

**Committee on Oversight and Government Reform  
U.S. House of Representatives  
114th Congress**



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**Politicization of the  
Waters of the United States Rulemaking**

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**Majority Staff Report**

**Hon. Jason Chaffetz, Chairman  
Committee on Oversight and Government Reform**

**Hon. Cynthia Lummis, Chairman  
Subcommittee on the Interior**

**Hon. Mark Meadows, Chairman  
Subcommittee on Government Operations**

**Hon. Jim Jordan, Chairman  
Subcommittee on Health Care, Benefits, and Administrative Rules**

**Hon. John Mica, Chairman  
Subcommittee on Transportation and Public Assets**

**October 27, 2016**

## EXECUTIVE SUMMARY

The “Clean Water Rule,” commonly referred to as the “waters of the United States” (WOTUS) rule, was signed by Environmental Protection Agency Administrator Gina McCarthy and Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy on May 27, 2015 in a picturesque signing ceremony hosted by the National Wildlife Federation on the banks of Washington, D.C.’s Anacostia River. The process that led to the rule’s signing, however, was rife with legal shortcuts, predetermined conclusions, and politically-driven timelines.



Passed by Congress in 1972, the Clean Water Act (CWA) gave the federal government limited jurisdiction over certain navigable waters. The statute failed to adequately define navigable waters, leaving the task to the agencies responsible for implementing the law. The legal definition of navigable waters is significant as it triggers multiple authorities under the CWA and provides the foundation of the jurisdictional authorities over navigable waters for both the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), which share CWA jurisdiction.

Challenges to the legal scope of the term “navigable waters” ensued after passage of the CWA, culminating in two notable Supreme Court cases in the last fifteen years. These cases upheld congressional limits on the scope of the CWA and rejected the notion of limitless federal government authority over water. In response to those decisions, the Bush Administration in 2008 issued guidance incorporating the Court’s decision limiting CWA jurisdiction. However, in 2011 the Obama Administration issued its own guidance expanding the CWA’s reach to regulate a broad category of wetlands.

On September 17, 2013, the EPA and the Corps announced a plan to abandon the proposed guidance in favor of clarifying the CWA through the rulemaking process. The agencies sent a draft rule to the Office of Information and Regulatory Affairs (OIRA)—the executive branch agency which reviews all significant draft regulations—the very same day.

On April 21, 2014, after OIRA's initial review, the EPA and the Corps issued a proposed WOTUS rule. The agencies sent a final draft of the rule to OIRA for review on April 6, 2015. The final rule was released on May 27, 2015.<sup>1</sup>

The final rule significantly increased the federal government's jurisdiction under the CWA. The Administration purports that the federal government's regulation of water will reach 117 million new people under the rule, stating "about 117 million Americans—one in three people—get drinking water from streams that were vulnerable to pollution before the Clean Water Rule."<sup>2</sup> The EPA similarly determined in its Economic Analysis for the rule that the rule would increase jurisdiction.<sup>3</sup> In the final rule, however, the Administration provides that the rule actually decreases the federal government's control over waters. The final rule stated:

The scope of jurisdiction in this rule is narrower than that under the existing regulation. Fewer waters will be defined as "waters of the United States" under the rule than under the existing regulations, in part because the rule puts important qualifiers on some existing categories such as tributaries. In addition, the rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities, including the states and tribes with authorized section 402 and 404 CWA permitting programs, would need to make jurisdictional determinations on a case-specific basis.<sup>4</sup>

These inconsistent positions illustrate the Administration's unwillingness to admit its unprecedented effort to expand the federal government's jurisdiction under the Clean Water Act.

The final rule also created significant uncertainty by imposing an arbitrary standard whereby waters within 4,000 feet from any jurisdictional water would be covered. As the rule explains:

[W]aters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule.<sup>5</sup>

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<sup>1</sup> Definition of "Waters of the United States" Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>2</sup> EPA website, *available at* [https://www.epa.gov/sites/production/files/2015-05/documents/fact\\_sheet\\_summary\\_final\\_1.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/fact_sheet_summary_final_1.pdf).

<sup>3</sup> EPA website, *available at* [https://www.epa.gov/sites/production/files/2015-06/documents/508-final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf).

<sup>4</sup> EPA website, *available at* <https://www.epa.gov/cleanwaterrule/final-clean-water-rule>.

<sup>5</sup> EPA website, *available at* <https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>.

This standard would be very difficult to implement. As a chief Corps regulatory official involved in writing the rule and critical of the process told the Committee, “nobody has a 4,000 foot long tape measure.”<sup>6</sup>

The 4,000-foot standard effectively captures all of the nation’s water features. The rule’s Economic Analysis states: “The agencies have determined that the vast majority of the nation’s water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.”<sup>7</sup> The Executive Summary of the Final Rule stated:

In this final rule, the agencies clarify the scope of “waters of the United States” that are protected under the Clean Water Act, based upon the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies’ technical expertise in implement the statute.

None of this was true. Documents and testimony obtained by the Committee show the rulemaking process, and the outcome it produced, were deeply flawed because of numerous shortcuts and process violations. Witnesses testified that key decisions during the rulemaking process were affected by political considerations, including the timeline for finalizing the rule, which marginalized the scientific and economic considerations that would ordinarily form the basis for rulemaking decisions. Documents show staff from the Corps complained about the process, especially as it neared completion. Chief among those complaints was that the process was politicized, and not driven by science or economics.<sup>8</sup>

Documents also show high-level White House staff, including the Chief of Staff, assured environmentalist groups the Administration would quickly finalize the WOTUS rule.<sup>9</sup> The Administration’s efforts to satisfy those groups caused the career staff involved in developing the rule to feel pressure to meet accelerated timelines, which caused deficiencies in the regulatory process.

This report will provide information on the flawed process and outline other areas of concern with respect to the WOTUS rulemaking. The Administration’s insistence on adhering to a specific timeline resulted in cut corners and bypassed regulatory protocols. This rulemaking demonstrates how an ideological policy agenda can override regulatory safeguards put in place by Congress. The documents and testimony described in this report show:

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<sup>6</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Jennifer Moyer, Tr. at 146-147 (Dec. 17, 2015). [hereinafter Moyer Tr.]

<sup>7</sup> Economic Analysis of the EPA-Army Clean Water Rule, U.S. EPA and U.S. Department of the Army, May 20, 2015, *available at* [https://www.epa.gov/sites/production/files/2015-06/documents/508-final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf).

<sup>8</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Chip Smith, at 40 (Jan. 21, 2016). [hereinafter Smith Tr.]

<sup>9</sup> Email from Jim Laity to Shayna L. Strom, Mar. 29, 2012, 2:12 p.m. (OMB-041300).



***OIRA shortened the interagency review period for the final rule despite agencies' complaints they would be unable to complete a proper review.***

The interagency review process was so rushed that several federal agencies did not have time to properly review the rule. Staff at the National Aeronautics and Space Administration (NASA) wrote: "You're killing us. . . . I think it's fair to say that the powers that be are more interested in schedule (apparently compressed) than a reasoned response that objectively lays out likely ramifications . . . ." <sup>10</sup>

When the Department of Transportation asked for additional regulatory documents and time to review them, OIRA staff suggested their request might not go over well with EPA and the Corps, citing "the pressure to get this rule out the door." <sup>11</sup>

The Department of Agriculture called the process "not well managed" and referenced White House priorities interfering in the regulatory process by stating "sometimes the folks across the street from you do not care about longer term issues that other agencies do care about." <sup>12</sup>

The day the final rule was released, the OIRA staffer charged with conducting interagency review wrote: "The real challenge here was working on a very tight schedule which required me to provide short deadlines. To the extent that Agencies were able to provide me comments . . . I did all that I could to address them with EPA and the Corps . . . but even then there was only so much that I could do." <sup>13</sup>

***EPA sidelined the Army Corps of Engineers.***

As the administrator of dredge-and-fill permits, one of the most important parts of the CWA, and with experienced field staff all over the country, the Corps should have played a coequal role in the WOTUS rulemaking process. As the WOTUS rulemaking drew to a close, however, the Corps found itself less involved in the process than when it began. Corps staff testified the EPA did not involve them in writing the rule's preamble, which outlines the justifications for undertaking the rulemaking. The Corps was also excluded from creation of the Economic Analysis of the rule, only seeing the analysis after the EPA sent it to OIRA for final review. When Corps staff finally saw the Economic Analysis, a Corps employee stated ". . . they had not used the data that we had developed, and they had used their own data." <sup>14</sup>

The Corps' minimal role in the rulemaking process was also observed by OIRA staff. On May 12, 2015, about two weeks before the final rule was released, an OMB employee sent an email summary of the "interagency Clean Water Rule roll-out meeting." <sup>15</sup> The summary

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<sup>10</sup> Email from Kenneth Kumor, NASA to Vlad Dorjets, OIRA (May 5, 2015, 6:35 p.m.) (OMB-005830).

<sup>11</sup> Email from Vlad Dorjets, OIRA, to Shoshanna Lew, DOT (May 5, 2015, 06:30 p.m.) (OMB-005827).

<sup>12</sup> Email from Vlad Dorjets, OIRA, to Robert Johansson, USDA (May 27, 2015 11:10 a.m.) (OMB-006194).

<sup>13</sup> *Id.*

<sup>14</sup> Moyer Tr. at 87-88 (Dec. 17, 2015).

<sup>15</sup> Email from Tera Fong, OMB, to Vlad Dorjets, OIRA, *et al.* (May 12, 2015, 02:58 p.m.) (OMB-39663).

described the Corps as “a bit player in this process,” and observed that “[a]lthough all roll-out seems to be joint between EPA and the [Army] Corps, the meeting was very EPA-centric.”<sup>16</sup>

***The EPA and the Army pushed the rule through despite strong objections from senior Corps leadership.***

Major General John Peabody, Deputy Commanding General for Civil and Emergency Operations with the Corps, highlighted the Corps’ concerns regarding the EPA’s takeover of the rulemaking. In a series of memoranda (the Peabody Memoranda),<sup>17</sup> sent shortly before the final rule’s public release to the Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy, General Peabody laid out several legal, scientific, and procedural concerns regarding the rule and stressed the Corps’ concerns about the rule’s deficiencies were ignored. Major General Peabody wrote:

The preamble to the proposed rule and the draft preamble to the draft rule state that the rulemaking has been a joint effort of the EPA and the Corps, and that both agencies have jointly made significant findings, reached important conclusions, and stand behind the final rule. These statements are not accurate.<sup>18</sup>

Major General Peabody then requested the rule “not identify the Corps as Author, co-author, or substantive contributor,” and stated “the Corps of Engineers logo should be removed from those documents.”<sup>19</sup>

The political leadership at the Army also sought to control information and the Corps’ interaction with EPA. In 2013, as the proposed WOTUS rule was being drafted, Assistant Secretary Darcy issued instructions that “all communications with EPA and OMB during the interagency review . . . shall be reviewed by me or the Principal Deputy.”<sup>20</sup> In April 2015, immediately prior to the release of the final rule, Assistant Secretary Darcy issued another “gag order” preventing Army Corps officials from communicating without her knowledge or permission. Specifically, she directed: “All communications with EPA, OMB, Congress, and the media during the interagency review process must come from my office.”<sup>21</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of “Waters of the United States”* (May 15, 2015); Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Draft Final Rule on Definition of “Waters of the United States”* (Apr. 27, 2015).

<sup>18</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Draft Final Rule on Definition of “Waters of the United States”* (Apr. 27, 2015).

<sup>19</sup> *Id.*

<sup>20</sup> Memorandum from Jo Ellen Darcy, Assistant Sec. Civil Works, U.S. Army, to U.S. Army Corps Chief of Engineers (Oct. 3, 2013).

<sup>21</sup> Email from Jo Ellen Darcy, U.S. Army, to Thomas Bostick, U.S. Army, *et.al.*, (May 15, 2015, 05:13 p.m.).

***EPA and the Army did not consider appropriate alternatives to the rule, as they were required to do.***

Under Executive Order 12866, agencies are required to identify and assess alternatives to regulatory proposals.<sup>22</sup> The presentation of alternatives is intended to bolster agencies' arguments in favor of a regulation by comparing it to viable alternatives, and is meant to occur prior to issuance of a proposed rule. After a draft of the proposed rule was leaked, however, and OIRA heard the charge that "substantive decisions have already been made" and the rule "includes no 'alternatives' as required by EO 12866," OIRA staff conceded "[T]his is a fair concern."<sup>23</sup>

OIRA continued to voice frustration with the EPA on this matter on ensuing drafts, especially in the area of isolated non-connected waters. The same OIRA staffer wrote: "In place of these four distinct options the new preamble now has a long, disorganized series of requests for comment on just about everything they could possibly request comment on regarding other waters."

In reference to the EPA's position, OIRA Administrator Howard Shelanski noted "[Administrator] Gina [McCarthy] made clear this was her doing not staff's."<sup>24</sup> Thereafter, OIRA largely accepted the EPA's position.<sup>25</sup>

***EPA did not fully consider public comments before finalizing the rule.***

One of the foundations of the rulemaking process is soliciting feedback through the public comment period. The EPA's process for responding to comments was atypical—it failed to follow protocol for addressing them in the rule's preamble.<sup>26</sup> For WOTUS, the EPA instead chose to address public comments in a "massive separate response" which was "unlikely to be finished" in time for OIRA to review.<sup>27</sup> This decision came from EPA Administrator Gina McCarthy herself. An OIRA official wrote: "EPA staff said it was Gina's personal decision to write the preamble this way, and she was fully informed that this was 'atypical' for a final rule preamble."<sup>28</sup>

Army and Corps staff testified that despite expressing concerns that doing so was contrary to the standard agency process, the EPA and the Army decided comments could be addressed after the final rule entered interagency review.<sup>29</sup> Since comment review occurred so late in the rulemaking process—even after the Corps reported receiving the draft final rule from

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<sup>22</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* [https://www.whitehouse.gov/sites/default/files/omb/inforeg/EO12866/EO12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/EO12866/EO12866_10041993.pdf).

<sup>23</sup> Email from Jim Laity, OIRA, to Gregory Peck, EPA (Dec. 12, 2013, 7:19 p.m.).

<sup>24</sup> Email from Howard Shelanski, OIRA, to Dominic Mancini, OIRA (Mar. 17, 2014, 11:52 a.m.) (OMB-051213) (unredacted version on file with U.S. Dept. of Justice).

<sup>25</sup> Email from Howard Shelanski, OIRA, to Andrei Greenawalt and Jim Laity, OIRA (Mar. 23, 2014, 05:36 p.m.) (OMB-051253) (unredacted version on file with U.S. Department of Justice). (emphasis added)

<sup>26</sup> Email from Jim Laity, OIRA, to Howard Shelanski, Dom Mancini, and Katie Johnson, OIRA (Apr. 14, 2015, 6:27 p.m.).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Moyer Tr. at 33 (Dec. 17, 2015).

the EPA—it cannot be determined how any of the comments were taken into account in the creation of the rule.

***The handling of the science supporting the rule was problematic.***

The EPA assembled a Scientific Advisory Board (SAB) to review a draft report titled “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence” (Connectivity Report) in July 2013.<sup>30</sup> The report’s purpose was to show the need for WOTUS. The Connectivity Report, however, was finalized after the proposed rule was published, which creates the appearance that EPA’s policy decisions were foregone conclusions. Despite serving as the scientific basis for the rulemaking, the report was not finalized until January of 2015, well after the rule was drafted. OIRA noted this belated submission violated its information quality procedures. A high-ranking OIRA official further admitted this schedule was pursued “for primarily political reasons.”<sup>31</sup>

As the WOTUS rule evolved throughout the rulemaking process, especially with last-minute additions, Army and Corps staff testified that no new science was conducted or incorporated, as doing so would have interfered with the deadline for finalizing the rule.

***The White House allowed EPA to bypass additional analysis and small business review panels despite the requirement under the Regulatory Flexibility Act.***

Under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA), an agency engaging in rulemaking must analyze whether its actions will have a significant impact on small businesses. The EPA, specifically, is required to work with the Small Business Administration’s (SBA) Office of Advocacy and OIRA to convene a small business advocacy review panel to thoroughly review how a proposed regulation will impact small entities.

In this instance, the EPA not only ignored comprehensive evidence suggesting the WOTUS rule would have a significant impact on small businesses, but deliberately avoided conducting a regulatory flexibility analysis and public hearings on WOTUS’ impact on small businesses. An OIRA memo states:

We were reminded by EPA that there was an agreement at the time we were reviewing the draft guidance to not convene a SBREFA panel, but rather to convene a “voluntary, SBREFA-like” process including outreach to small entities and a report to the Administrator. SBA was not a party to that agreement, but might be persuaded that it is an acceptable substitute for a full SBREFA process. EPA did convene an outreach meeting to small

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<sup>30</sup> Memorandum from Thomas M. Armitage, Designated Federal Officer, EPA Science Advisory Board Staff Office, to Christopher S. Zarba, Acting Director EPA Science Advisory Board Staff Office, July 29, 2013, [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/7724357376745F48852579E60043E88C/\\$File/Final%20Determination%20memo\\_connectivity%20panel%20\(unsigned\).pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/Final%20Determination%20memo_connectivity%20panel%20(unsigned).pdf) (last visited Aug. 11, 2016).

<sup>31</sup> Email from Dominic Mancini, OIRA, to Margo Schwab and Jim Laity, OIRA (Sep. 13, 2013, 3:29 p.m.) (OMB-34473) (unredacted version on file with U.S. Department of Justice). (emphasis added)

entities in 2011, which OIRA and SBA also attended, and has now provided a draft report which we are currently reviewing.<sup>32</sup>

SBA did not accept this view and continued to criticize the rulemaking process.<sup>33</sup> An OIRA staffer noted less than a month before WOTUS was finalized that “SBA will make their own decisions about what to do after the rule is published.”<sup>34</sup>

***The Army predetermined its NEPA analysis to avoid interference with the rigorous timeline for rolling out the rule.***

The National Environmental Policy Act (NEPA) requires a federal agency to prepare an environmental impact statement (EIS) for any major federal action “significantly affecting the quality of the human environment.”<sup>35</sup> To determine the need for an EIS, an agency must first prepare an Environmental Assessment (EA), which governs whether to prepare an EIS or make a finding of no significant impact (FONSI). If an EIS is necessary, agencies must undergo a lengthy environmental study process and public outreach effort.<sup>36</sup> Conversely, a FONSI leads to a much more streamlined NEPA process, with only a requirement to present why the agency determined no significant environmental impact would occur due to the rule.

