the law. Is that right?

A Correct.

Q Were you also or was the team also given a directive to come up with a rule that addressed concerns by the regulated public?

A That wasn't specifically in the charge. But that's to me, what -- that was inherent in listening to the public comments. I mean, the regulated public is part of the comment body that we got. That was the regulated public as well.

Q Do bright-line delineations offer clarity to the regulated public?

A They do. And why you're seeing me cock my head a little

bit is I think bright-lines are very helpful I think when, and I will say when you read the rule, the language is clear, they're grammatically correct sentences. But when you read a 4,000-foot threshold, that's easy to understand. It's harder to implement on the ground. Because, and this is going to sound funny and it is in a certain sense, but nobody has a 4,000-foot-long tape measure. And it's hard to implement that.

So for the regulated public, the questions we get back is how do I know when I'm 4,000 feet away. You know, my wetland in my background, how do I know where the nearest thing that I'm measuring to is, how do I know where it is. So those are the questions that we get back. So the language can be very clear, but it's the actual practical implementation of it that gets tricky. So I guess that's a very long way of answering your question.

So, yes, the regulated public does benefit from clear, bright-lines. But the implementation piece does get to be a challenge. But I think it's a challenge that can be overcome with follow-on guidance and materials that we can use with the public.

Q And are there challenges to implementation of most rules?

A Yes. Absolutely.

Q There was some mention, I believe, in the first hour of why was the EPA in a rush to finalize this rulemaking. Is that how you would characterize it?

A I wouldn't characterize it as anything. I would just say there was a desire to complete a rulemaking. And, as I have mentioned, the target shifted. I wouldn't characterize it as a rush. And I

mentioned this before too, I'm used to working to milestones. And if somebody says I want you to have this done by the end of next week, I'm going to work to that. So, as I said, I wasn't concerned about a milestone that was put on the wall other than needing to bring staff resources to help achieve that milestone.

Q Sure. Is it uncommon for time tables to slip in rulemaking?

A No.

Mrs. Bamiduro. We can go off the record for now.

Thank you.

[Recess.]

Ms. Aizcorbe. It's 3:23. We will resume with what is our final round.

BY MS. AIZCORBE:

Q I wanted to just clean up some of the items that we previously discussed. So I apologize if there's any overlap here. I'll try not to to the best of my ability. When we were discussing about the environmental assessment and the environmental impact statement, we discussed how those NEPA documents were developed in the Army. What I don't believe I had a chance to really flesh out is the discussions that you may have had with your staff about the FONSI. Did you engage in any communications with your staff about the decision?

A My team at headquarters?

Q Correct.

A We didn't talk about the decision once Ms. Darcy had made it.

Q Okay. Were you aware or were your staff aware that a second environmental assessment was in the process of being produced?

A Yes. We were aware that Mr. Owen was working on an EA because he was asking for data about the number of JDs, approved JDs and preliminary JDs. And so I asked for that data to be harvested from our database.

Q Did any of your staff express concern with the FONSI?

A And this is probably just part of our culture, they expressed concern but not in a way that undermines Ms. Darcy's authority.

Q Did you speak to anybody outside of your office, for example, anybody in the Army, about the FONSI?

A Just that it existed. And I asked for a copy of it. And it was part of the documents that were, I believe it was part of the documents that went with the final rule. So it was posted on Army's Web site. So I was pointed there to get it.

Q So you didn't express your concern with the FONSI to anybody?

A It wasn't my place to express that concern because it was a finalized action. And it was Ms. Darcy's decision. So it wasn't something I would have said anything about.

Q Okay. You made several recommendations in your April 24th memo, including reducing the linear foot distance in the definition from 1,500 to 300 feet, adding new criteria such as the 100-year flood plain, and editing the final draft for clarity and simplicity, and that

without these changes, quote, "the final draft cannot be promulgated as a final rule without an environmental impact statement," unquote. Were all of these changes that you had recommended in the final rule?

A No. They weren't.