In 2014, Chip Smith, the Army’s primary NEPA staffer, was preparing an EA that anticipated a FONSI based on the substance of the draft rule. Around early 2015, though, “last minute” modifications greatly “changed the dynamics” of the rule by significantly shrinking EPA’s jurisdiction over certain wetlands and water bodies.<sup>37</sup> These revisions rendered work on the EA inconsistent with the new draft, and Smith believed this now required preparation of an EIS under NEPA.

Smith’s belief was mirrored by Major General Peabody, the military head of the Corps’ civil works activities, who stated in a memorandum: “The Corps would need to prepare an (EIS) to address the significant adverse effects on the human environment that would result from the adoption of the rule in its current form.”<sup>38</sup>

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<sup>32</sup> Waters of the US Outstanding Policy Issues, Internal Memo, OIRA on Waters of the US Outstanding Policy Issues, (Jan. 9, 2014) (OMB-045605).

<sup>33</sup> Email from Jim Laity, OIRA, to Vlad Dorjets, Howard Shelanski, and Dominic Mancini, OIRA (Apr. 29, 2015, 11:02 a.m.) (OMB-034284).

<sup>34</sup> *Id.*

<sup>35</sup> The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970; 42 U.S.C.) § § 4332(2)(C); *State of N.C. v. F.A.A.*, 957 F.2d 1125, 1128 (4th Cir. 1992).

<sup>36</sup> Linda Luther, Cong. Research Serv., RL33152, The National Environmental Policy Act (NEPA): Background and Implementation; CRS (2011).

<sup>37</sup> Smith Tr. at 73 (Jan. 21, 2016).

<sup>38</sup> Memorandum from John W. Peabody, Maj. Gen. U.S. Army, to EPA Asst. Sec. for Civil Works (Apr. 27, 2015).

Regulatory staff at the Corps also agreed with the need for an EIS.<sup>39</sup> When Smith recommended an EIS, he was removed from his duties on WOTUS, and replaced by someone who had no previous experience on WOTUS and who “essentially started from scratch.”<sup>40</sup> Smith’s replacement recommended a FONSI, which Assistant Secretary Darcy adopted.<sup>41</sup>

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<sup>39</sup> Moyer Tr. at 115-116 (Dec. 17, 2015).

<sup>40</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Craig Schmauder, Tr. at 171 (Feb. 17, 2016). [hereinafter Schmauder Tr.]

<sup>41</sup> Moyer Tr. at 131 (Dec. 17, 2015).

## FINDINGS

- ✓ *The agencies pushed the rule through on an accelerated timeline that appeared to have been motivated by political considerations. Some officials involved in the process believed politics deprived them the opportunity to conduct a meaningful and full review of the rule before its promulgation. Interagency reviewers and the White House were not provided the full rule package for review.*
- ✓ *The U.S. Army Corps of Engineers, which shares jurisdiction over the Clean Water Act, was cut out of the rule development process.*
- ✓ *The EPA made no effort to ensure the rule was based on sound science. The EPA did not conduct additional research (which the Corps believed was necessary) to justify the rule's conclusions. OIRA enabled the agencies to proceed with the rulemaking despite violation of its own Information Quality standards.*
- ✓ *The agencies did not consider alternatives to the rule, and even went so far as to gut the discussion of alternatives after OIRA stated such discussion was necessary.*
- ✓ *The Army went to unusual lengths to avoid completing an Environmental Impact Statement after its own experts recommended such an analysis was necessary, in violation of NEPA. The Army pulled its primary WOTUS staffer off the rule entirely and retaliated against him after he recommended to conduct the analysis.*
- ✓ *Disagreement over the EPA's interpretation of the costs of the rule and its impact on small businesses continued throughout the rulemaking. OIRA and the EPA intentionally avoided compliance with the Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA). The agencies construed the rulemaking as "definitional" to avoid the EPA's obligations under the RFA, altogether.*
- ✓ *Public comments were not fully reviewed and considered before agencies drafted the final rule. The agencies contrived a unique process for considering and responding to public comments, despite arguments from Army Corps and EPA staff in favor of including such responses in the rule's preamble, as is customary.*
- ✓ *The agencies failed to comply with various rulemaking obligations, including Executive Orders requiring consultation with states and local governments and tribes.*



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## TIMELINE OF THE “WATERS OF THE UNITED STATES” RULE

### Events Leading Up to Rulemaking: 1972-2011

1972

Underlying Statute Passed

- ✓ Congress passes the Clean Water Act (CWA) to regulate discharges of pollutants into the “waters of the United States” (WOTUS).<sup>42</sup> Responsibilities under the program are shared by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps).

1985

Supreme Court First Addresses “Waters of the United States”

- ✓ U.S. Supreme Court first addresses the proper interpretation of the Corps’ regulation defining “waters of the United States” and the scope of its jurisdiction under the Clean Water Act in *United States v. Riverside Bayview*.<sup>43</sup> The Court holds unanimously that the Corps has acted reasonably in interpreting the CWA to require permits for the discharge of fill material into wetlands adjacent to the “waters of the United States.”

2001

Supreme Court Rules that Agency Regulation of Dredged or Fill Material Exceeds Statutory Scope

- ✓ U.S. Supreme Court holds that the Environmental Protection Agency (EPA) and the Corps’ extension of jurisdiction for regulating the discharge of dredged or fill material exceeded their authority under the CWA in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.<sup>44</sup>

2006

Supreme Court Rules that Agency Regulation of Wetlands Exceeds Statutory Scope

- ✓ U.S. Supreme Court again overturns the EPA and the Corps’ expansive definition of jurisdiction over wetlands under the CWA in *Rapanos v. United States (Rapanos)*.<sup>45</sup>

<sup>42</sup> 33 U.S.C. §§1251-1387 (1972).

<sup>43</sup> 474 U.S. 121 (1985).

<sup>44</sup> 531 U.S. 159 (2001).

<sup>45</sup> 547 U.S. 715 (2006).

## 2007

First Guidance Issued Following Supreme Court's Finding that Agency Regulation Exceeds Statutory Scope

- ✓ Subsequent to the *Rapanos* decision, the agencies issue a preliminary guidance memorandum aimed at answering questions regarding CWA regulatory authority over wetlands and streams.<sup>46</sup>

## 2008

Additional Guidance Released Adhering to Plurality Opinion in *Rapanos*

- ✓ The Agencies release an updated guidance memorandum to EPA regions and Corps districts clarifying the terms and procedures to be used to determine the extent of federal jurisdiction over “waters of the United States,” building upon the previous guidance memorandum issued in 2007.<sup>47</sup> This guidance largely hewed to the plurality opinion in *Rapanos*, requiring the EPA and the Corps to establish a “significant nexus” between navigable waters and wetlands in order to regulate under CWA.

## February 2009

Obama Administration Holds First Meeting with Intention to Pursue WOTUS Rule

- ✓ Roughly one month after the Obama administration takes office, the EPA holds its first principal meeting and announces its intention to pursue the Waters of the United States (WOTUS) rule before political leadership is set up within the Office of Assistant Secretary of the Army for Civil Works, which oversees the Corps.<sup>48</sup> Administrator Lisa Jackson attends.<sup>49</sup>

## May 2011

Agencies Release Further Guidance Extending Jurisdiction over Waters of the U.S. Despite Supreme Court Rulings Curtailing Their Jurisdiction

- ✓ The EPA and the Corps release guidance, intended to replace the existing 2008 guidance, to further clarify how the agencies identify “waters of the United States” under the CWA.<sup>50</sup> Despite the Court rulings in *Rapanos* and *SWANCC*, the agencies state in the proposed guidance that “the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been

<sup>46</sup> See Joint Legal Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007).

<sup>47</sup> Revised Mem. from Envtl. Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008), available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>48</sup> Smith Tr. at 11-12 (Jan. 21, 2016).

<sup>49</sup> *Id.*

<sup>50</sup> Environmental Protection Agency and Army Corps of Engineers, “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” Apr. 27, 2011, p. 20, available at [http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous\\_guidance\\_4-2011.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf).

asserted under existing guidance.”<sup>51</sup> Both supporters and critics of the 2011 guidance formally urge the EPA and the Corps to replace guidance, which is non-binding and not subject to full notice-and-comment rulemaking procedures, with revised regulations to define “waters of the United States.”<sup>52</sup> This guidance essentially becomes the final WOTUS rule.

## July 2011

Comments Submitted in Response to Proposed Guidance Arguing It Misconstrues the Supreme Court’s Holdings

- ✓ Members of Congress, stakeholders, and states submit comments to the Agencies, expressing, among other things, concern that the proposed guidance misconstrues the Supreme Court’s holdings in *Rapanos* and *SWANCC*,<sup>53</sup> “usurps the rights of state and local governments to manage land and water resources,”<sup>54</sup> and circumvents the requirements and safeguards of the Administrative Procedures Act.”<sup>55</sup>

## February 2012

Regulatory Review of Proposed Guidance Begins

- ✓ The EPA and the Corps send the revised proposed guidance to the OIRA for review under Executive Order 12866.<sup>56</sup>

## March 2012

Email Notes White House Chief of Staff Commitment on WOTUS to Environmental Groups

- ✓ In an email dated March 29, 2012, OIRA’s Chief of the Natural Resources and Environmental Branch, Jim Laity writes “This is very big deal. I understand COS has promised enviros it will be done ‘soon.’”<sup>57</sup>

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<sup>51</sup> Environmental Protection Agency and Army Corps of Engineers, “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” May 2, 2011, p. 3, <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0409-0002>.

<sup>52</sup> CLAUDIA COPELAND, CONGRESSIONAL RESEARCH SERVICE, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 3 (2016); Environmental Protection Agency, Persons and Organizations Requesting Clarification of “Waters of the United States” By Rulemaking (Apr., 2014), *available at* [https://www.epa.gov/sites/production/files/2014-03/documents/wus\\_request\\_rulemaking.pdf](https://www.epa.gov/sites/production/files/2014-03/documents/wus_request_rulemaking.pdf).

<sup>53</sup> Arizona Mining Association, Comment Letter on Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409 (July 29, 2011), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0409-3599>.

<sup>54</sup> Minnesota Free Market Institute, Comment Letter on Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409 (July 26, 2011), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0409-3267>.

<sup>55</sup> Ohio Oil and Gas Association, Comment Letter on Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409 (July 29, 2011), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0409-3355>.

<sup>56</sup> Letter from Hon. Sheldon Whitehouse, U.S. Senator, to Hon. Sylvia Matthews Burwell, Office of Management and Budget (June 4, 2013), *available at* <https://www.whitehouse.senate.gov/news/release/omb-delays-undermining-administrations-agenda-on-environment-energy-and-public-health>.

<sup>57</sup> Email from Jim Laity, OIRA, to Shayna L. Strom, OIRA (Mar. 29, 2012, 2:12 p.m.) (OMB-041300).

## Rulemaking: 2013 – 2015

### July 2013

Science Advisory Board Assembled to Review Rule's Underlying Science

- ✓ The EPA Science Advisory Board (SAB) launches an Expert Scientific Peer Review for the EPA's Water Body Connectivity Report, which discusses the current scientific understanding of the connections or isolation of streams and wetlands relative to large bodies of water.<sup>58</sup>

### September 2013

Agencies Announce the Withdrawal of the Proposed Guidance and Decision to Pursue Notice-and-Comment Rulemaking;  
Review of Guidance Still Outstanding

- ✓ On September 17, 2013, the Corps and the EPA withdraw the proposed guidance from OIRA review and simultaneously submit a draft WOTUS rule for regulatory review.<sup>59</sup> The guidance had been under OIRA review since February, 2012, well over a year past the 90-day time period allowed under Executive Order 12866.<sup>60</sup>
- ✓ The EPA releases its draft Connectivity Report – the scientific basis for the Rule – to be reviewed by the SAB prior to proposed rule.<sup>61</sup>

### October 2013

Assistant Secretary for Civil Works Issues First "Gag Order"

- ✓ On October, 3 2013, U.S. Army Assistant Secretary for Civil Works Jo-Ellen Darcy issues the first "gag order" directing all Army and Army Corps communications with the EPA, OMB, or other outside entities regarding WOTUS to first go through her office.<sup>62</sup>

### November 2013

Congressman Lamar Smith Questions Why Science Advisory Board Failed to Address "Significance" of Connections

- ✓ On November 6, 2013, Chairman Lamar Smith of the House Committee on Science, Space and Technology requests that the SAB reviewing the Connectivity Report provide

<sup>58</sup> Memorandum from Thomas M. Armitage, Designated Federal Officer, EPA Science Advisory Board Staff Office, to Christopher S. Zarba, Acting Director EPA Science Advisory Board Staff Office, July 29, 2013, *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr\\_activites/77243.57376745F48852579E60043E88C/\\$File/Final%20Determination%20memo\\_connectivity%20panel%20\(unsigned\).pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/77243.57376745F48852579E60043E88C/$File/Final%20Determination%20memo_connectivity%20panel%20(unsigned).pdf).

<sup>59</sup> Amana H. Saiyid, *EPA, Corps Send Proposed Rule to OMB to Clarify Clean Water Act Jurisdiction*, BLOOMBERG BNA (Sept. 18, 2013), *available at* <http://www.bna.com/epa-corps-send-n17179877129/>.

<sup>60</sup> EPA Readies 'Connectivity' Study to Bolster Clean Water Jurisdiction Policy, Inside EPA, Feb. 16, 2012.

<sup>61</sup> 78 Fed. Reg. 185 (Sept. 24, 2013).

<sup>62</sup> Memorandum from Jo Ellen Darcy, Assistant Sec. Civil Works, U.S. Army, to U.S. Army Corps Chief of Engineers (Oct. 3, 2013).

explanations as to why the report fails to “ask important questions about the about the significance of these connections to the health and integrity of downstream waters.”<sup>63</sup>

#### December 2013

The EPA Fails to Address Congressman Lamar Smith’s Concerns

- ✓ On December 16, 2013, the EPA responds to Chairman Smith without answering any of his questions.<sup>64</sup>

#### February 2014

The EPA Unlawfully Uses Social Media to Generate Support for WOTUS;

The Corps Informs the EPA of Outdated Economic Data

- ✓ The Administration and the EPA begin engaging in advocacy efforts to garner backing for the WOTUS rulemaking using various social media platforms, including Facebook, Twitter, Thunderclap, and a #Ditchthemyth campaign.<sup>65</sup> The GAO ultimately concludes that “EPA violated the described provisions through its use of social media in association with its rulemaking efforts to define ‘Waters of the United States’ under the Clean Water Act (CWA) during FYs 2014 and 2015.”<sup>66</sup>
- ✓ On February 20, 2014, the Corps indicates that the EPA’s Economic Analysis relied on outdated data and “[t]he analysis has not be revised to specifically evaluate the benefits and cost of the proposed rule, which is very different from the proposed Guidance.”<sup>67</sup>

#### April 2014

Proposed WOTUS Rule Released

- ✓ On April 21, 2014, the proposed WOTUS rule is published in *Federal Register*, which starts the public comment period.<sup>68</sup>

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<sup>63</sup> Letter from the Honorable Lamar A. Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to Dr. Amanda Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report (Nov. 6, 2013), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/7FF38D8F9D02345485257C2300685787/\\$File/11-06-2013+Science+Committee+Letter+to+Dr++Rodewald+and+Dr++Allen.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/7FF38D8F9D02345485257C2300685787/$File/11-06-2013+Science+Committee+Letter+to+Dr++Rodewald+and+Dr++Allen.pdf).

<sup>64</sup> Letter from Laura Vaught, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Lamar Smith (Dec. 16, 2013) *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/E4735639227A41CE85257C43006DF51F/\\$File/Chairman+Smith.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/E4735639227A41CE85257C43006DF51F/$File/Chairman+Smith.pdf).

<sup>65</sup> Letter from Susan A. Poling, General Counsel, Gov’t Accountability Office, to the Honorable James M. Inhofe, Chmn., Comm. on Environment and Public Works, U.S. Senate, Dec. 14, 2015, *available at* <http://www.gao.gov/assets/680/674163.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> Memo attached to Email from Charles Smith, Army Corps, to Jim Laity, OIRA (Jan. 23, 2015, 12:49 p.m.) (OMB-046648).

<sup>68</sup> Definition of “Waters of the United States” Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.



## June 2014

Initial Extension of Comment Period

- ✓ On June 24, 2014, the Agencies extend the comment period for the rule by 90 days.<sup>69</sup>

## September 2014

“Team of Eight” First Meets

- ✓ EPA/Army Corps’ “team of eight”— A group of eight individuals from the EPA and the Corps who met to discuss “technical issues and concerns” related to the rulemaking—begins working through the proposed WOTUS rule.<sup>70</sup>

## October 2014

SAB Completes Scientific Basis for Rulemaking Five Months After Rule Published

- ✓ The EPA’s Scientific Advisory Board (SAB), which provides independent engineering and scientific advice to the agency, completes its review of the Connectivity Report.<sup>71</sup> Thus, the scientific understanding behind the rule was completed *after* the rule was published.
- ✓ On October 14, 2014, the Agencies again extend the comment period, this time by 30 days.<sup>72</sup>
- ✓ The Small Business Administration Office of Advocacy’s Chief Counsel releases WOTUS comment letter strongly opposing the EPA’s determination that the rule does not invoke regulatory protections for small businesses.<sup>73</sup>
- ✓ The National Federation of Independent Businesses submits two sets of comments protesting the rule, asserting that the EPA violated the Regulatory Flexibility Act because the EPA failed to convene a Small Business Advocacy Review Panel before drafting the proposal.<sup>74</sup>

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<sup>69</sup> Definition of “Waters of the United States” Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>70</sup> Moyer Tr. at 56 (Dec. 17, 2015).

<sup>71</sup> CLAUDIA COPELAND, CONGRESSIONAL RESEARCH SERVICE, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 3 (2016).

<sup>72</sup> Definition of “Waters of the United States” Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>73</sup> WINSLOW SARGEANT, CHIEF COUNSEL, OFFICE OF ADVOCACY, SBA, COMMENT LETTER ON THE PROPOSED DEFINITION OF “WATERS OF THE UNITED STATES” UNDER THE CLEAN WATER ACT 4 (Oct. 1, 2014), *available at* <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

<sup>74</sup> *Drowning in Regulations: The Waters of the U.S. Rule and the Case for Reforming the RFA Before the S. Comm. on Small Business and Entrepreneurship*, 114th Cong. (2016) (statement of Elizabeth Milito, Esq., National Federation of Independent Business).

## November 2014

### EPA Effectively Cuts the Corps Out of Rulemaking

- ✓ The EPA suddenly stops “team of eight” meetings, effectively cutting the Corps out from collaboration without resolving all WOTUS concerns.<sup>75</sup>
- ✓ On November 14, 2014, the public comment period for WOTUS rule closes, allowing only one month for the public to review the rule after the SAB completed its peer review of the science cited as the basis for the rule.<sup>76</sup>

## January 2015

### Final Connectivity Report Released Despite Final Rule Still Under Review

- ✓ Corps personnel on team of eight are “surprised” to see WOTUS final draft text.<sup>77</sup>
- ✓ The EPA releases final Connectivity Report—the scientific analysis of the rule—on January 15, 2015, at approximately the same time that the final rule was completed.<sup>78</sup>

## February 2015

### Last Minute Changes Spark the Corps to Call for Revising NEPA Analysis

- ✓ Significant last-minute jurisdictional changes to the rule convince the Corps to call for revising the National Environmental Policy Act (NEPA) analysis to recommend that more environmental analysis be conducted.<sup>79</sup>

## April 2015

### The EPA Submits Final Rule for Review and Ignores Concerns Raised by OIRA and Other Agencies

- ✓ On April 3, 2015, Assistant Secretary Darcy issues a second “gag order” demanding that all Army and Army Corps communications to outside agencies and entities first go through her office.<sup>80</sup>
- ✓ On April 6, 2015, the final WOTUS rule is submitted to OIRA for review.<sup>81</sup>

<sup>75</sup> Moyer Tr. at 56-57 (Dec. 17, 2015).

<sup>76</sup> Definition of “Waters of the United States” Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>77</sup> Moyer Tr. at 59 (Dec. 17, 2015).

<sup>78</sup> Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, 80 FR 2100, *available at* <https://www.federalregister.gov/articles/2015/01/15/2015-00339/connectivity-of-streams-and-wetlands-to-downstream-waters-a-review-and-synthesis-of-the-scientific>.

<sup>79</sup> Smith Tr. at 73 (Jan. 21, 2016).

<sup>80</sup> Email from Jo Ellen Darcy, U.S. Army, to Thomas Bostick, U.S. Army, et.al., (May 15, 2015; 05:13 p.m.).

<sup>81</sup> Definition of “Waters of the United States” Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

- ✓ On April 14, 2015, OIRA expresses concern over ability to meet the accelerated review deadline, as well as the EPA's failure to deliver the rule's Economic Analysis despite having already submitted the rule for review.
- ✓ On April 27, 2015, Maj. Gen. Peabody of the Corps argues that the new changes to CWA jurisdiction under WOTUS are significant enough to require preparation of an Environmental Impact Statement (EIS), despite the Army's Finding of No Significant Impact (FONSI), which does not require the time-consuming environmental study of an EIS.<sup>82</sup>
- ✓ On April 27, 2015, OIRA sends rule out for interagency review and requests agency responses by May 11, 2015, allowing other agencies a mere two weeks to review the rule and provide feedback.<sup>83</sup>
- ✓ On April 28, 2015, in an example of agency concern over lack of review time, NASA requests an extension to review the final rule as they "had no ability to include [their] critical field centers in the [their] comment review process."<sup>84</sup>
- ✓ On April 29, 2015, OIRA denies NASA pleas for more time to review the complex rule.<sup>85</sup>
- ✓ In late April 2015—a month before the final rule is promulgated—Assistant Secretary Darcy reassigns NEPA preparation from the Army's long-time NEPA staffer to personnel with minimal knowledge of rule after the staffer continuously advises the EPA of the need for an EIS.<sup>86</sup>

## May 2015

Final Rule is Signed Despite Agency Concerns;

A Corps Memo States the Economic Analysis of the Rule is Significantly Flawed

- ✓ On May 5, 2015, despite the already rushed timeline, OIRA requests interagency comments on WOTUS sooner, since "[t]he pressure on WOTUS/Clean Water Rule is getting turned up from on high."<sup>87</sup>
- ✓ Following OIRA's push for a faster review process, NASA officials tell OIRA that "[y]ou're killing us"<sup>88</sup> and Department of Transportation (DOT) officials inform OIRA they are "not sure we can do it."<sup>89</sup>

<sup>82</sup> Memorandum from John W. Peabody, Maj. Gen. U.S. Army, to EPA Asst. Sec. for Civil Works (Apr. 27, 2015).

<sup>83</sup> Email from Vlad Dorjets, OIRA, to Jonathan Levy, Dept. Energy, *et al.*, (Apr. 27, 2015, 06:10 p.m.) (OMB-005178).

<sup>84</sup> Email from Linda Wennerberg, NASA to Vlad Dorjets, OIRA (Apr. 28, 2015, 3:41 p.m.) (OMB-039145).

<sup>85</sup> Email from Vlad Dorjets, OIRA, to Linda Wennerberg, NASA (Apr. 29, 2015, 11:52 a.m.) (OMB-039145).

<sup>86</sup> Smith Tr. at 11 (Feb. 19, 2016).

<sup>87</sup> *See, e.g.*, email from Vlad Dorjets, OIRA, to Eric Gormsen, Dept. Justice (May 5, 2015, 05:52 p.m.) (OMB-005850), email from Vlad Dorjets, OIRA, to Elizabeth Kohl, Dept. Energy (May 5, 2015, 05:51 p.m.) (OMB-005848).

<sup>88</sup> Email from Kenneth Kumor, NASA to Vlad Dorjets, OIRA (May 5, 2015, 6:35 p.m.) (OMB-005830).

<sup>89</sup> Email from Shoshana Lew, Dept. Transportation, to Vlad Dorjets, OIRA (May 5, 2015, 6:23 p.m.) (OMB-005821).

- ✓ On May 5, 2015, in addition to the shortened deadline, the DOT informs OIRA that they have yet to receive the Regulatory Impact Analysis (RIA), a vital piece of information for interagency review.<sup>90</sup> Though OIRA ultimately provides the RIA, they nonetheless continued to push DOT to finalize their comments by May 11, allowing the agency only 6 days to review the RIA and provide comment.<sup>91</sup>
- ✓ On May 13, 2015, EPA officials circulate WOTUS rollout timeline to push rule to finalization.<sup>92</sup>
- ✓ On May 15, 2015, Army Maj. Gen. Peabody signs memorandum advising that the Economic Analysis and Technical Support Document for WOTUS are deeply flawed, and the EPA “should not identify the corps as an author, co-author or substantive contributor”.<sup>93</sup>
- ✓ Despite the complexity of the WOTUS rule, as well as averaging 219 days to review EPA proposed rules,<sup>94</sup> on May 26, 2015, OIRA finishes its review of the WOTUS rule a mere 50 days after receiving the final draft.<sup>95</sup>
- ✓ On May 27, 2015, the EPA Administrator Gina McCarthy and Army Assistant Secretary for Civil Works Jo-Ellen Darcy sign the final WOTUS rule in a ceremony hosted by the advocacy group Earth Conservation Corps, the National Wildlife Federation’s Washington D.C. affiliate.<sup>96</sup>
- ✓ The same day the EPA is hosting the rule signing ceremony with advocacy groups, officials with the U.S. Department of Agriculture (USDA) inform OIRA that they never received the Regulatory Impact Analysis (RIA), a vital piece of information for interagency review.<sup>97</sup> In response, OIRA dismisses USDA’s concern, stating “[u]nfortunately, by the time I got your message we had already wrapped up the RIA and it would have been extremely difficult to re-open it at that point.”<sup>98</sup>
- ✓ The same day a USDA official expressed dismay over mismanagement of the rulemaking process, citing political concerns “. . . that process was not well managed... “sometimes the folks across the street from you do not care about longer term issues that other agencies do care about.”<sup>99</sup>

<sup>90</sup> Email from Shoshana Lew, Dept. Transportation to Vlad Dorjets, OIRA (May 5, 2015, 5:59 p.m.) (OMB-005821).

<sup>91</sup> Email from Vlad Dorjets, OIRA, to Shoshana, Lew Dept. Transportation (May 5, 2015, 06:30 p.m.) (OMB-005821).

<sup>92</sup> Email from Liz Purchia, EPA, to Vlad Dorjets, OIRA, *et.al.* (May 13, 2015, 04:55 p.m.) (OMB-036233).

<sup>93</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of “Waters of the United States” (May 15, 2015)

<sup>94</sup> Office of Info. and Regulatory Affairs, Reginfo.gov, Review Counts (last visited Sept. 20, 2016).

<sup>95</sup> Definition of “Waters of the United States” Under the Clean Water Act, Docket Folder Summary, Docket ID: EPA-HQ-OW-2011-0880, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>96</sup> National Wildlife Foundation, *A Historic Day for Clean Water*, YOUTUBE (May 27, 2015), *available at* <https://www.youtube.com/watch?v=oCzp2rW0rIs#t=1349>.

<sup>97</sup> Email from Vlad Dorjets, OIRA, to Robert Johansson, USDA (May 27, 2015 11:10 a.m.) (OMB-006194).

<sup>98</sup> *Id.*

<sup>99</sup> Email from Robert Johansson, USDA to Vlad Dorjets, OIRA (May 27, 2015 11:00 a.m.) (OMB-006194).

## June 2015

Final Rule Published in *Federal Register*

- ✓ On June 29, 2015, the final WOTUS rule is published in the *Federal Register*.<sup>100</sup>

## Post-Rulemaking

## August 2015

Rule Takes Effect

- ✓ On August 28, 2015, WOTUS takes effect.<sup>101</sup>

## October 2015

Court Blocks WOTUS Nationwide

- ✓ On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issues a stay of the Rule, delaying its implementation pending further action by the Court.<sup>102</sup>

## December 2015

GAO Reports EPA Violated Anti-Lobbying Act

- ✓ On December 14, 2015, GAO releases a report finding that EPA used appropriated funds for pro-WOTUS lobbying activities in violation of Anti-Lobbying Act.<sup>103</sup>

## September 2016

EPA Responds to GAO's Anti-Lobbying Act Finding

- ✓ Administrator McCarthy disavows GAO's findings, stating "Because no violation has occurred, no disciplinary action has been taken and no further steps are required on the part of the EPA."<sup>104</sup>

<sup>100</sup> Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 40 C.F.R. pts 110, 112, 116, et.al.), available at <https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>.

<sup>101</sup> The Final Clean Water Rule, available at <https://www.epa.gov/cleanwaterrule/final-clean-water-rule>.

<sup>102</sup> Order of Stay, *State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.* (6th Cir. 2015).

<sup>103</sup> Letter from Susan A. Poling, General Counsel, Gov't Accountability Office, to the Honorable James M. Inhofe, Chmn., Comm. on Environment and Public Works, U.S. Senate, Dec. 14, 2015, available at <http://www.gao.gov/assets/680/674163.pdf>.

<sup>104</sup> Letter from Gina McCarthy, Administrator, U.S. Environmental Protection Agency, to Gene Dodaro, Comptroller General, U.S. Government Accountability Office (Sept. 15, 2016).

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### U.S. Environmental Protection Agency (EPA)

- ✓ Lisa Jackson – Administrator, 2009-2013
- ✓ Gina McCarthy – Administrator, 2013-present
- ✓ Robert Sussman – Senior Policy Counsel to the Administrator
- ✓ Gregory Peck – Chief of Staff, Office of Water
- ✓ Liz Purchia – Deputy Associate Administrator for the Office of Public Affairs

### U.S. Army

- ✓ Jo-Ellen Darcy – Assistant Secretary for Civil Works, 2009-present
- ✓ Craig Schmauder – Deputy General Counsel, Office of General Counsel
- ✓ Chip Smith – Assistant for Environmental, Tribal and Regulatory Affairs
- ✓ Gib Owen – Assistant Deputy, Policy and Legislation Office

### U.S. Army Corps of Engineers (Army Corps)

- ✓ Maj. Gen. John Peabody – Deputy Commanding Gen. for Civil and Emergency Operations
- ✓ Terrence “Rock” Salt – Principal Deputy Assistant Secretary of the Army (Civil Works)
- ✓ Jennifer Moyer – Chief of the Regulatory Program
- ✓ Meg Gaffney-Smith – former Chief of the Regulatory Program
- ✓ Paul Scodari – Economist

### Office of Information and Regulatory Affairs (OIRA)

- ✓ Cass Sunstein – Administrator, 2009-2012
- ✓ Howard Shelanski – Administrator, 2013- present
- ✓ Dominic Mancini, Jr. – Deputy Administrator
- ✓ Jim Laity – Chief of Natural Resources and the Environment
- ✓ Vlad Dorjets – Desk Officer managing review of the final rule

### Small Business Administration Office of Advocacy (Advocacy)

- ✓ Dr. Winslow Sargeant – Chief Counsel
- ✓ Kia Dennis – Assistant Chief Counsel

### National Aeronautics and Space Administration (NASA)

- ✓ Dr. Linda Wennerberg – Environmental Management Division
- ✓ Kenneth Kumor – Environmental Management Division

### Department of Transportation (DOT)

- ✓ Shoshana Lew – Deputy Assistant Secretary for Policy

## INTRODUCTION

Water is one of the planet's most ubiquitous resources. The duty of maintaining access to clean water has historically fallen to state and local governments. In 1972, however, Congress passed the Clean Water Act (CWA) to give the federal government limited jurisdiction over navigable waters.<sup>105</sup> These waters are called “navigable waters of the United States,” “navigable waters,” or commonly “waters of the United States” (WOTUS). Since 1972, there have been numerous attempts to expand the definition of navigable waters legislatively, all of which have failed.<sup>106</sup> The Environmental Protection Agency (EPA) is leading the current effort to define federal jurisdiction over water by redefining “waters of the United States” via a rulemaking the agency termed the “Clean Water Rule.”<sup>107</sup>

The scope of the definition for “waters of the United States” is legally significant. If a body of water is covered by the definition, then multiple authorities under the CWA apply, including a federal prohibition on discharges of pollutants (Section 301), requirements to obtain a permit prior to discharge (Sections 402 and 404), water quality standards and measures to attain them (Section 303), oil spill liability and oil spill prevention and control measures (Section 311), certification that federally permitted activities comply with state water quality standards (Section 401), and enforcement (Section 309).<sup>108</sup> As both the EPA and the U.S. Army Corps of Engineers (Corps) share jurisdiction over implementation of the Clean Water Act, WOTUS activity would be joint between EPA and the Corps.<sup>109</sup>

### The History of the Definition of Navigable Waters

Congress has been utilizing a definition of navigable waters since at least 1899.<sup>110</sup> Since the Supreme Court first held in 1870 that “‘waters’ must be navigable in fact, or susceptible of being rendered so,”<sup>111</sup> the Court has “twice stated that the meaning of ‘navigable waters’ in the Act is broader than the traditional understanding of that term.”<sup>112</sup> The CWA has a single definition of “navigable waters” that applies to the act as a whole, including the “dredge and fill” permit program in Section 404, the source of the Corps jurisdiction.

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<sup>105</sup> 33 U.S.C. §1251 et seq. (1972).

<sup>106</sup> Claudia Copeland & Alexandra M. Wyatt, “The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond,” Congressional Research Service, Apr. 27, 2016, available at <http://www.crs.gov/Reports/RL33263>.

<sup>107</sup> Daguiard, Robert, and Lina Younes, U.S. Environmental Protection Agency, “Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy,” May 27, 2015, available at <https://yosemite.epa.gov/opa/admpress.nsf/0/62295CDDD6C6B45685257E52004FAC97>.

<sup>108</sup> Claudia Copeland, “Legislative Approach to Defining Waters of the United States,” Congressional Research Service, Dec. 29, 2010, available at <http://www.crs.gov/pdfloader/R41225>. EPA is primarily responsible for implementing the CWA, but EPA and the Corps share responsibilities to implement Section 404, the dredge and fill regulatory program.

<sup>109</sup> 33 U.S.C. §1251 et seq. (1972).

<sup>110</sup> Rivers and Harbors Act of 1899 §10 (33 U.S.C. §403).

<sup>111</sup> *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

<sup>112</sup> *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).



Arguments about the scope of navigable waters continued, however, with subsequent Supreme Court decisions, particularly the 2001 case *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*<sup>113</sup> and the 2006 case *Rapanos v. United States* decision.<sup>114</sup> Both of these rulings upheld congressional limits on the scope of the CWA.

In the *Rapanos* decision, a plurality of four justices, led by Justice Scalia, interpreted Section 404 narrowly, rejecting the Corps' position that its authority over water was essentially limitless under the CWA.<sup>115</sup> The Court found the term "waters of the United States . . . includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"<sup>116</sup>

Justice Kennedy's concurring opinion stated a less-stringent case-by-case reading of the CWA, arguing that all waters with a "significant nexus" to "navigable waters" are covered.<sup>117</sup> The words "significant nexus" have been open to judicial interpretation and considerable controversy.<sup>118</sup> The remaining four dissenting justices adhered to the prior interpretation of the federal government's broad CWA jurisdiction.<sup>119</sup>

#### The EPA's and the Corps' Responses to the Court's Decisions

In response to the *Rapanos* decision, the Bush Administration issued guidance in 2008 that attempted to provide clarity to the post-*Rapanos* landscape.<sup>120</sup> The guidance document largely hewed to the plurality opinion.<sup>121</sup> It states:

[T]he agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable

<sup>113</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

<sup>114</sup> *Rapanos v. United States*, 547 U.S. 715, 746 (2006). What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only "the waters of the United States."

<sup>115</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>116</sup> *Rapanos v. United States*, 547 U.S. 715, 716 (2006).

<sup>117</sup> *Rapanos v. United States*, 547 U.S. 715, 759-786 (2006). "In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard." at 782.

<sup>118</sup> Lawrence Hurley, Supreme Court's Murky Clean Water Act Ruling Created Legal Quagmire, Greenwire, Feb. 7, 2011, available at <http://www.eenews.net/greenwire/stories/1059944930/>.

<sup>119</sup> For a greater discussion of *Rapanos*, see Claudia Copeland and Alexandra M. Wyatt, "The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond," Apr. 27, 2016, Congressional Research Service, available at <http://www.crs.gov/pdfloader/RL33263>.