Q In 2014, the EPA and the Corps promulgated an interpretive rule pertaining to agricultural exemptions in Waters of the U.S. under the Clean Water Act but withdrew the rule shortly thereafter. Are you aware of this interpretive rule?

A Yes.

Q Do you know why the agencies decided to pursue the interpretive rule?

A And that was while Meg [Gaffney-Smith] was chief. The interpretive rule, to my understanding and this was, I had peripheral understanding and involvement in this. So I think that if you want more in-depth understanding, I think talking to Meg will be more beneficial.

But I'll share what I know. That was to enable agricultural producers to have a broader understanding of the existing agricultural exemptions and what was covered by those exemptions. So it is providing an interpretation of those exemptions to the public.

Q Okay. Was it developed with the understanding that it would ultimately become a final formal rule instead of just an interpretive rule?

A I don't think so. But I don't know.

Q Okay. Do you know what science it was based on?

A I don't. I wasn't involved in any of that.

Q The Corps was not involved?

A The Corps was. I just personally wasn't.

Q Okay. So while the interpretive rule was intended to be a part of the WOTUS rulemaking, was it included in the final rule?

A No. My understanding was that when the proposed rule was put out for public comment, the interpretive rule was put out as part of that package and was put out as itself.

Q And then subsequently withdrawn?

A Right. As part of the CR/Omnibus last year.

Q I see. Are you aware of any memos or comments made from the Corps or Army staff raising concerns with the interpretive rule?

A I know that in its development there was a lot of interagency interaction during the development of it. But the detailed substance of that I can't tell you because that was when Meg was chief and I wasn't in the day-to-day interaction there.

Q And you, in your role at that time, didn't have any part in the interpretive rule or the review of the drafting?

A Correct. I was on the periphery.

Q Okay. In the course of the WOTUS rulemaking, did you ever meet or speak with anybody at the Department of Agriculture regarding the interpretive rule or final versions of the WOTUS rule?

A I didn't talk to anybody at Agriculture about the interpretive rule. I was involved in one meeting after the draft final rule was in OMB, that the final rule was in OMB vetting with OMB, EPA,

and I'm trying to remember whether Mr. Schmauder was there, I can't recall, at USDA to discuss the final Waters of the U.S. rule.

Q And was it a general rule where you spoke about the entire final rule? Or were there specific items being addressed at that particularly meeting?

A It was a general discussion and facilitated by OMB.

Q Okay. Were you aware at that time that EPA and Army had had previous meetings with USDA on the rulemaking?

A I wasn't aware of specific meetings that they had had. During that meeting, it was brought up where that sentence in the adjacency paragraph came from, in terms of wanting to make sure that producers weren't automatically jurisdictional as adjacent waters.

Q Okay. So you hadn't received any invitation to those prior meetings with USDA?

A No.

RPTR GENEUS

EDTR HUMKE

[3:30 p.m.]

Q We've spoken a bit today about your memos that were a part of the Peabody memoranda transmitted to Assistant Secretary Darcy, just a few clean-up questions about those memos. Do you believe that the Corps was treated as a coequal in this rulemaking with the EPA?

A No.

Q Would you still consider your positions in the memos to be a valid reflection of the Corps evaluation of the rulemaking?

A Yes.

Q The rule was finalized a mere month after these memos were transmitted, yet, Administrator McCarthy testified before this committee that Jo-Ellen Darcy indicated that all concerns of the Army Corps raised in the memos had been satisfied. And Ms. McCarthy also echoed that these concerns were satisfied. Do you feel as though all the concerns raised by the Corps in these memos were satisfied?

A I think that the technical concerns that were raised in these memos were brought to the attention of the decisionmaker for -- let me rephrase that -- were brought to the attention of the Army decisionmaker. I don't know what else she had in front of her, and I don't know if she shared these with EPA, or if she didn't. From where I stand, the final rule didn't address all of the recommendations that were brought forth in these memos, and it wasn't my expectation

that it would. My purpose in producing these for General Peabody was to make sure that she had all the information from my program standpoint, from the regulatory program standpoint, so that she was fully informed as she made her decision.

Q And why was it your expectation that not all of the concerns in the memos would be addressed in the final rule?

A Because I understand that she has other sources of information, or may have other sources of information, and she's making a policy decision, and I'm providing technical advice and recommendations based on analysis.

Q And is that expectation also because you had experienced some disagreements with the EPA previously on --

A Yes. And I understand that they were likely providing similar analyses and recommendations to their leader.

Q Okay. Did any of the concerns raised in these memos exist with respect to the 2010 Clean Water Act guidance which was redrafted to consider much of the same new science that was in the process of being developed by the EPA?

A Oh, wow. That's -- you know, I didn't go back and reconsider the guidance in terms of the concerns that were raised here, so I don't know how to -- I don't know. That's a good question, though.

Q Okay.

A I may have to contemplate that.

Q Let us know if you have anything.

Mr. MCGRATH. One question on the coequal aspect. Why do you

think that the Corps was not treated coequally with EPA?

Ms. Moyer. I don't know why we weren't treated equally, but I would suggest that we weren't treated equally. I would suggest that it would be fair to say we were treated as other stakeholders were treated.

BY MS. AIZCORBE:

Q Is that your experience with other joint rulemakings with the EPA?

A No. It hasn't been. I would suggest in the development of the joint Army EPA 2008 mitigation rule, that that was not an effort that played out the way this one did. That was definitely one that was also very dynamic, but it was definitely Corps, EPA, Army all together working out their issues, reaching compromise positions and moving forward together.

Q You would say that that was for of a collaborative effort?

A Correct.

Q Okay. Earlier we were discussing the public comments that were brought in and that within the 20,000 -- or 21,000 or so unique comments, there was a group of about 2,000 letters that were specific, and you put those in categories. You were discussing that you made decisions as to whether these letters were positive, negative, or neutral in nature?

A Correct.

Q But that that's not necessarily something that you would have done. Who directed you to make those characterizations?

A Nobody directed me to do that. That was, to me, something that was going to be informative on a very gross scale. If we could make that generalization, we needed to just for that first gross scale consideration of is this comment letter positive or negative. If we did it, we needed to do it, because we were going to be asked that question, positive, negative, or neutral.

Q And I may have misunderstood, but I thought that you suggested that it wasn't necessarily representative of whether the full comment was positive or was negative. Is that correct?

A That's correct. In some, we couldn't categorize.

Q Okay. Was that left out of your analysis?

A No, I think that when we couldn't categorize them, we probably put it in the neutral bucket.

Q Okay. Okay. Earlier we were discussing the connectivity report and when the rule was being drafted by the EPA and/or Army. You said you weren't aware of when it had started -- drafting the final rule. You mentioned that the connectivity report was finalized in November of 2015 and from what I understand the rule went final and was --

A 2014.

Q 2014. Okay.

Okay. So the connectivity report was finalized in November of 2014. That's --

A Yes. Because we are in 2015 now, right?

Q Yes. Okay. It's a little confusing, because on the actual

report it says January of 2015 on the top.

A Okay.

Q So it's not very clear as to when it was actually finalized. And I understand it went through peer review, and there were certain benchmarks that it went through, and I just wanted to clarify when that was actually finished.

A I think -- and I could be mistaken, since that's an EPA product. So I think that's when it was actually finalized.

Q Sure. Do you believe that the final rule was being drafted before -- or, sorry, not the final rule. Do you believe that the proposed rule was being drafted before the connectivity report was finalized?

A Not the proposed rule, but the draft final rule? So the proposed rule went out on public comment. We got all the public comments. The connectivity report wasn't finalized then.

Q Okay.

A It was finalized last winter, so --

Q Okay. So the proposed rule was drafted, at the same time, the connectivity report was in the process of being drafted. Is that correct?

A Right. Right.

Q Okay. The proposed rule went out for public comment. At that point in time, the connectivity report was not yet finalized?

A Correct.