<sup>120</sup> Revised Mem. from Envtl. Prot. Agency & Dep't of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008), available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>121</sup> For a greater discussion of *Rapanos*, see Claudia Copeland and Alexandra M. Wyatt, "The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond," Apr. 27, 2016, Congressional Research Service, p.9, available at <http://www.crs.gov/pdfloader/RL33263>.

tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters.<sup>122</sup>

On April 27, 2011, the Obama Administration issued its own draft guidance to provide “clarification” on the question of which bodies are under CWA jurisdiction.<sup>123</sup> In the 2011 draft guidance, the EPA and the Corps defined the CWA’s reach to regulate a broad category of wetlands.<sup>124</sup> This guidance document was intended to replace and supersede the Bush-era guidance.<sup>125</sup>

### Guidance Became a Rulemaking

The Administration signaled it might replace its guidance document with a proposed rule, and so stated in the April 2011 draft guidance.<sup>126</sup> On September 17, 2013, the EPA and the Corps announced they would no longer pursue expansion of their CWA jurisdiction through the guidance process, opting instead to use notice-and-comment rulemaking.<sup>127</sup> A draft rule was sent to the White House Office of Information and Regulatory Affairs (OIRA) for review the same day.<sup>128</sup>

In fact, the guidance had been under review at OIRA for nineteen months prior to that point, since February of 2012—far in excess of the 90-day maximum for OIRA’s review period established in Executive Order 12866.<sup>129</sup> On April 21, 2014, the EPA and the Corps issued a proposed WOTUS rule.<sup>130</sup> It broadened CWA jurisdiction from the 2008 guidance. The proposed rule stated:

The agencies propose to define ‘waters of the United States’ in section (a) of the proposed rule for all sections of the CWA to mean: Traditional navigable waters; interstate waters, including interstate wetlands; the territorial seas; impoundments of traditional navigable waters, interstate

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<sup>122</sup> Revised Mem. from Env’tl. Prot. Agency & Dep’t of the Army on Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008), available at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>123</sup> Environmental Protection Agency and Army Corps of Engineers, “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” Apr. 27, 2011, p. 1.

<sup>124</sup> Paul Quinlan, Guidance Won’t Spark ‘Massive Increase’ in Federal Jurisdiction—EPA Chief, E&E News PM, Apr. 27, 2011, available at <http://www.eenews.net/eenewspm/stories/1059948298/>.

<sup>125</sup> Environmental Protection Agency and Army Corps of Engineers, “Draft Guidance on Identifying Waters Protected by the Clean Water Act,” Apr. 27, 2011, p. 1.

<sup>126</sup> *Id.*

<sup>127</sup> Nancy Stoner and Lek Kadeli, EPA Science: Supporting the Waters of the U.S., EPA Connect: The Official Blog of EPA’s Leadership, Sept. 17, 2013, available at <http://blog.epa.gov/epaconnect/2013/09/watersoftheus/>.

<sup>128</sup> See <http://www.reginfo.gov>.

<sup>129</sup> EPA Readies ‘Connectivity’ Study to Bolster Clean Water Jurisdiction Policy, Inside EPA, Feb. 16, 2012.

<sup>130</sup> Clean Water Act; Definitions: “Waters of the United States,” Reg. Identifier No. 2040-AF30, Docket ID: EPA-HQ-OW-2011-0880, available at <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

waters, including interstate wetlands, the territorial seas, and tributaries, as defined, of such waters; tributaries, as defined, of traditional navigable waters, interstate waters, or the territorial seas; and adjacent waters, including adjacent wetlands. Waters in these categories would be jurisdictional ‘waters of the United States’ by rule—no additional analysis would be required. The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or in combination with similarly situated waters in the region, is significant based on data, science, the CWA, and caselaw.<sup>131</sup>

The comment period for the rule was extended twice, to November 14, 2014.<sup>132</sup> A final draft of the rule was sent to OIRA for review on April 6, 2015, and the final rule was released on May 27, 2015.<sup>133</sup> The final rule defines eight waterbodies as falling within the CWA jurisdiction. The rule states:

The first three types of jurisdictional waters, traditional navigable waters, interstate waters, and the territorial seas, are jurisdictional by rule in all cases. The fourth type of water, impoundments of jurisdictional waters, is also jurisdictional by rule in all cases. The next two types of waters, ‘tributaries’ and ‘adjacent’ waters, are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. For waters that are jurisdictional by rule, no additional analysis is required.

The final two types of jurisdictional waters are those waters found after a case-specific analysis to have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with similarly situated waters in the region.<sup>134</sup>

A recently-published report by the Senate Committee on Environment and Public Works notes the final rule allowed for the agencies to broadly claim jurisdiction, including for puddles, tire ruts, sheet flow, and standing water.<sup>135</sup> Under the new rule, these features could be

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<sup>131</sup> Clean Water Rule: Definition of “Waters of the United States,” Reg. Identifier No. 2040-AF30, Docket ID: EPA-HQ-OW-2011-0880-20862, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>132</sup> Definition of Waters of the United States under the Clean Water Act, Reg. Identifier No. 2040-AF30, Docket ID: EPA-HQ-OW-2011-0880-2733; *see also* Definition of Waters of the United States, Reg. Identifier No. 2040-AF30, Docket ID: EPA-HQ-OW-2011-0880-7500, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>133</sup> Clean Water Rule: Definition of “Waters of the United States,” Reg. Identifier No. 2040-AF30, Docket ID: EPA-HQ-OW-2011-0880-20862, *available at* <https://www.regulations.gov/docket?D=EPA-HQ-OW-2011-0880>.

<sup>134</sup> *Id.*

<sup>135</sup> Majority Staff, From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act, S. COMM. ON ENVIRONMENT AND PUBLIC WORKS, Sep. 20, 2016, *available at* [http://www.epw.senate.gov/public/\\_cache/files/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/wotus-committee-report-final1.pdf](http://www.epw.senate.gov/public/_cache/files/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/wotus-committee-report-final1.pdf).

reclassified as “disturbed wetlands” and regulated by the EPA. Further, if farmers change their land use from one form of agriculture to another, such as from crops to grazing, this could be considered a “new use,” rendering certain farmers vulnerable to losing their agricultural exemption.

The final rule also created an arbitrary standard whereby waters within 4,000 feet from any jurisdictional water would be covered. The rule states:

[W]aters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or covered tributary are subject to case-specific significant nexus determinations, unless the water is excluded under paragraph (b) of the rule.<sup>136</sup>

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<sup>136</sup> Final Rule: <https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>

## POLITICAL CONSIDERATIONS DROVE THE WOTUS RULEMAKING

FINDING: The agencies pushed the rule through on an accelerated timeline that appeared to have been motivated by political considerations. Some officials involved in the process believed politics deprived them the opportunity to conduct a meaningful and full review of the rule before its promulgation. Interagency reviewers and the White House were not provided the full rule package for review.

Since assuming office, the Obama Administration made it a priority to promulgate an expansion of the defined “waters of the United States” under the jurisdiction of the CWA. Chip Smith, Assistant for Environment, Tribal and Regulatory Affairs for the Office of the Assistant Secretary of the Army (Civil Works) testified to the Committee in a transcribed interview that Administration officials were already pushing a WOTUS rule before political leadership could even be set up in the Office of the Assistant Secretary of the Army for Civil Works. Smith testified:

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

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

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

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

Q And can I clarify whose belief was that?

A Administrator Jackson personally, I sat next to her, and Robert Sussman.<sup>137</sup>

According to Smith’s testimony, in early meetings, then-EPA Administrator Lisa Jackson and her top aide, Robert Sussman, pushed to accelerate the process, starting with the initial

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<sup>137</sup> Smith Tr. at 58 (Jan. 21, 2016).

WOTUS guidance document, which was later withdrawn and replaced with more formal rulemaking.<sup>138</sup> Smith stated that such a demand conflicted with procedural and practical rulemaking considerations, especially given the complexity of the WOTUS effort. Smith testified:

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

A Uh huh.

Q Who was trying to complete it quickly?

A The [EPA] administrator and Robert Sussman.

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

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

And there was thinking that [the] guidance could be written fairly quickly, but if you've looked at some of this stuff, it's really hard. I mean, it's one thing to write the words, but then how it plays out in the field is tough. Nature is hard to describe, and so we got kind of you know, I'm not pointing fingers at anybody here; it's just hard to do that.<sup>139</sup>

Top-level interest continued into 2012, as the Administration was preparing WOTUS guidance. In an email from March of that year, OIRA staff discussed the White House Chief of Staff's commitments on WOTUS to environmentalist groups.<sup>140</sup> On March 29, 2012, the Chief of the Natural Resources and Environmental Branch, Jim Laity, wrote to his colleagues regarding the draft Clean Water Act guidance: "This is a very big deal. I understand COS has promised enviros it will be done 'soon.'"

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<sup>138</sup> *Id.* at 16.

<sup>139</sup> *Id.* at 16-17.

<sup>140</sup> Email from Jim Laity, OIRA to Shayna L. Strom, OIRA (Mar. 29, 2012, 2:12 p.m.) (OMB-041300).

**From:** Laity, Jim  
**Sent:** Thursday, March 29, 2012 2:12 PM  
**To:** Strom, Shayna L.  
**Cc:** Mancini, Dominic J.; Weiss, Jeff; Neyland, Kevin F.  
**Subject:** HVP for Waters of the US Guidance  
**Attachments:** HVP for Clean Water Act Jurisdictional Guidance Final.docx

Shayna, We are still a few weeks away on this, but I wanted to get into vetting early. This is very big deal. I understand COS has promised enviros it will be done "soon." -- jim

Emails obtained by the Committee show that as work on WOTUS continued, the EPA communicated with environmentalist groups and provided special access as the process moved forward. For example, on September 16, 2013, EPA Deputy Chief of Staff Arvin Ganesan wrote "I think we should - on an embargoed basis - give the WOTUS final public doc to select groups who will say positive things."<sup>141</sup>

The emails also show the EPA Administrator was directly involved in the rulemaking process, even after Administrator Lisa Jackson was replaced by Gina McCarthy in 2013. In an email from November of that year, OIRA staff wrote: "OW [EPA Office of Water] staff told me that Gina has insisted that policy issues go straight to her, without trying to work them at a lower level first."<sup>142</sup>

Documents and testimony show that as the rulemaking proceeded, the EPA continued to dominate the rulemaking schedule. Smith testified that EPA Administrator Jackson's successor, Gina McCarthy, continued aggressively pushing the rule forward, and set an uncompromising timeline for releasing the final WOTUS rule in May 2015.<sup>143</sup> For example, documents show that in early 2013, McCarthy attempted to downplay the economic impact of the rule, which would have resulted in more deliberation and a deeper examination that would slow WOTUS.<sup>144</sup>

**From:** Laity, Jim  
**Sent:** Thursday, November 07, 2013 10:04 AM  
**To:** Shelanski, Howard  
**Cc:** Mancini, Dominic J.; Higgins, Cortney; Greenawalt, Andrei  
**Subject:** WOTUS

I understand Gina is concerned about calling it economically significant. Let me know if you need more info.

<sup>141</sup> Email from Arvin Ganesan, EPA, to Sarah Bittleman, EPA, *et al.* (Sept. 16, 2013, 2:56 p.m.) (OMB-034495).

<sup>142</sup> Email from Jim Laity, OIRA, to Cortney Higgins, OIRA (Nov. 26, 2013, 5:49 p.m.) (OMB-037507).

<sup>143</sup> Smith Tr. at 13 (Feb. 19, 2016).

<sup>144</sup> Email from Jim Laity, OIRA, to Dominic Mancini, Cortney Higgins, and Andrei Greenawalt, OIRA (Nov. 7, 2013, 10:04 a.m.) (OMB-045654).



Staff at the Army told the Committee that politics appeared to play a role in the push for them to move forward on WOTUS. Jennifer Moyer, Chief of the Regulatory Program at the Corps, testified:

Q 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.<sup>145</sup>

Chip Smith testified that the push for the rule was politically motivated. He stated:

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

A Yes.

Q And why do you say that?

A **The schedule was driven by politics; the policy decisions, some of them, in my opinion, were driven by politics; and in particular, several of the last minute changes in the last few months, in my view, were not science or economic based, but driven solely by politics.**<sup>146</sup>

\* \* \*

Q In a previous round, you commented that politics played a role in rulemaking. What was your basis for saying that?

A Several statements from EPA staff that this is a chance to grab as much jurisdiction as we can, and then statements on the other side of the equation if we don't change the rule and take something off the table, Secretary Vilsack will be angry. This is Greg Peck. If we don't do something for ditches along roadsides, DOT may not chop on the rule. And I can come up with other examples if I had to, but instead of talking about the science and what's the right answer in terms of tributaries and what to regulate and not regulate, there was this constant jockeying for how do we get the rule out the door on a nonscientific basis adjusting the rule to meet people's concerns or other agencies' concerns. To me, that's a political thing, not a science-based

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<sup>145</sup> Moyer Tr. at 35 (Dec. 17, 2015).

<sup>146</sup> Smith Tr. at 40 (Jan. 21, 2016).

thing.<sup>147</sup>

Smith further testified:

Q Were you ever told in any way, or feel pressure to achieve the administration's objective in this rulemaking?

A Yes.

Q How so?

A Typically, we're provided a problem, we study it, we assess it, we come up with alternatives, we propose a solution. The boss picks one, and we proceed.

**In this case, we were told the answer up front pretty much.** We really were not allowed to do the science and study options and alternatives. We went towards one goal and one goal only for 6 years, which is probably the reason we meandered so much, and so there was constant pressure to get from a predetermined initial policy point to a final point that was as close as possible to that, and the only give was to take some jurisdictional waters off the table to help with concerns expressed by USDA and farmers.

Q And these were some of the reasons you mentioned that you felt the rule was political. Is that correct?

A That's correct. That, along with the interpretive rule.

Q And you would say that this process that you just outlined, studying a problem, coming up with solutions, evaluating alternatives, proposing, and making a decision is part of a normal rulemaking process?

A That's correct.

Q Even in the case of a joint rulemaking between the EPA and Army Corps?

A That's correct.

Q At any other point in your tenure, besides working on WOTUS, did you feel pressure to conduct your work or data analysis to achieve a certain result?

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<sup>147</sup> *Id.* at 179.

A No.

Q Would you say that your experience with WOTUS rulemaking is unprecedented in the manner in which your work was managed?

A Yes.<sup>148</sup>

Documents and testimony show that OIRA staff acknowledged WOTUS rulemaking was a high regulatory priority for the Administration. This message was communicated to OIRA through increased pressure and attention to the rulemaking. Jim Laity testified that senior OIRA leadership communicated the Administration's concerns to him directly. Laity stated: "There was a lot of concern that to me was communicated from the senior leadership of OIRA."<sup>149</sup> Laity further testified the Administration can and does influence the OIRA review process. He stated:

Q In your time at OIRA, have you ever received such direction to make sure a rule makes it through the review process?

A Yes.

Q Do you recall which proposals those would include?

A The most common case when that happens is when there is a judicial deadline for review, a court-ordered deadline. And then we try very hard to meet those court-ordered deadlines, and that sometimes requires a very compressed review.

Occasionally, there could also be a very high-profile rule where the administration has made a public commitment to get something done by a particular time. And then we would also be aware of that and do our very best to meet that deadline.<sup>150</sup>

\* \* \*

It is not uncommon for my boss, Howard Shelanski, whom I work for and who gives me direction, to tell me that there is a desire on the part of the administration to get a rule done on a particular schedule. And there have been other rules in this administration and in other administrations where I have received that kind of instruction from the Administrator of

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<sup>148</sup> Smith Tr. at 89-91 (Feb. 19, 2016).

<sup>149</sup> H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Jim Laity, Tr. at 25 (Mar. 8, 2016). [hereinafter Laity Tr.]

<sup>150</sup> *Id.* at 165. (emphasis added)

OIRA.<sup>151</sup>

As a general rule, the White House plays an important role in OIRA's regulatory review. OIRA is aware of the influence of political offices and gives deference to political decision makers. Laity testified to the Committee:

I think it's fair to say that we give a little more weight or pay a little more attention to comments from the Executive Office, you know, EOP offices because they are—each of them has their own fairly senior decision maker within the White House or within the EOP.<sup>152</sup>

According to Laity, OIRA specifically solicits feedback from the Council on Environmental Quality (CEQ), Council of Economic Advisers, the Office of Science and Technology Policy, the Domestic Policy Council, White House counsel's office, and the Office of the U.S. Trade Representative.<sup>153</sup>

### The EPA Funded an Improper Grassroots Lobbying Effort

The documents show the Administration engaged in an advocacy effort to create the appearance of grassroots support for WOTUS. The non-partisan Government Accountability Office (GAO) found the EPA violated restrictions on lobbying and propaganda in its social media efforts to drum up support for the WOTUS rule in 2014 and 2015.<sup>154</sup> GAO took issue with the EPA's use of a software program called Thunderclap, which allows for a particular message to be spread across multiple social media platforms, such as Facebook and Twitter, simultaneously.<sup>155</sup> Specifically, GAO noted that the EPA used Thunderclap to send messages supporting WOTUS to approximately 1.8 million people.<sup>156</sup> Due to the nature of Thunderclap, however, it was not clear to these recipients that the EPA, a federal government agency, had authored the messages.<sup>157</sup> As such, GAO wrote "we conclude that EPA's use of Thunderclap constitutes covert propaganda, in violation of the publicity or propaganda prohibition."<sup>158</sup>

GAO found that the EPA also violated laws barring federal agencies from engaging in or encouraging lobbying of Congress.<sup>159</sup> The violation in question stems from a blog post written by EPA Communications Director for Water Travis Loop published on the EPA's website. The blog post touted the Clean Water Rule and urged readers to post pictures of themselves showing

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<sup>151</sup> *Id.* at 167. (emphasis added)

<sup>152</sup> *Id.* at 24.

<sup>153</sup> *Id.* at 55.

<sup>154</sup> Letter from Susan A. Poling, General Counsel, Gov't Accountability Office, to the Honorable James M. Inhofe, Chmn., Comm. on Environment and Public Works, U.S. Senate, Dec. 14, 2015, *available at* <http://www.gao.gov/assets/680/674163.pdf>.

<sup>155</sup> *Id.* at 3.

<sup>156</sup> *Id.* at 13-14.

<sup>157</sup> *Id.* at 12.

<sup>158</sup> *Id.* at 11.

<sup>159</sup> *Id.*

support for the rule on various social media outlets.<sup>160</sup> Loop's blog post also provided hyperlinks to two environmentalist group websites: The Surfrider Foundation and the Natural Resources Defense Council (NRDC).<sup>161</sup> Those websites contained links enabling users to contact Congress and lobby in favor of WOTUS. GAO found that arrangement to be improper. GAO stated: "We also conclude that EPA hyperlinks to the NRDC and Surfrider Foundation webpages provided in the EPA blog post constitute grassroots lobbying, in violation of the grassroots lobbying prohibition."<sup>162</sup> Based upon these findings, GAO concluded:

Because EPA obligated and expended appropriated funds in violation of specific prohibitions, we also conclude that EPA violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), as the agency's appropriations were not available for these prohibited purposes. Accordingly, EPA should report the violation to the President and Congress, with a copy to the Comptroller General, as required by the Antideficiency Act.<sup>163</sup>

The EPA responded to GAO's findings about the problematic blog post by Travis Loop three days later, in another blog post, this time by Liz Purchia, the Deputy Associate Administrator for the Office of Public Affairs. Purchia criticized GAO as "backward-thinkers" and dismissed GAO's findings with respect to the EPA's promotional activities for the Clean Power Plan and WOTUS rule. Purchia wrote:

It's almost 2016. One of the most effective ways to share information is via the Internet and social media. Though backward-thinkers might prefer it, we won't operate as if we live in the Stone Age.

\* \* \*

At no point did the EPA encourage the public to contact Congress or any state legislature about the Clean Water Rule. Plain and simple. The rule is an agency action, promulgated by EPA. It's not even about congressional legislation.<sup>164</sup>

On September 15, 2016, more than nine months later, the EPA formally responded to GAO in a letter signed by Administrator McCarthy.<sup>165</sup> McCarthy disavowed GAO's findings

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<sup>160</sup> Travis Loop, Communications Director-Office of Water, U.S. Environmental Protection Agency, Tell Us Why #CleanWaterRules, Our Planet, Our Home: EPA's Blog About Our World, Apr. 7, 2015, available at <http://blog.epa.gov/blog/2015/04/tell-us-why-cleanwaterrules/>.

<sup>161</sup> Letter from Susan A. Poling, General Counsel, Gov't Accountability Office, to the Honorable James M. Inhofe, Chmn., Comm. on Environment and Public Works, U.S. Senate, Dec. 14, 2015, available at <http://www.gao.gov/assets/680/674163.pdf>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 26.

<sup>164</sup> Liz Purchia, Deputy Associate Administrator, Office of Public Affairs, EPA, *We Won't Back Down from our Mission*, EPA CONNECT (Dec. 17, 2015, 6:19 p.m.), <https://blog.epa.gov/blog/2015/12/we-wont-back-down-from-our-mission/>.

<sup>165</sup> Letter from Gina McCarthy, Administrator, U.S. Environmental Protection Agency, to Eugene Dodaro, Comptroller General, U.S. Government Accountability Office (Sept. 15, 2016) (on file with Committee staff).

and stated that the EPA took no action in response to the findings. She wrote: “Because no violation has occurred, no disciplinary action has been taken and no further steps are required on the part of the EPA.”<sup>166</sup>

Army and Corps officials stated that the public affairs components of the Clean Power Plan and WOTUS rule were not typical to the normal rulemaking process. Chip Smith testified:

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

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

Q And why did you advise against it?

A We have never social media’d, in my 36 years of experience, a rule like this. I’m not saying it’s lobbying, but it gives the perception of sort of lobbying for what you want to do, and we just thought—considering how contentious this rule was, myself and several others in the Corps thought it was not a good idea, but we didn’t have any real control over that.<sup>167</sup>

Jennifer Moyer testified:

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.<sup>168</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> Smith Tr. at 41 (Jan. 21, 2016).

<sup>168</sup> Moyer Tr. at 44 (Dec. 17, 2015).

## Politics Influenced the Timeline for Releasing the Rule

Documents and testimony show that political pressure affected the entire WOTUS rulemaking and led the Administration to prioritize speed over a thorough and thoughtful process. Staff responsible for conducting the rulemaking were repeatedly rushed, often without any explanation. The public comment period closed November 14, 2014, and almost immediately thereafter, staff were rushed to complete the rulemaking as quickly as possible. Jennifer Moyer testified “**there was a sense of urgency,**” which led her to bring on additional staff to try to complete the rulemaking work and the review of public comments as quickly as possible.<sup>169</sup> Moyer testified that Craig Schmauder made her aware of the sense of urgency surrounding the rulemaking.<sup>170</sup> Schmauder is an attorney with the Army’s Office of General Counsel, who led the Army and the Corps through the WOTUS rulemaking.<sup>171</sup> Moyer stated:

Q Who expressed that sense of urgency to you?

A I was hearing that from Craig Schmauder.

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

A 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.<sup>172</sup>

The Rule was submitted to OIRA for review in April 2015. At that time, the EPA informed OIRA staff of their expectation that OIRA would complete the review in less than the 90-day time period provided by Executive Order 12866. During an interview, Laity testified to the Committee that there was concern about this timing. Laity stated:

Q Were you aware of any timeframe or deadline set for the rule’s development or finalization?

A I do not remember the details of those discussions, but I do remember that there was a lot of concern that to me was communicated from the senior leadership of OIRA, but they may well have been talking to other people, I don’t know, and that we certainly at various points in time were trying to make deadlines.<sup>173</sup>

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<sup>169</sup> *Id.* at 30. (emphasis added)

<sup>170</sup> *Id.*

<sup>171</sup> Schmauder Tr. at 10 (Feb. 17, 2016).

<sup>172</sup> Moyer Tr. at 32 (Dec. 17, 2015).

<sup>173</sup> Laity Tr. at 25-26 (Mar. 8, 2016).



Documents show EPA sought a commitment from OIRA that it would complete the review within 60 days.<sup>174</sup> OIRA staff had numerous concerns with that timeline, however, including insufficient supporting documentation and the speed at which they could complete the interagency comment process.<sup>175</sup> Laity detailed some of these concerns and discussion in an email to OIRA Administrator Howard Shelanski on April 14, 2015 after a meeting between staff from OIRA, the Corps, and the EPA.<sup>176</sup> Regarding the meeting, Laity wrote: “Several process issues came up.”<sup>177</sup> Laity referred to EPA’s request for a 60-day review and an insufficient preamble drafted in a manner directed by EPA Administrator Gina McCarthy herself.

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<sup>174</sup> Email from Jim Laity, OIRA, to Howard Shelanski, Dom Mancini, and Katie Johnson, OIRA (Apr. 14, 2015, 6:27 p.m.)

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

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**From:** Laity, Jim  
**Sent:** Tuesday, April 14, 2015 6:27 PM  
**To:** Shelanski, Howard; Johnson, Katie B.; Mancini, Dominic J.  
**Cc:** Dorjets, Vlad; Levenbach, Stuart  
**Subject:** WOTUS Update

Howard:

We had a productive meeting with EPA and Corps senior staff. Rule is in pretty good shape. We are still reading it, so don't know yet what substantive issues may warrant elevation. One issue we discussed is whether the potential number of case-by-case jurisdictional determinations in the draft final rule can be further reduced. EPA has made huge progress since proposal in shrinking the area where case-by-case determinations are required and included some very helpful bright lines for regulatory certainty. But for so-called "isolated waters" between 100 and 4,000 feet away from a jurisdictional water, a case-by-case determination is still required. This is a huge step forward from proposal, where all isolated waters required case-by-case, but still encompasses a large number of waters, especially in the East where waters tend to be pretty close together. A key feature of our review will be to explore this issue thoroughly. In other controversial areas, such as ditches and agricultural lands, they have simplified considerably, and based on the preliminary briefing, rule seems in good shape (but of course, devil is in the details).

Several process issues came up. EPA believes there is an understanding at your level that we will do a 60-day review. Apparently Gina has announced publicly that they will release the rule "this spring" (ie, by June 21). We told them that we were aware of their request for a 60-day review and would do our best to accommodate it, but that our understanding was that OIRA had not yet committed to that and it depends on the timing of getting supporting docs (we still do not have the economic analysis), level of interagency comments, how quickly EPA and the Corps are able to resolve issues, etc. This was how I interpreted our last discussion with you on this issue, so I hope I have not misrepresented OIRA's perspective. Based on this feedback, EPA agreed to speed up their completion of the EA and get it to us next week (they had started out saying several more weeks).

We are also concerned that the preamble does not discuss comments and the agencies' response to them, as final rules typically do. EPA staff said it was Gina's personal decision to write the preamble this way, and she was fully informed that this was "atypical" for a final rule preamble. EPA is frantically trying to finish a massive separate response to comment document by the release date, it is unlikely to be finished in time to show us during our review. However, it turns out that EPA does have a summary of major comments already; as a compromise they agreed to share this with us, along with some key representative raw comments, and then answer any questions we have about how they were addressed in cases where it is not already obvious from the rule and preamble. Less than ideal but probably the best we can get.

EPA expressed some concern about sharing the EA to the wider interagency review group. We indicated that this is fairly standard in our review process (and interagency reviewers have already asked for it), but emphasized the restricted distribution process we are using (one senior official at each agency). By the end of the conversation EPA seemed to agree that this was an acceptable approach. However, it is possible that you may get further blowback on some or all of these process issues.

Let me know if you need more info. Jim X [REDACTED]

Despite these concerns and the "frantic" pace of the work, OIRA completed the WOTUS review in just 50 days.<sup>178</sup>

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<sup>178</sup> *Id.*

## OIRA's Review was Rushed

OIRA staff were directed to complete their review on a rushed timeline. To accommodate the aggressive timeline, the agency omitted a complete review of rulemaking processes, supporting documentation, and interagency comments. OIRA received the final WOTUS rule on April 6, 2015 for review.<sup>179</sup> Executive Order 12866 allows OIRA to review regulations for 90 days plus additional time as requested by the Administrator or the agency.<sup>180</sup> OIRA completed the review on May 26, 2015, fifty days after receiving the final rule text.<sup>181</sup>

Fifty days to review a rule is short by OIRA standards, especially for a complicated rule originating with the EPA. In 2014, OIRA averaged 127 days per review.<sup>182</sup> For EPA rules, the average review was even longer—219 days.<sup>183</sup>

In 2015, OIRA sped up its review time significantly, particularly for EPA rules. Overall, the average review time dropped to 88 days—approximately 30 percent shorter.<sup>184</sup> For EPA rules, OIRA averaged 89 days to review a rule, nearly 60 percent shorter than the previous year.<sup>185</sup> OIRA Administrator Howard Shelanski told the Committee that he has made an effort to shorten review times.<sup>186</sup> Even by OIRA's improved standards, however, the WOTUS review was uniquely brief.

Documents show that for the WOTUS rulemaking, OIRA staff felt that a 60-day deadline was unreasonable and could compromise their review. An email between OIRA staff in March 2015 detailed OIRA's timing concerns and acknowledged EPA was unable even then to produce documents to OIRA on this schedule.<sup>187</sup> Jim Laity wrote: "We can meet a schedule of 60 days on WOTUS if necessary, but it may compromise the thoroughness of our review."<sup>188</sup>

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<sup>179</sup> Office of Info. and Regulatory Affairs, Reginfo.gov, Historical Reports, RIN 2040-AF16 (last visited June 30, 2016).

<sup>180</sup> E.O. 12866, 58 Fed. Reg. 51005 (Sept. 29, 1993).

<sup>181</sup> Office of Info. and Regulatory Affairs, Reginfo.gov, Historical Reports, RIN 2040-AF16 (last visited June 30, 2016).

<sup>182</sup> Office of Info. and Regulatory Affairs, Reginfo.gov, Review Counts (last visited Sept. 20, 2016).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Howard Shelanski, Tr. at 10-11 (May 13, 2016).

<sup>187</sup> Email from Howard Shelanski, OIRA, to Stuart Levenbach, OIRA, *et al.* (Mar. 25, 2015, 5:19 p.m.) (OMB-037023).

<sup>188</sup> Email from Jim Laity, OIRA to Howard Shelanski, OIRA, *et al.* (Mar. 25, 2015, 5:00 p.m.) (OMB-037023).

**From:** Shelanski, Howard  
**Sent:** Wednesday, March 25, 2015 5:19 PM  
**To:** Levenbach, Stuart; Laity, Jim; Johnson, Katie B.; Mancini, Dominic J.  
**Cc:** Dorjets, Vlad  
**Subject:** RE: Timing for Stream Protection & WOTUS

Thanks Stu.

**From:** Levenbach, Stuart  
**Sent:** Wednesday, March 25, 2015 5:16 PM  
**To:** Laity, Jim; Johnson, Katie B.; Mancini, Dominic J.; Shelanski, Howard  
**Cc:** Dorjets, Vlad  
**Subject:** RE: Timing for Stream Protection & WOTUS

The Stream Protection Rule is over 1,100 pages, and the RIA has 9 chapters and 7 appendices. I gave reviewers until April 17 to review, and I intend to bring the document with me while traveling so that I can also meet the deadline. It is very speculative, not knowing how USACE, EPA, and others will view the rule, but an ambitious yet attainable deadline might be the end of May.

**From:** Laity, Jim  
**Sent:** Wednesday, March 25, 2015 5:00 PM  
**To:** Johnson, Katie B.; Mancini, Dominic J.; Shelanski, Howard  
**Cc:** Dorjets, Vlad; Levenbach, Stuart  
**Subject:** RE: Timing for Stream Protection & WOTUS

We can meet a schedule of 60 days on WOTUS if necessary, but it may compromise the thoroughness of our review. For the record, there is no external deadline here, and EPA is over a month late in getting this to us (originally promised for the end of February). I understand why it has taken them longer than expected to prepare this complex final rule package; these are the same reasons why we would also like a full 90 -day review. It is unfortunate that EPA's late submission, which we don't control, should cut into our review time.

Now that I've vented, we will meet a 60 -day schedule if EOP leadership deems that necessary.

Stu can respond about status and timing for the Stream Protection Rule. Jim

Even as early as the proposed rule stage, the agencies were struggling to meet the accelerated schedule. Documents show OIRA staff acknowledged they were working to meet an early-January 2013 deadline due to numerous complications such as interagency review and negotiating recommended changes to the rule. In December 2013, Laity wrote to his colleagues: "At this point it will already be very challenging to finish up by the first week in January as we had been targeting."<sup>189</sup>

<sup>189</sup> Email from Jim Laity, OIRA, to Howard Shelanski, OIRA, *et al.* (Dec. 18, 2013, 1:59 p.m.) (OMB-038003).



**From:** Laity, Jim  
**Sent:** Wednesday, December 18, 2013 1:59 PM  
**To:** Shelanski, Howard  
**Cc:** Mancini, Dominic J.; Greenawalt, Andrei; Higgins, Cortney; Whiteman, Chad  
**Subject:** Call with Bob  
**Attachments:** Waters of the US comments.docx

Howard: Here is a short summary of the issues from staff this morning that you were going to raise in your call with Bob.

- 1) EPA rule withdrawals: There are two that we think EPA should move ahead with sooner rather than later, CAFO Guidance and TRI Mining. It may be helpful to get EPA to commit to a date certain, even if it is somewhat in the future. We agreed with EPA to hold off on withdrawing R ACT/RACM because of legal concerns.
- 2) RFS Economic Analysis: As you know, we believe as a factual matter that this rule meets the EO definition of "economically significant." This is ultimately OIRA's determination to make. The EO requires quantitative cost-benefit analysis for economically significant rules. In this case, there are three options under consideration that could have significantly different costs and benefits. Having this analysis available should be one important input into the final decision among them, as envisioned in the EO. We need a decision soon so that EPA can prepare any required cost-benefit analysis as part of the final rule package.
- 3) Waters of the United States: We provided written comments to senior career staff at EPA and the Corps on Friday, December 6 (attached). We have not heard anything back, although we have tried to reach out to agency staff. Because several other Federal agencies (USDA, DOI, DOE, SBA) and EOP offices (CEQ, DPC) have significant equities here, we will need some time once a basic understanding is reached between OIRA and the Corps and EPA to work out the details and shop this with the other agencies. We do believe that if EPA and the Corps accept OIRA's recommendations it would largely address the other agencies' concerns, but **we will need some time to work this through with them, and we can't begin this process until we hear back. At this point it will already be very challenging to finish up by the first week in January as we had been targeting.**

Please call if you have questions. Jim

Executive Order 12866 requires OIRA to complete a thorough review of the regulatory requirements and provides for interagency review of proposed regulations. OIRA facilitates an interagency review to "provide meaningful guidance and oversight so that each agency's regulatory actions . . . do not conflict with the policies or actions of another agency."<sup>190</sup> Documents obtained by the Committee show the WOTUS interagency review process was rushed and mismanaged, leading to frustration from other federal agencies potentially affected by the rule.

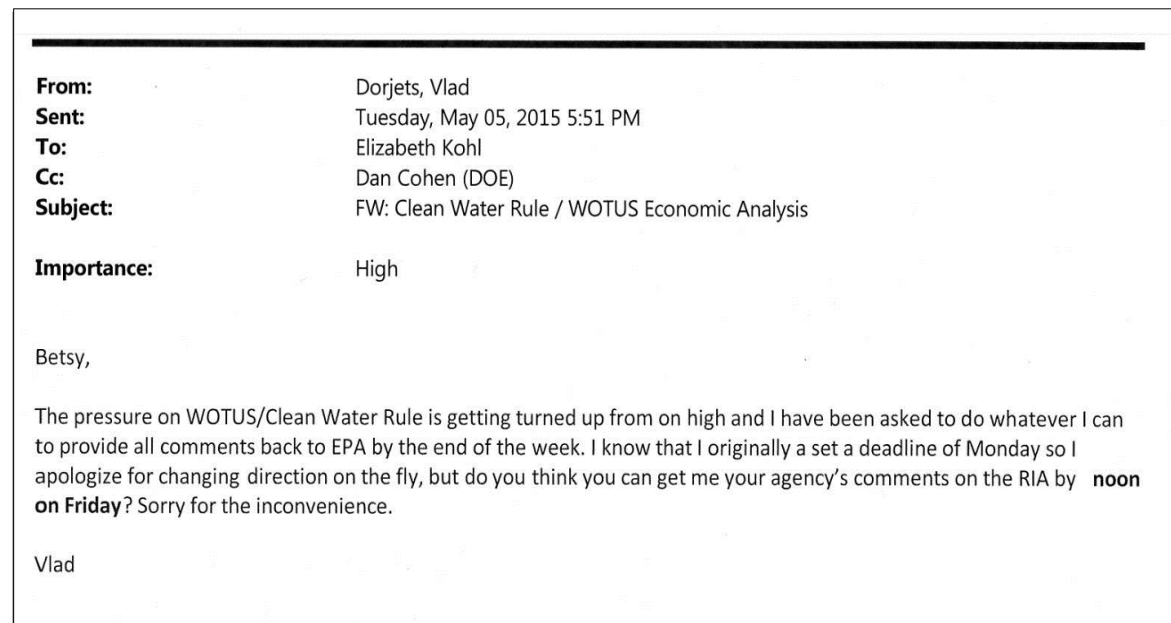
On Monday April 27, 2015, Vlad Dorjets, the OIRA desk officer managing review of the final rule, sent the rule out for interagency review.<sup>191</sup> He requested a response by Monday, May

<sup>190</sup> E.O. 12866, 58 Fed. Reg. 51005, Sec. (6)(b) (Sept. 29, 1993).