Q Correct. The public comment period closes -- I'm just

trying to get an idea of the timeline here.

A I'm glad you're doing this, because it's confusing.

Q The public comment time closes, and then the connectivity report is finalized somewhere between that time and when the draft final rule goes to inter-agency review?

A Yes.

Q At the same time when the connectivity report is being finalized, somewhere in that window, the draft final rule is also beginning to be --

A Yes.

Q Okay. So a lot of these things overlap. Do you have any understanding why EPA thought it would be prudent to move forward with a rulemaking based on a scientific product that was not yet finalized?

A I don't know why that decision was made other -- I would have to speculate on why that decision was made.

Q Okay. You, in, I believe it was one of the minority's hours, were discussing how the team of eight meetings had stopped for a period of time. There were some disagreements at the inter-agency table. Do you know if anybody specifically directed that those meetings stop? I may have missed something.

A No, I don't know that they were directed to stop.

Q Okay. Who generally scheduled those meetings?

A I got the meeting invites from Mr. Schmauder.

Q Okay. Was anybody at the EPA an equal partner in scheduling or creating an agenda for these meetings that you know of?

A Mr. Peck.

Q Mr. Peck. So Mr. Peck and Mr. Schmauder essentially ran these meetings?

A Yes.

Q Okay. I think I just have one more.

We were discussing the timeline of the rule, and I was a little confused as to how you all were able to conduct all of your review of the public comments in such a short period of time compared to how long it has taken you to do similarly situated rulemakings in the past. And we got to the point where I asked you whether you believed politics played a role in the timeline and why the rule seemed rushed. And you said that there was an appearance that politics played a role. Why do you feel that way? Were there any specific indicators that made you feel that way?

A And I guess I would say I feel that way partly because the timeline shifted, although not surprising to me that the timeline shifted.

Q Shifted longer or shorter?

A Longer. So first, it was January, then it was spring. So I guess that's why I would say that, usually when I have an internal milestone established by the Corps, so usually a general -- that timeline is, it doesn't shift unless I say, I've lost resources to be able to work on this. And that, to me, shifting it to, oftentimes, the consternation of my senior leaders.

But when something external shifts the timeline, and it's more

of an ambiguous shift, so -- but I don't know why the timeline shifted.

Q Were you prepared from the Corps perspective to produce on the original timeline before it was shifted?

A The products that we were being asked to produce, meaning the analysis of the comments, the analysis of the isolated waters, JDs, had brought in resources to enable us to do what we needed to do to inform those external analyses.

Q So the change in the timeline or these shifts were not a product of you requesting an extension?

A That's correct.

Q Okay.

BY MR. MCGRATH:

Q I just have a few more final questions here, so it shouldn't take too long.

One thing that -- and I wasn't here for this. I was meeting with the chairman, actually. But at one point I think you talked about that it would be speculative to talk about whether someone's duties had been changed based on these memos being made public.

I don't want you to get into speculation, but do you have someone else who it would be worth us talking to, someone else who would be more knowledgeable about something of that nature?

A I think talking to Chip would be. I think he could talk to you about that circumstance.

Q Okay. Were you able to watch Assistant Secretary Darcy's testimony before the Transportation Infrastructure Committee?

A Yes. We had a bit of a feed problem --

Q Okay.

A -- so some of it, I think, we missed, but we saw most of it, yes.

Q Is there anything in there that you would disagree with?

A I think some of the technical representations she made about the specifics of the rule, because I'm a very wonky regulatory person, I would, but other than that, I didn't balk at anything that she said.

Q Okay. Did you see secretary -- or Administrator McCarthy's testimony before our committee?

A I did not.

Q Okay. You talked a little bit about how this -- generally, I think I could say, and tell me if I'm putting words in your mouth or anything, that the relationship has been good for other rulemakings and this is somewhat of a different relationship between Army Corps and EPA related to this rulemaking compared to other rulemakings in the past?

A I would characterize that this rulemaking wasn't as collaborative among the three parties as other rulemakings, joint rulemakings, in the past have been.