<sup>191</sup> Email from Vlad Dorjets, OIRA, to Jonathan Levy, Dept. Energy, *et al.*, (Apr. 27, 2015, 06:10 p.m.) (OMB-005178).

11, allowing agencies just two weeks to review the rule.<sup>192</sup> Agencies responded by asking for additional time to review the complex rule.<sup>193</sup> OIRA denied those requests.<sup>194</sup>

On Tuesday, May 5, 2016, Dorjets emailed each of the agencies involved in the interagency review process and requested their comments even sooner. He wrote: “The pressure on WOTUS/Clean Water Rule is getting turned up from on high and I have been asked to do whatever I can to provide all comments back to EPA by the end of the week.”<sup>195</sup>



In response to Dorjets’ original request for comments, NASA asked for an extension, so it could include the relevant field centers in the review process.<sup>196</sup>

<sup>192</sup> Email from Vlad Dorjets, OIRA, to Jonathan Levy, Dept. Energy, *et al.*, (Apr. 27, 2015, 06:10 p.m.) (OMB-005178).

<sup>193</sup> *See, e.g.*, email from Linda Wennerberg, NASA to Vlad Dorjets, OIRA (Apr. 28, 2015, 3:41 p.m.) (OMB-039145).

<sup>194</sup> Email from Vlad Dorjets, OIRA, to Linda Wennerberg, NASA (Apr. 29, 2015, 11:52 a.m.) (OMB-039145).

<sup>195</sup> *See, e.g.*, email from Vlad Dorjets, OIRA, to Eric Gormsen, Dept. Justice (May 5, 2015, 05:52 p.m.) (OMB-005850), email from Vlad Dorjets, OIRA, to Elizabeth Kohl, Dept. Energy (May 5, 2015, 05:51 p.m.) (OMB-005848).

<sup>196</sup> Email from Linda Wennerberg, NASA to Vlad Dorjets, OIRA (Apr. 28, 2015, 3:41 p.m.) (OMB-039145).

Vlad Dorjets  
Natural Resources and Environment Branch  
Office of Information and Regulatory Affairs  
White House Office of Management and Budget  
[REDACTED] [REDACTED]

**From:** WENNERBERG, LINDA S. (HQ-LD020) [REDACTED]  
**Sent:** Tuesday, April 28, 2015 3:41 PM  
**To:** Dorjets, Vlad  
**Cc:** Leatherwood, James (HQ-LD020); Mcneill, Mike A (HQ-LD020); Kumor, Kenneth M. (HQ-LD020); Laity, Jim  
**Subject:** NASA request, current interagency review of draft WOTUS Definition Final Rule

Vlad:

NASA thanks OMB and EPA for the opportunity to review the draft WOTUS Definition Final Rule. Due to the very short time period provided for our interagency review, we had no ability to include our critical field Centers in our comment review process. Our primary, but not only, interests focus on impacts to our launch and mission execution and any related impacts on the continued maturation of co-located commercial space flight operations. We plan to review the newly released Economic Assessment as the basis of our next set of comments which we plan to include field Center input.

NASA requests an extension of the comment period on the Economic Assessment until Friday, May 15<sup>th</sup> to facilitate review by our Center staffs. We request this additional time to ensure the Center teams are up to date on the draft WOTUS Final Rule and allows for enough time to provide a clear consistent set of issues and comments for consideration.

Kenneth Kumor is the HQ lead for Natural Resources and will be the designated contact for this review. Please work with him on this.

Thank you again for the opportunity for interagency review and consideration of a short extension for our comments.

Linda

Linda S. Wennerberg, Ph.D.  
Environmental Management Division  
NASA Headquarters  
MS-2T89  
300 E Street SW  
Washington, DC 20546-0001

OIRA rejected NASA's request for an extension. Then, after Dorjets followed up by reducing the review period even further, a NASA official responded: "You're killing us. . . . I think it's fair to say that the powers that be are more interested in schedule (apparently compressed) than a reasoned response that objectively lays out likely ramifications. . . . We will do our best, but NASA's response may be raw, less than comprehensive, and overall less than is needed to properly weigh the implications of the new definition of WOTUS on NASA and our proud nation as a whole."<sup>197</sup>

<sup>197</sup> Email from Kenneth Kumor, NASA to Vlad Dorjets, OIRA (May 5, 2015, 6:35 p.m.) (OMB-005830).



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**From:** Kumor, Kenneth M. (HQ-LD020) <kenneth.m [REDACTED]>  
**Sent:** Tuesday, May 05, 2015 6:35 PM  
**To:** Dorjets, Vlad; WENNERBERG, LINDA S. (HQ-LD020)  
**Cc:** Leatherwood, James (HQ-LD020); Mcneill, Mike A (HQ-LD020); Laity, Jim  
**Subject:** Re: NASA request, current interagency review of draft WOTUS Definition Final Rule

Vlad,

You're killing us. I have 3 NASA Centers working hard to a present deadline of COB May 7 (that would leave time to address ambiguities and holes for a NASA response by the 11th). BTW, I am on leave since I won't have any this summer. I guess that loses. While I feel for your situation and am grateful for your candor, I think it is fair to say that the powers that be are more interested in schedule (apparently compressed) than a reasoned response that objectively lays out likely ramifications to NASA programs, projects, and operations. We will do our best, but NASA's response may be raw, less than comprehensive, and overall less than is needed to properly weigh the implications of the new definition of WOTUS on NASA and our proud nation as a whole.

Ken

*Kenneth M. Kumor  
OSI/Environmental Management Division  
NASA Headquarters*

The Department of Transportation (DOT) also responded with concerns about the shortened time period.<sup>198</sup>

-----Original Message-----

**From:** shoshana.lew [REDACTED] [mailto:shoshana.lew [REDACTED]]  
**Sent:** Tuesday, May 05, 2015 6:23 PM  
**To:** Dorjets, Vlad  
**Subject:** Re: Clean Water Rule / WOTUS Economic Analysis

Thank you. I'm not sure we can do it by end of week...

According to Dorjets, he was not in control of the deadline. He replied to DOT's request for an extension: "I'll do everything I can on my end to buy you some more time but it may be out of my control."<sup>199</sup>

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<sup>198</sup> Email from Shoshana Lew, DOT, to Vlad Dorjets, OIRA (May 5, 2015, 6:34 p.m.) (OMB-005821).

<sup>199</sup> Email from Vlad Dorjets, OIRA, to Shoshana Lew, DOT (May 5, 2015, 6:34 p.m.) (OMB-005821).

**From:** Dorjets, Vlad  
**Sent:** Tuesday, May 05, 2015 6:34 PM  
**To:** shoshana.lew. [REDACTED]  
**Subject:** RE: Clean Water Rule / WOTUS Economic Analysis

I apologize for not sending you a heads up after distributing the doc to the original set of recipients. I guess I assumed it would be forwarded it to you like the rule was. I'll do everything I can on my end to buy you some more time but it may be out of my control.

In addition to the short deadline for review, agencies were further hampered by not receiving key documents necessary to conduct the review. The lack of sufficient documentation, however, did not slow down the review. For example, when DOT explained that they had not yet received the regulatory impact analysis (RIA),<sup>200</sup> Dorjets forwarded the RIA, but continued to push DOT to meet the original deadline of May 11, referring again to pressure from above.<sup>201</sup> He stated: “If needed, I can send the other comments to EPA and the Corps and let them know that you’re [sic] agency’s comments will be provided later but **I can’t gaurantee [sic] how that will go over given the pressure to get this rule out the door.**”<sup>202</sup>

On May 27, 2015, a U.S. Department of Agriculture (USDA) official emailed Dorjets and noted that the rule was to be announced that day. The USDA official asked Dorjets whether the RIA was complete or still in development. Dorjets replied that OIRA had already concluded its review on the Economic Analysis, and wrote: “[u]nfortunately, by the time I got your message we had already wrapped up the RIA and it would have been extremely difficult to re-open it at that point.”<sup>203</sup>

The USDA official responded: “. . . **that process was not well managed. There was no return solicitation for agencies to see what EPA had proposed (or not) changing in response to comments. . . .**” and “**sometimes the folks across the street from you do not care about longer term issues that other agencies do care about.**”<sup>204</sup>

<sup>200</sup> Email from Shoshana Lew, DOT, to Vlad Dorjets, OIRA (May 5, 2015, 6:34 p.m.) (OMB-005821).

<sup>201</sup> Email from Vlad Dorjets, OIRA, to Shoshana Lew, DOT (May 5, 2015, 6:34 p.m.) (OMB-005821).

<sup>202</sup> *Id.* (emphasis added)

<sup>203</sup> Email from Vlad Dorjets, OIRA, to Robert Johansson, USDA (May 27, 2015 11:10 a.m.) (OMB-006194).

<sup>204</sup> *Id.* (emphasis added)

**From:** Johansson, Robert - OCE [REDACTED]@usda.gov]  
**Sent:** Wednesday, May 27, 2015 11:00 AM  
**To:** Dorjets, Vlad  
**Subject:** RE: wotus

Hi Vlad,

Yes that process was not well managed. There was no return solicitation for agencies to see what EPA had proposed (or not) changing in response to comments. You will find that it becomes difficult to convince folks to participate in the interagency process if they feel that their time is just being wasted. However, as I am sure you agree given the resource limitations at OIRA that leveraging the interagency process is one way to significantly improve rulemakings and the supporting docs such as the RIA. In other words, you cannot do it alone and sometimes the folks across the street from you do not care about longer term issues that other agencies do care about.

Rob

Dorjets replied: “The real challenge here was working on a very tight schedule which required me to provide short deadlines. To the extent that Agencies were able to provide me comments . . . I did all that I could to address them with EPA and the Corps . . . but even then **there was only so much that I could do.**”<sup>205</sup>

When Committee staff questioned OIRA staff about the shortened time period and the pressure to complete the rule, none of the witnesses could clearly recall. Laity testified:

Q In the course of this rulemaking, did you ever receive or were you aware of any suggestion or direction to conduct your review in a certain timeframe?

A As I said before, I believe there were timeframes and deadlines, but I don't remember exactly what they were.<sup>206</sup>

Dorjets stated:

Q And you don't recall why the review period was shortened?

A No. That I do not.<sup>207</sup>

Dorjets further testified: “There may be a reason why a rule needs to come out on a certain date. Whether that is a press release or a legal obligation, sometimes a rule is being issued because it's a court order.”<sup>208</sup>

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<sup>205</sup> *Id.* (emphasis added)

<sup>206</sup> Laity Tr. at 164 (Mar. 8, 2016).

<sup>207</sup> H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Vlad Dorjets, Tr. at 33 (May 10, 2016).

<sup>208</sup> *Id.* at 53.

In the case of the WOTUS rule, there were no court orders or legal obligations in place at the time. There was, however, a press release on May 27, 2015, to announce the issuance of the final rule.<sup>209</sup>

On May 13, 2015, EPA officials sent a “Clean Water Rule Rollout” to OIRA that detailed the timeline for publicizing the final rule.<sup>210</sup> An EPA official emailed the plan to Dorjets, and wrote “tick tock.”<sup>211</sup> Dorjets forwarded the email to his colleagues, and expressed regret that the EPA left OIRA out of the planning. He stated: “Very surprised – and disappointed – we’re not being included.”<sup>212</sup>

**From:** Dorjets, Vlad  
**Sent:** Monday, May 18, 2015 12:57 PM  
**To:** Johnson, Katie B.  
**Cc:** Mancini, Dominic J.; Laity, Jim  
**Subject:** Fw: Clean Water Rule Follow Up

Very surprised - and disappointed - we're not being included.

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**From:** Tarquinio, Ellen  
**Sent:** Monday, May 18, 2015 12:42 PM  
**To:** Dorjets, Vlad  
**Subject:** FW: Clean Water Rule Follow Up

-----Original Message-----

**From:** Purchia, Liz [REDACTED]  
**Sent:** Wednesday, May 13, 2015 04:55 PM Eastern Standard Time  
**To:** Tuss, Taryn L.; Goldfuss, Christina; Costa, Kristina; Patel, Rohan; Barranco, Angela; Bauserman, Trent; Zaidi, Ali; Jensen, Jay; Mallory, Brenda; Benenati, Frank; Rowe, Courtney; Crook, Lowry; Elson, Tom; [REDACTED]; Billingsley, Tara; Anderson, Amanda D.; Matthew Herrick; Cullen Schwarz; Tarquinio, Ellen  
**Cc:** Rupp, Mark; Reynolds, Thomas; Bond, Brian; Lee, Monica; Loop, Travis; Kelley, Moira L CIV (US); Ragland, Micah; Vaught, Laura; Davis, Jay  
**Subject:** Clean Water Rule Follow Up

Hi All,

Thanks for joining yesterday so we could provide an update on our plans for the Clean Water Rule. As promised, we’re following up with some of our draft materials, tick tock and our WH/Agency asks. Please see attached and below.

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<sup>209</sup> Press Release, EPA, “Clean Water Rule Protects Streams and Wetlands Critical to Public Health, Communities, and Economy (May 27, 2015), *available at* <https://www.epa.gov/newsreleases/clean-water-rule-protects-streams-and-wetlands-critical-public-health-communities-and>.

<sup>210</sup> Email from Liz Purchia, EPA, to Vlad Dorjets, OIRA, et.al. (May 13, 2015, 04:55 p.m.) (OMB-036233).

<sup>211</sup> *Id.*

<sup>212</sup> Email from Vlad Dorjets, OIRA, to Dominic Mancini, OIRA, Jim Laity, OIRA (May 18, 2015, 12:57 p.m.) (OMB-036233).

## EPA EXCLUDED THE CORPS FROM THE “JOINT” RULEMAKING PROCESS

**FINDING:** The U.S. Army Corps of Engineers, which shares jurisdiction over the Clean Water Act, was cut out of the rule development process.

Despite a noted track record of successfully working together on other joint rulemakings,<sup>213</sup> the EPA failed to include the Corps in this rulemaking. This failure resulted in major inadequacies in the rule.

Joint Rulemaking is an often-used tool for the federal government to ensure that certain agencies with a particular expertise can work together in developing a more streamlined and efficient set of rules, which saves taxpayers money and sets forth a clearer path towards compliance for those affected by the proposed rule.<sup>214</sup> However, that potential “can be wasted if the agencies work at cross-purposes or fail to capitalize on one another’s unique strengths and perspectives.”<sup>215</sup> Such was the thought when Congress left it to the Corps and the EPA to define the term “waters of the United States” under the Clean Water Act.<sup>216</sup> Because the WOTUS Rule can potentially affect every American in some capacity, having the two agencies act independently under their respective statutes would likely cause significant duplication and potentially conflicting requirements.<sup>217</sup> Indeed, the EPA itself recognized that the rule was a joint effort in the first line of the proposed rule’s preamble:

The Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA or the Act), in light of the statute, science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), and *Rapanos v. United States* (Rapanos), and the agencies’ experience and technical expertise.<sup>218</sup>

The significance of the Corps’ participation in the rulemaking is highlighted by Congress’ decision to convey upon it the duty to administer Section 404 of the CWA, which

<sup>213</sup> Moyer Tr. at 17, 154-155 (Dec. 17, 2015).

<sup>214</sup> Admin. Conf. of the United States, *Improving Coordination of Related Agency Responsibilities* (June 15, 2015), available at <https://www.acus.gov/sites/default/files/Final-Recommendation-2012-5-Improving-Agency-Coordination.pdf>.

<sup>215</sup> *Id.*

<sup>216</sup> Definition of “waters of the United States” is found at 33 C.F.R. § 328.3 (Army Corps) and 40 C.F.R. § 122.2 (EPA). The term is similarly defined in other EPA regulations, as is the term “navigable waters.” It is not defined in the CWA.

<sup>217</sup> *Rapanos v. U.S.*, 547 U.S. 715, 722 (2006) (“In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”).

<sup>218</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 40 C.F.R. pts 110, 112, 116, *et.al.*), available at <https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>.

regulates the discharge of dredged or fill material into waters of the United States, and requires a permit before dredged or filled materials may be discharged.<sup>219</sup> The legislative history of the CWA shows that Congress intended the two agencies to share responsibility for enforcement—and, thus, the promulgation of rules under the CWA—when they granted the Administrator of the EPA and the Secretary of the Army shared responsibility for the issuance of permits and enforcement of their terms.<sup>220</sup>

According to Chip Smith, however, this was not how the joint rulemaking worked in the case of WOTUS. He testified:

Whenever you do a joint rulemaking, the objective is and always has been, in my experience, until this one, for the two agencies to co-write and develop the rule, discuss and evaluate and resolve any issues, and go forward to OIRA linked at the hip and prepared to answer any challenges from other agencies together. That did not happen in this case.<sup>221</sup>

Jennifer Moyer also acknowledged the WOTUS anomaly. She stated:

A 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.

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.<sup>222</sup>

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<sup>219</sup> Clean Water Act, 33 U.S.C. § 1344.

<sup>220</sup> Senate Comm. on Public Works, 93rd Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972* (1973), at 1509.

<sup>221</sup> Smith Tr. at 179 (Jan. 21, 2016).

<sup>222</sup> *Id.*



## The EPA Did Not Include the Corps in Important WOTUS Decision-Making

This Congressionally mandated shared responsibility did not occur during the WOTUS rulemaking. The EPA marginalized the Corps throughout the formulation of the rule. Jennifer Moyer testified the Corps was unaware of when the EPA undertook drafting the final rule. She stated:

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

A No. I don't.<sup>223</sup>

Chip Smith testified that such a situation in a joint rulemaking is unheard of. He stated:

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

A No. It is unheard of.<sup>224</sup>

The EPA also drafted the entire 299-page preamble to the final rule without the Corps' input.<sup>225</sup> It is therefore unsurprising that Jennifer Moyer struggled to answer questions concerning the preamble. She testified:

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.<sup>226</sup>

The EPA also did not include the Corps in the drafting of the Economic Analysis or the Technical Support Document,<sup>227</sup> both of which were essential to understanding the rule.<sup>228</sup>

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<sup>223</sup> Moyer Tr. at 28 (Dec. 17, 2015).

<sup>224</sup> Smith Tr. at 36 (Jan. 21, 2016).

<sup>225</sup> Moyer Tr. at 40 (Dec. 17, 2015).

<sup>226</sup> *Id.*

<sup>227</sup> Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Department of the Army, May 27, 2015, *available at* [https://www.epa.gov/sites/production/files/2015-05/documents/technical\\_support\\_document\\_for\\_the\\_clean\\_water\\_rule\\_1.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf). According to page 2, "This Technical Support Document addresses in more detail the legal basis and the existing scientific literature in support of the significant nexus determinations underpinning the Clean Water Rule."

<sup>228</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of "Waters of the United States"* (May 15, 2015).



Moyer testified that the Corps was only initially involved in drafting the Economic Analysis, before conversations with EPA suddenly, and without explanation, stopped. Regarding working on the Economic Analysis, she testified:

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 [Economic Analysis] 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.<sup>229</sup>

When asked to elaborate on the collaborative breakdown in drafting the Economic Analysis, Moyer explained that the EPA wanted to extrapolate cost data<sup>230</sup> for specific mitigation types and apply it to all mitigations types, which “was making us uncomfortable.”<sup>231</sup> She testified:

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.

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<sup>229</sup> Moyer Tr. at 87-88 (Dec. 17, 2015).

<sup>230</sup> A portion of costs to [Section 404 permit] applicants may result from compensatory mitigation of wetlands and streams. There is an assumption that costs will arise in the form of compensatory mitigation. U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. ARMY CORPS OF ENGINEERS, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE (May 2015), [https://www.epa.gov/sites/production/files/2015-05/documents/final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-15\\_2.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf).

<sup>231</sup> Moyer Tr. at 88 (Dec. 17, 2015).

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 [EPA] ever come back to you for additional data?

A Not that I'm aware of.<sup>232</sup>

Chip Smith shared Moyer's concern. He testified:

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

A I can't explain it because we didn't write it. All I can say is, we gave EPA 260—some cases that we had looked at—or the Corps had looked at—out of 70,000 we do every year. And based on that small set of data, EPA finalized a rule and did its Economic Analysis.<sup>233</sup>

In fact, the Corps was not even provided drafts of the Economic Analysis or Technical Support Document until after the final rule was submitted to OIRA for final review. Moyer told the Committee that despite repeated questions about the drafting status and content of the Technical Support Document, and requests to see it during the development of the preamble, the Corps was ignored and excluded. With regard to the Economic Analysis and Technical Support Document, she stated:

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

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<sup>232</sup> Moyer Tr. at 88-89 (Dec. 17, 2015). (emphasis added)

<sup>233</sup> Smith Tr. at 90 (Jan. 21, 2016).

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 [2015] timeframe. I'm not specifically sure of when in that timeframe that was.<sup>234</sup>

The lack of collaboration forced the Corps to weigh in on the substance of these two documents, stating “both documents are flawed in multiple respects.”<sup>235</sup>

#### EPA Excluded the Corps from Considering Basic Components of the Rule

The EPA's exclusionary tactics extended past the Economic Analysis and Technical Support Document. EPA failed to consult with the Corps on the decision to significantly increase jurisdiction under the Clean Water Act by 72 percent between the proposed rule and final rule.<sup>236</sup> In fact, Moyer could not even explain to the Committee how EPA reached this decision. She testified:

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.<sup>237</sup>

Furthermore, the EPA ignored many of the Corps' recommendations and comments. Moyer testified the Corps submitted multiple recommendations on comments to the rule that were disregarded. She testified:

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<sup>234</sup> Moyer Tr. at 85-86 (Dec. 17, 2015).

<sup>235</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of “Waters of the United States”* (May 15, 2015).

<sup>236</sup> Moyer Tr. at 94 (Dec. 17, 2015). *See also Id.*, at 3 “The [economic analysis] estimates CWA jurisdiction to increase from its estimate of 2.7 percent in the proposed rule to 4.65 percent in this analysis of the draft final rule” representing a 72 percent difference in increased jurisdiction.

<sup>237</sup> Moyer Tr. at 94 (Dec. 17, 2015).

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.<sup>238</sup>

Smith also testified the Corps was largely left out of the outreach efforts.<sup>239</sup> In fact, the Corps also only participated in "72 or 73" out of 400<sup>240</sup> outreach meetings with the states and other outside interests, due, in part, to the fact that it was not aware of all the meetings.<sup>241</sup>

The EPA continued to take a lead (or, in many cases, solo) role in public management of the rule, all the way through its roll-out. On May 12, 2015, an OMB employee sent an email summary of the "interagency Clean Water Rule roll-out meeting" with the EPA that occurred that morning.<sup>242</sup> The summary described the Corps as merely "a bit player in this process," and observed that "[a]lthough all roll-out seems to be joint between EPA and the [Army] Corps, the meeting was very EPA-centric."<sup>243</sup>

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<sup>238</sup> *Id.* at 29.

<sup>239</sup> Smith Tr. at 91 (Jan. 21, 2016).

<sup>240</sup> Moyer Tr. at 20, 134-135 (Dec. 17, 2015).

<sup>241</sup> Moyer Tr. at 20 (Dec. 17, 2015).

<sup>242</sup> Email from Tera Fong, OMB, to Vlad Dorjets, OIRA, *et al.*, (May 12, 2015, 02:58 p.m.) (OMB-39663).

<sup>243</sup> *Id.*

**From:** Fong, Tera L.  
**Sent:** Tuesday, May 12, 2015 2:58 PM  
**To:** Colyar, Kelly T.; Burke, Erin; Leung, Andrea; Dorjets, Vlad; Laity, Jim  
**Cc:** Hickey, Mike; Irwin, Janet  
**Subject:** Summary of Clean Water Rule Roll-out mtg at CEQ

Water and Power Branch and OIRA, please see the following quick summary of the interagency Clean Water Rule roll - out meeting at CEQ this morning. Please note our recommendations related to the Army Corps and let us know if you have any concerns with us flagging this for Ali.

I've tried to flag the big points first and additional details follow. I'm happy to follow -up on any of these points. Thanks.

Main points:

- **EPA's plan to roll-out the rule is very extensive.** All systems seem to be "go" for the 21<sup>st</sup>, and EPA indicates they are on-target to meet that. We should begin to see rollout materials (talking points, Q&As, blog posts, etc) as soon as tomorrow. EPA is working with the Corps on coordinating materials, timing, and the overall announcements.
- **However, the Corps seems to be a bit player in this process.** Although all roll-out seems to be joint between EPA and the Corps, the meeting was very EPA -centric. The Corps (Moir Kelley) says they are working with the approach EPA has designed, but that they are still working on the economic analysis and need to make sure none of the comms materials conflict with the final EA. The Corps indicated a need to make sure they have their regions aligned on messaging, and CEQ acknowledged challenges in their ability to do so vs EPA's ability to align its regions. I think it would be helpful if Ali could touch-base at the policy level with CEQ and/or the directly with the Corps to make sure they're fully looped -in and ready for roll-out next week, particularly as there are concerns that immediate questions on implementation will be directed at the Corps, and EPA seems to be struggling to connect with stakeholders in the development sectors such as the homebuilders.

The Corps was not the only agency left out of the EPA's outreach and efforts to finalize the rule. In a late-April 2015 email, Jim Laity expressed frustration to colleagues that EPA was scheduling "side meetings w[ith] agencies" without including OIRA, since such meetings were specifically OIRA's "job."<sup>244</sup>

<sup>244</sup> Email from Jim Laity, OIRA, to Vlad Dorjets, OIRA (Apr 26, 2015, 10:19 a.m.) (OMB-035216).

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**From:** Laity, Jim  
**Sent:** Sunday, April 26, 2015 10:19 AM  
**To:** Dorjets, Vlad  
**Subject:** RE: WOTUS memo

We can talk more Tuesday. Your first draft was a great start. EPA should not be scheduling elevation meetings w DOT even w us invited. Katie and Howard may well want to make this part of a larger package deal. Greg is trying to use a divide and conquer strategy here. Talk to Katie abt this. If she wants to go ahead w DOT call OK. But tell Greg he should not be scheduling any more side meetings w agencies. That's our job. Call if u want to discuss [REDACTED]

And yes Howard and Katie need to know abt SBA concern. Remind them that SBA sent a public letter complaining abt this during the comment period which in turn was the basis of a hostile congressional inquiry to us.

### The EPA Stopped Collaborating with the Corps Altogether

In September 2014, a “team of eight” comprised of Army, Army Corps, and EPA personnel started meeting weekly to work through issues with the rule.<sup>245</sup> Moyer, who was a member of the group, summarized its purpose when she testified to the Committee. She stated:

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.<sup>246</sup>

These meetings about the draft final rule primarily occurred via conference call.<sup>247</sup> Moyer testified the meetings were generally productive, with the group engaging in “very robust conversations” about the rule.<sup>248</sup> The group developed and then discussed various “option

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<sup>245</sup> Moyer Tr. at 56 (Dec. 17, 2015).

<sup>246</sup> *Id.* at 57.

<sup>247</sup> *Id.* at 60.

<sup>248</sup> *Id.* at 57.

papers,” and “were having necessary and robust disagreements at that inter-agency table as you would in the development of a final rule.”<sup>249</sup>

Despite such dynamic and productive joint-agency interaction, the EPA suddenly, and without explanation, stopped the meetings at the beginning of November 2014. Moyer testified:

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.<sup>250</sup>

Smith, who was also a part of the “team of eight,” recalled that the group was created in order for the EPA to speed up release of the rule.<sup>251</sup> Smith testified that the team did not meet nearly as much as intended before it disbanded:

In either October or November of 2014, there was an urgent desire to move the rule forward. Obviously we’re on a time schedule having to do with the administration and the time left and just getting it done, we’d been working on it for so long, so that we created this team of eight.

I was one of the people on the team of eight. And the goal was to get together on a weekly or on an even more regular basis and talk about rule issues, try to resolve them so that the rule text could be adjusted by EPA, and then any issues that were unresolved, we would quickly elevate to our appointees for a solution so we could keep things moving, but as it turned out, we only met, I believe, in person twice and we had maybe two phone calls, and all the other weeks typically EPA would not meet with us. For whatever reason, they were busy or whatever.<sup>252</sup>

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<sup>249</sup> *Id.* at 57-58.

<sup>250</sup> *Id.* at 56-57.

<sup>251</sup> Smith Tr. at 22-23 (Jan. 21, 2016).

<sup>252</sup> *Id.*



Despite option papers authored by the Corps proposing necessary improvements to WOTUS, and the Corps' comments regarding the rule, the Corps' key recommendations were not incorporated into the final rule. Moyer stated she was "surprised" when the draft final rule text was presented to the team after they resumed meeting in mid-January 2015,<sup>253</sup> since the team was still in the process of working out issues when it stopped meeting in late 2014. Moyer testified:

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.<sup>254</sup>

Smith testified that the Corps was not included in drafting the final rule. He stated:

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

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

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

A It is true we were consulted, but the consultation was minimal and it was usually—text was provided us and we would be given a couple hours, maybe a day or two, to look at it and then react.<sup>255</sup>

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<sup>253</sup> Moyer Tr. at 59 (Dec. 17, 2015).

<sup>254</sup> *Id.* (emphasis added)

<sup>255</sup> Smith Tr. at 23-24 (Jan. 21, 2016).

He went on to comment about the unusual nature of this proceeding, testifying:

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

A No. It is unheard of.<sup>256</sup>

Moyer testified the EPA never explained why it chose to leave the Corps' comments out of the rule.<sup>257</sup> Once the Corps did eventually see the final rule, it realized that "several" of its key recommendations on the rule text were omitted. Moyer testified:

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 [Peabody] memos. There were several recommendations that were made that were not incorporated.<sup>258</sup>

When the Corps attempted to raise important unaddressed technical issues with the draft rule language, the EPA grew irritated and attempted to push forward without resolving the matters.<sup>259</sup> Moyer testified:

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

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<sup>256</sup> *Id.* at 36.

<sup>257</sup> Moyer Tr. at 29 (Dec. 17, 2015).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 60-61.

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.**<sup>260</sup>

#### Corps Leadership Had Concerns About the EPA's Approach

The EPA's decision to name the Corps as a co-author to the rule is misleading and against direct statements by the Corps.<sup>261</sup> Despite the EPA's assertion that the rulemaking was prepared jointly, the Corps disagrees. In their view, it was "not a joint venture."<sup>262</sup> Major General Peabody, Deputy Commanding General for Civil and Emergency Operations with the Corps, highlighted the Corps concerns over the EPA's takeover of the rulemaking in memoranda sent to the Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy (hereinafter, the "Peabody Memoranda").<sup>263</sup> The Peabody Memoranda set forth many legal, scientific, and procedural concerns regarding the rule, but also the general lack of consideration of Corps concerns.

Indeed, Major General Peabody specifically stated that "[t]he preamble to the proposed rule and the draft preamble to the draft rule state that the rulemaking has been a joint effort of the EPA and the Corps, and that both agencies have jointly made significant findings, reached

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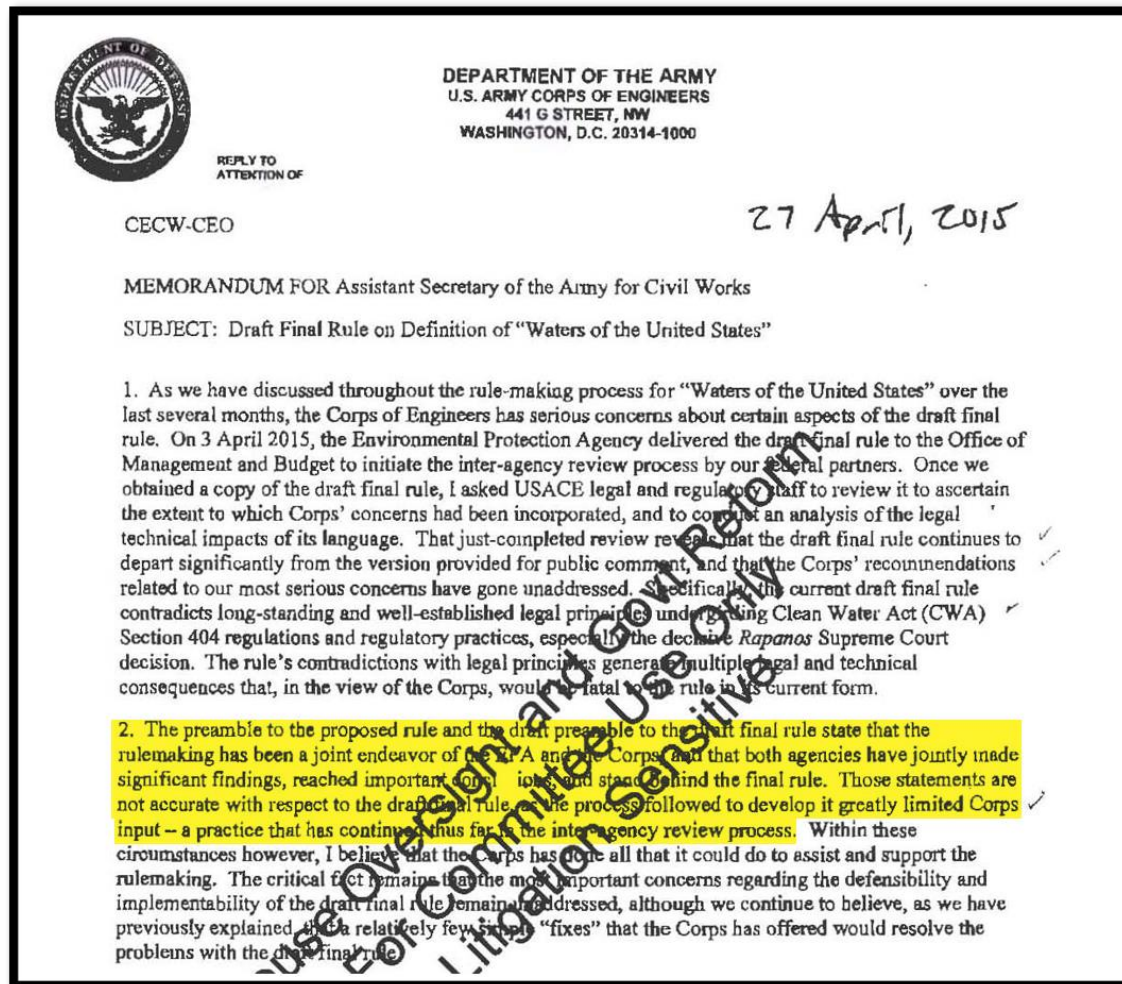
<sup>260</sup> *Id.* at 61-62. (emphasis added)

<sup>261</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of "Waters of the United States"* (May 15, 2015); Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Draft Final Rule on Definition of "Waters of the United States"* (Apr. 27, 2015).

<sup>262</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of "Waters of the United States"* (May 15, 2015).

<sup>263</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of "Waters of the United States"* (May 15, 2015); Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Draft Final Rule on Definition of "Waters of the United States"* (Apr. 27, 2015).

important conclusions, and stand behind the final rule. These statements are not accurate...”<sup>264</sup>



Major General Peabody requested that the rule “not identify the Corps as Author, co-author, or substantive contributor,” and “the Corps of Engineers logo should be removed from those documents.”<sup>265</sup>

<sup>264</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Draft Final Rule on Definition of “Waters of the United States”* (Apr. 27, 2015).