Q Okay. In a larger sense, how do you think that the kind of split jurisdiction that the Clean Water Act has put in place is working?

A I think that the implementation of the Clean Water Act as a whole between EPA and Army, I think we do a good job managing that

inherent dynamic friction that is established with the Corps responsible for the day-to-day implementation of the 404 program with EPA oversight of how we do that.

Q Yeah.

A I think that both agencies are staffed with extraordinarily competent professionals, and although there are rubs sometimes, because we don't agree on certain things, we work it out. And I think that nearly 100 percent of the time there is phenomenal delivery of that program to the regulated public.

Ms. Aizcorbe. Quickly, let me jump in.

Mr. MCGRATH. Sure.

BY MS. AIZCORBE:

Q On that note, when we're regarding specifically the Corps relationship with the Army, because you did mention there were some policy changes or standard processes that were changed in this rulemaking, such as Army conducting the NEPA document, and we discussed Mr. Schmauder being an attorney from Army OGC drafting the rule and the guidance, were you ever explained as to why some of these changes were made?

A I do understand why the EA was drafted by Army. That was because of workload issues. And that was a volunteer --

Ms. Fraser. I'm sorry. Can you clarify which EA?

Ms. Moyer. Oh, the environmental assessment -- sorry. I was clarifying your words. Sorry about that.

Ms. Aizcorbe. No, that's fine.

Ms. Moyer. And I don't have a clear understanding of Mr. Schmauder's involvement. I will say, I don't think I'm owed that explanation, so I just accept based on Ms. Darcy's office's role in all this, when she sends people, I liaise with those people.

Q Okay.

BY MR. MCGRATH:

Q You talked about the 404 process, generally. What role do you and your team have in that process, the 404 permitting process? Is that handled by the local areas, or do you handle that at the national level?

A All permit authority is delegated to district engineers. So all of those decisions are made at the district office level. So at the divisions, they are providing kind of that quality control, quality assurance piece, and monitoring consistency among the districts. And then at the headquarters' level, we're doing that overall program oversight and management and providing policy guidance interpretations and then also overseeing budget execution, development and execution.

Q Okay. So it's mainly going to be at the local level you are dealing with the actual application process --

A Absolutely, yes.

Q -- that type of thing? Okay.

But, however, you said earlier I think you are working on the nationwide permit aspect?

A Right. The nationwide permits are issued at the

headquarters' level. So that being package right now has just started OMB and inter-agency review. And they are rules, so that's a rulemaking process.

Q And that happens usually every 5 years? Is that correct?

A Every 5 years.

Q Okay. And so the last one was 2012?

A Yes.

Ms. Aizcorbe. Is that also joint with the EPA or --

Ms. Moyer. No.

Ms. Aizcorbe. -- or is that just a Corps rulemaking?

Ms. Moyer. That's just Corps rulemaking.

BY MR. MCGRATH:

Q And so the timeframe for this would be the 2017 timeframe?

A This is another timeline. So the draft proposal is in OMB review right now. We hope to finish up inter-agency review in March-ish and get it out in the Federal Register for public comment, because you need public comment review, review and assess those comments for a 4-month period and get it back to OMB in September 2016 timeframe to publish a final rule in December of 2016.

Q Okay. Has there been any discussion of using any of the language that has been in the WOTUS rulemaking in the nationwide permit rulemaking to expand using the nationwide permit rulemaking to expand --

Ms. Navaro. Can I just say that this seems a little bit beyond the broad scope of things related to the WOTUS rulemaking.

Ms. Aizcorbe. We're asking about WOTUS language.

Ms. Navaro. Right, but the nationwide language permit effort is completely separate.

Ms. Aizcorbe. We don't have any germane rules in the committee. I mean, if Ms. Moyer doesn't care to answer the question, then we don't have to discuss it, but it is germane to the WOTUS rulemaking, so that's why we're interested in it.

Ms. Moyer. So in our package that's with OMB right now, we have not included WOTUS-specific language recognizing that depending on the outcome of the litigation, we may have language that we have to make sure that doesn't conflict. So we have tweaked language to make sure that we will have workable nationwide permits depending on the outcome of the litigation. So we didn't go into it blindly saying, WOTUS -- Clean Water Rule exists or it doesn't exist. So that's how we've addressed that.

BY MR. MCGRATH:

Q Okay. That makes sense. A couple of other things, and these may be a little off topic, but we know you're here; we have multiple investigations going on, if it's not comfortable answering, we understand, but did you or your office have any input into the 2008 stream buffer zone rule done by the Department of the Interior?

A No. I'm going to have to ask you, is that the stream protection --

Q This is an earlier version of it, but there's a new one now.

A Okay. I know that we reviewed and provided comments, but

it wasn't an effort like this.

Q An effort, okay.

A Yes. And in the previous version and the current one, it was the same, we provided comments.

Q Okay. One thing more about your job duty. Does your office have anything to do with the Army Corps contracting process, or is that dealt totally separately?

A That's --

Q Totally separate. That's what I thought. That's what I assumed, but I --

Mr. MCGRATH. Okay. I think that's all I have. Do you have any further follow up?

Ms. Aizcorbe. No, besides thank you.

Mr. MCGRATH. Go off the record.

Ms. Moyer. Thank you.

[Recess.]

BY MRS. BAMIDURO:

Q Can you hear me?

A Yes.

Q Okay. So I thought I understood you said in the last hour before the break that it was not uncommon for timelines to shift in rulemaking. Is that right?

A That's right.

Q Do you know the basis for the timeline shifting in this rulemaking?

A No, I don't.

Q So, then, what leads you to say that you thought politics was involved?

A My basis for saying that was, is when it's an internal Corps milestone that is set, typically, by a military officer, they don't shift unless I say due to resources, I can't meet that milestone. So that is complete supposition on my part. It may not have been politics. I don't know what it was.

Q Do you have any reason to know whether politics, in fact, was --

A No.

Q -- the impetus behind the timeline shift?

A No, I have no reason to.

Q Do you have any reason to believe that Assistant Secretary Darcy would enter into a rule that she did not support?

A I have no reason to believe that she would do that, no.

Q Do you have any reason to believe that Ms. Darcy was pressured into entering -- excuse me -- into entering into this rulemaking? That was a mouth full.

A No, I don't know any of the inner-workings of her office other than my interaction with her on a technical basis.

Q Do you have any reason to believe that the final rule does not, in fact, reflect the Army's view?

A No. In fact, I've heard her say exactly the opposite.

Q You mentioned just a few moments ago that you did not think

that this particular rulemaking was as collaborative as other rulemakings. What's your basis for making that statement?

A The basis for making that statement is the fact that in other rulemakings there was Corps Army interaction on joint rulemakings. Corps Army interaction at every juncture. There were not meetings among staff, and by that I mean between Mr. Schmauder and Mr. Peck to discuss substantive issues that did not include the technical members of the Corps or other technical members of EPA, that those members of EPA had communicated to me that they weren't included in some of these discussions as well.

And I'm not saying whether it's appropriate or inappropriate. I'm just saying in previous joint rulemaking efforts, there were those meetings throughout the process. And in this rulemaking effort, those collaborative meetings ended. And when they reconvened, they were sporadic, and then they ceased again.

And I think that this process could have been more collaborative, even if at any point in time there was a communication to the Corps or to EPA, hey, a policy decision on this matter has been made, it's off the table, now we're only discussing this body of issues.

Q Do you have any reason to believe that the Army was at any point shut out of the collaborative process in developing this rule?

A I have no information on that one way or the other.

Ms. Fraser. And as far as you know, Mr. Schmauder, in his deliberations and collaborations, with the EPA would report to the assistant secretary?

Ms. Moyer. I don't know if he did or did not.

Mrs. Bamiduro. Okay.

Mr. MCGRATH. Okay, we can go off.

[Whereupon, at 3:55 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