<sup>265</sup> *Id.*

3. With respect to these two documents, the Corps provided the EPA with raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for aquatic resources within the span of control of the Corps' regulatory program (i.e., Section 404 of the Clean Water Act), and provided similar raw data for the Technical Support Document. However, the Corps had no role in selecting or analyzing the data that EPA used in drafting either document. As a result, the documents can only be characterized as having been developed by the EPA, and should not identify the Corps as an author, co-author or substantive contributor. To the extent that the term "agencies" includes the Corps of Engineers, any such reference should be removed. Finally, the Corps of Engineers logo should be removed from these two documents. To either

OIRA, which reviews draft regulations and rules from federal agencies, also recognized that the EPA had effectively taken over the rulemaking process, but noted that they took significant steps to ensure that the EPA's effort to expel the Corps from the rulemaking process be kept hidden. Documents show Jim Laity stated on multiple occasions that the EPA had effectively taken the lead on the purported "joint" rulemaking.<sup>266</sup>

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**From:** Laity, Jim  
**Sent:** Tuesday, February 24, 2015 12:06 PM  
**To:** Seehra, Jasmeet; Orris, Allison; Aguilar, Brenda; Johnson, Katie B.; Mancini, Dominic J.; Hunt, Alex; Young, Carl  
**Cc:** Levenbach, Stuart; Brammer, Josh  
**Subject:** RE: Initial materials In Preparation for the meeting on 2/26 with DOD on reg priorities  
**Attachments:** DOD 2015 Priorities Rundown with Jasmeet edits on 2 24 2015 jl.docx

Hi Allison, sorry for the delay. Jasmeet has the lead here. I made one minor cosmetic change to the WOTUS item. DOD is a bit touchy about saying "EPA has the lead" (even though it's effectively true) so I reworded slightly. I know they won't see this, but we should avoid using that phrase in the meeting. Jim

-----Original Message-----

**From:** Laity, Jim  
**Sent:** Thursday, February 19, 2015 2:27 PM  
**To:** Seehra, Jasmeet; Orris, Allison; Aguilar, Brenda; Johnson, Katie B.; Mancini, Dominic J.; Hunt, Alex; Young, Carl  
**Cc:** Levenbach, Stuart

**Subject:** FW: Initial materials In Preparation for the meeting on 2/26 with DOD on reg priorities

+Stu who covers the Corps of Engineers (COE).

COE doesn't have much regulatory action (nothing listed on DOD top ten). Only rule of note at the moment is Clean Water Rule jointly with EPA, but EPA is taking the lead on that. Please keep Stu in the loop on DOD priorities meeting materials.

<sup>266</sup> See, e.g., email from Jim Laity, OIRA, to Jasmeet Seehra, OIRA, et al (Feb. 24, 2015, 12:06 p.m.) (OMB-036975); email from Jim Laity, OIRA, to Jasmeet Seehra, OIRA, et al (Feb. 19, 2015, 2:27 p.m.) (OMB-036976).



#### A. THE PEABODY MEMORANDA WERE “UNPRECEDENTED”

According to the Assistant Secretary of the Army for Civil Works Jo-Ellen Darcy, it is unprecedented for senior agency officials to present such opposition to their own rule, particularly given that the final WOTUS Rule was promulgated a mere month after the release of the Peabody Memoranda.<sup>267</sup> Assistant Secretary Darcy testified the memoranda caught her by surprise, despite her direct involvement in the multiyear process creating the rule. She stated:

Q And you mentioned earlier that you had met, if not frequently with the Corps, at least enough that it was more than four times. Why would you say that you were surprised in seeing these memos at this stage?

A Well, they—these are internal, deliberative memos to the Corps and the Army. And I guess I was surprised that they had—had handed it to me in writing. That that surprised me. ‘Cause that—I—I don’t think in the entire seven years—six-and-a-half years that I’ve been in this position has a deputy commanding general handed me a memo that I didn’t know about.

Q And when you say you didn’t know about the memo, are you saying about its contents or about the fact that they were developing the memo?

A That they were developing the memo.

Q So you’re saying essentially you had no notice that these memos were coming to you?

A Correct. It was handed to me on a Monday afternoon.<sup>268</sup>

Despite the significance of the concerns raised in the Peabody Memoranda, however, Darcy failed to raise these concerns with anyone at the EPA. She stated:

Q Did you discuss the memos or their contents with the EPA after receiving these memos?

A No.<sup>269</sup>

Darcy testified she was just “hoping that the Corps could support the—the President’s rule.” She stated:

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<sup>267</sup> The Clean Water Rule was published on June 29, 2015 in the Federal Register. 80 Fed. Reg. 37,054. The Peabody Memoranda were published between Apr. 27, 2015 and May 15, 2015.

<sup>268</sup> H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Jo-Ellen Darcy, Tr. at 110-11 (Mar. 29, 2016). (emphasis added)

<sup>269</sup> *Id.* at 111. (emphasis added)

Q And what was the general's conversation? What was the nature of that conversation?

A Well, as I have a monthly meeting with General Bostick, and this was the subject of one of our—one of the subjects of our monthly meeting. And I just said that I was very surprised by it and, you know, was hoping that the Corps could support the—the President's rule.<sup>270</sup>

B. THE PEABODY MEMORANDA SHOW THE EPA IGNORED THE ARMY CORPS' CONCERNS ABOUT DEVELOPING THE WOTUS RULE BASED ON FAULTY SCIENCE

In the Peabody Memoranda, Major General Peabody wrote:

[The Corps'] technical review of both documents indicate that the Corps' data provided to EPA has been selectively applied out of context, and mixes terminology and disparate datasets. In the Corps' judgment, the documents contain numerous inappropriate assumptions, with no connection to the data provided, misapplied data, analytical deficiencies, and logistical inconsistencies.<sup>271</sup>

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<sup>270</sup> *Id.* at 110. (emphasis added)

<sup>271</sup> Memorandum from Maj. Gen. John W. Peabody to Asst. Sec. of the Army for Civ. Works Jo-Ellen Darcy, *Economic Analysis and Technical Support Documents Concerning the Draft Final Rule on Definition of "Waters of the United States"* (May 15, 2015). (emphasis added)





REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

CECW-CEO

15 May, 2015

MEMORANDUM FOR Assistant Secretary of the Army for Civil Works

THRU Commanding General and Chief of Engineers, US Army Corps of Engineers

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of "Waters of the United States"

1. I am forwarding the attached memorandum summarizing the Corps of Engineers' technical review of the Economic Analysis and Technical Support Document (TSD) produced by the Environmental Protection Agency (EPA), to support the on-going draft final rule on the definition of the "waters of the United States" (WQUS) under the Clean Water Act (CWA). The Corps received these final draft versions for the first time in the last two weeks. These documents were reviewed at my request by some of the Corps' most experienced experts in applying Section 404 of the Clean Water Act, including legal, regulatory, and scientific experts in the Corps Headquarters, Engineer Research and Development Center, and the Institute for Water Resources.

2. The Corps of Engineers' technical review indicates that both documents are flawed in multiple respects. The collective view of the Corps experts is summarized by our Regulatory Chief in the attached memorandum, which highlights the key aspects requiring your awareness, and deserving of your attention. To briefly summarize, our technical review of both documents indicate that the Corps data provided to EPA has been selectively applied out of context, and mixes terminology and disparate data sets. In the Corps' judgment, the documents contain numerous inappropriate assumptions with no connection to the data provided, misapplied data, analytical deficiencies, and logical inconsistencies. As a result, the Corps' review could not find a justifiable basis in the analysis for many of the documents' conclusions. The Corps would be happy to undertake a comprehensive review with the EPA to help improve these supporting documents, which we recognize are critical to the rule-making.

To support his memorandum, Peabody attached a review of the rulemaking's Economic Analysis and the Technical Support Document (TSD) written by the Corps' economist, Paul Scodari. The review provided that "[t]he Corps had no role in selecting or analyzing the data that the EPA used in drafting either document."



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

CECW-CO-R

15 May 15

MEMORANDUM FOR Deputy Commanding General for Civil and Emergency Operations,  
U.S. Army Corps of Engineers (ATTN: MG John W. Peabody)

THROUGH the Chief of Operations and Regulatory, U.S. Army Corps of Engineers (ATTN:  
Edward E. Belk)

SUBJECT: Economic Analysis and Technical Support Document Concerning the Draft Final  
Rule on Definition of "Waters of the United States"

1. References

a. *Draft Final Economic Analysis of the EPA Army Clean Water Rule*, U.S.  
Environmental Protection Agency & U.S. Army Corps of Engineers, 27 April 2015

b. *Technical Support Document for the Clean Water Rule: Definition of Waters of the  
United States*, U.S. Environmental Protection Agency, June 2015

2. This memorandum responds to your request for a technical analysis of the documents in  
references a and b. Both documents were prepared by the U.S. Environmental Protection  
Agency (EPA). With respect to EPA's Economic Analysis, the Corps provided the EPA with  
raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for  
aquatic resources within the span of control of the Corps' regulatory program, but the Corps had  
no role in selecting or analyzing the data that EPA elected to use in drafting the attached  
Economic Analysis Document. Similarly, with respect to the Technical Support Document  
(TSD), Corps data was also used by EPA when crafting the TSD, but the Corps also had no role  
in actually performing the technical analysis or drafting the TSD.

Peabody again disavowed the work, stating: "[a]s a result, the documents can only be  
characterized as having been developed by the EPA and should not identify the Corps as an  
author, co-author or substantive contributor."<sup>272</sup> To imply or portray otherwise "is simply  
untrue," Peabody wrote.<sup>273</sup>

<sup>272</sup> *Id.* (emphasis added)

<sup>273</sup> *Id.* (emphasis added)

3. With respect to these two documents, the Corps provided the EPA with raw data on the overall numbers of jurisdictional determinations (JDs) made by the Corps for aquatic resources within the span of control of the Corps' regulatory program (i.e., Section 404 of the Clean Water Act), and provided similar raw data for the Technical Support Document. However, the Corps had no role in selecting or analyzing the data that EPA used in drafting either document. As a result, the documents can only be characterized as having been developed by the EPA, and should not identify the Corps as an author, co-author or substantive contributor. To the extent that the term "agencies" includes the Corps of Engineers, any such reference should be removed. Finally, the Corps of Engineers logo should be removed from these two documents. To either

imply or portray USACE as a co-author or contributor to these documents, other than as the provider of raw unanalyzed data, is simply untrue.

According to the Peabody memoranda, Moyer stated the EPA's use of the Corps' raw data was a "[g]ross misrepresentation of Corps raw data."<sup>274</sup>

8. The Economic Analysis grossly overestimates the amount of compensatory mitigation required under section 404 the CWA.

a. EPA assumed that all individual permits (IPs) and half of all general permits (GPs) require compensatory mitigation. The actual values are thirty-one percent and 8 percent, respectively, based on data in the Corps ORM2 database.

b. Mitigation totals used by the EPA represented only permittee-responsible mitigation (i.e. mitigation constructed by the permittee), but the totals are characterized as

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MEMORANDUM FOR DCG-CEO  
SUBJECT: Economic Analysis and TSD Concerning  
Draft Final Rule on Definition of WOUS

representing all types of compensatory mitigation, including mitigation banks and in-lieu fee programs.

c. Mitigation totals used by the EPA also included a range of ratios from all compensatory mitigation sources (establishment, rehabilitation, enhancement, preservation), but EPA assumed a 2:1 ratio for all compensatory mitigation.

d. The mitigation cost data tables used are out of date. No quality checks from the Corps on the data that EPA used were requested or obtained. EPA appears to have placed its own data into tables originally provided by the Corps. This results in a gross misrepresentation of the Corps' raw data.

These concerns were not new. Scodari noted in his May 2015 review of the rule's Economic Analysis that the Corps requested the EPA "characterize the entire report as an EPA analysis."<sup>275</sup> Despite the Corps' objection to receiving attribution for analysis underlying the

<sup>274</sup> *Id.* (emphasis added)

<sup>275</sup> Memorandum from Paul Scodari, Army Corps, *Review Comments on Economic Analysis of the EPA-Army Clean Water Rule* (May 11, 2015) at 2.



WOTUS rule, Scodari found the “EPA seems to go out of its way to link report responsibility to [the Corps].”<sup>276</sup>

**Review Comments on Economic Analysis of the EPA-Army Clean Water Rule (April 27, 2015)**

Paul Scodari, CEIWR-GW  
May 11, 2015

The comments presented below are limited to the 2015 report estimation of CWA Section 404 permit application costs and compensatory mitigation benefits, and how these calculations changed from the 2014 report that was released for public comment. The comments are organized in two parts that address: 1) major revisions from the 2014 report, and 2) what did not significantly change from the 2014 report.

**3. Representation of USACE views**

For the 2014 report, USACE made a point of telling EPA to delineate which sections of the analysis USACE did and did not contribute to, and to characterize the entire report as an EPA analysis. In the 2015 report, by contrast, EPA seems to go out of its way to link report responsibility to USACE. While it is true that USACE cannot run from this rulemaking or this report, some of things in the report that seem overblown might be addressed at the margin. One example is the strange report title. Other examples involve assertions in the narrative about what the “agencies believe.” For example, the last sentence of the second full paragraph on page 6 state, “For these and similar reasons, the agencies believe that positive jurisdictional determinations under the final rule will be less than assumed for the purpose of this economic analysis.” These statements should be identified, reviewed, and modified as deemed necessary to accurately reflect USACE views.

Documents show the concerns expressed by Scodari and Peabody echoed those of the Corps’ Regulatory Branch Chief, Margaret Gaffney-Smith, with regard to the regulation of tributaries and the science used to support the EPA’s findings.<sup>277</sup> In an email, she wrote:

[The Corps] remain extremely concerned with the manner in which the Ditch Exclusions and the language in the Tributary Section and science to support regulation of tributaries by rule is reflected and we believe more work should be done to address sections where language in this proposed rule is inconsistent and/or contradictory.<sup>278</sup>

<sup>276</sup> *Id.* (emphasis added)

<sup>277</sup> Email from Margaret Gaffney-Smith, Army Corps, to Craig Schmauder, Army Corps, and Marie Dominguez, Army Corps (Feb.21, 2014, 3:42 P.M. EST) (OMB-046639-40).

<sup>278</sup> *Id.*

Expressing these concerns, however, proved difficult, as “[u]nfortunately, [the Corps] have not been part of discussions with OMB or the EPA on this topic,” according to Gaffney-Smith.<sup>279</sup>

-----Original Message-----

From: Gaffney-Smith, Margaret E HQ [REDACTED]

Sent: Friday, February 21, 2014 3:42 PM

To: Schmauder, Craig R SES (US); Dominguez, Marie Therese SES USARMY (US)

Cc: Hannon, James R HQ02; Moyer, Jennifer A HQ02; Smith, Charles R CIV (US); Stockdale, Earl H HQ02; Gaffney-Smith, Margaret E HQ

Subject: Latest Draft of WOUS Rule and Preamble (UNCLASSIFIED)

Importance: High

Classification: UNCLASSIFIED

Caveats: NONE

Craig,

Regulatory and Counsel Staff have reviewed the OMB document and suggested edits and we have also reviewed the EPA response to OMB edits. Today we met with Chip and collectively developed the attached table/document of our comments.

In our view there are many excellent suggestions offered by OMB that will provide greater clarity to the proposed rule.

We remain extremely concerned with the manner in which the Ditch Exclusions and the language in the Tributary Section and science to support regulation of tributaries by rule is reflected and we believe more work should be done to address sections where language in this proposed rule is inconsistent and/or contradictory.

Attached is a summary of our detailed comments - and explanations of our position on the edits reviewed.

There are many areas that we believe should have further discussion and these are identified in the attached document.

We prepared this review on very short notice but have done our best to produce comments that are useful. Unfortunately, we have not been part of discussions with OMB or with EPA on this topic but it is our hope that the attached document conveys our comments clearly and in a manner that can be shared with OMB and EPA and that ultimately all of our offices can continue to work together to move this action forward.

We are available to discuss with you at your earliest convenience.

Respectfully,  
Meg

Smith testified that the Army penalized staff for asking “questions of science and economics.”<sup>280</sup> He testified:

Q You informed the committee that after Ms. Darcy took this action your salary level and grade level did not change. Did you experience any other type of change after Ms. Darcy took the action?

A Performance rating.

Q And—

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<sup>279</sup> *Id.*

<sup>280</sup> Smith Tr. at 21 (Feb. 19, 2016). (emphasis added)

A I've been in the Assistant Secretary's office since 1996, so I've been rated however many times that would be. Nineteen? Nineteen times. Somebody can do the math. And all of my ratings but two have been the highest possible. We have a scale of 1 to 5, 5 being exceptional. And all but two were exceptional. And the two that were not exceptional, down to a 4, pertained to this rule.

One was 3 years ago when EPA—Nancy Stoner and Greg Peck complained to Principal Deputy Rock Salt that the Corps and myself were too difficult to work with because we asked questions of science and economics. And so I got dinged for not being as collegial as I could be with EPA. And then this last rating period, Ms. Darcy dropped me down one, and I asked Let Mon, why did this happen? And the response was, because of the EIS recommendation.<sup>281</sup>

#### C. TOP ARMY OFFICIALS ISSUED A "GAG ORDER" TO BURY DISAGREEMENT WITH THE EPA'S AGENDA

Top officials at the Army also sought to restrict the ability of its rulemaking experts to voice concerns about WOTUS and the science underlying the rule. Smith expressed frustration that rather than addressing concerns about the rule, Assistant Secretary Jo-Ellen Darcy and Deputy General Counsel Craig Schmauder instead imposed "gag" orders on commenting on the rule.<sup>282</sup> Specifically, Darcy issued two memoranda mandating that personnel working on WOTUS direct all communications regarding the rule through her and her office. Schmauder testified:

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

A Generally, yes, I would say that's a fair characterization of those memos was that we—comments on the rules or comments to the interagency process or comments to others, that Ms. Darcy wanted to have a filter through or at least knowledge of all the communications affecting this key administration rulemaking effort. And I think she put out guidance to that effect.<sup>283</sup>

Darcy's first memorandum, issued October 3, 2013 to the Chief of Engineers, specifically demanded that "all communications with EPA and OMB during the interagency review . . . shall be reviewed by me or the Principal Deputy."<sup>284</sup>

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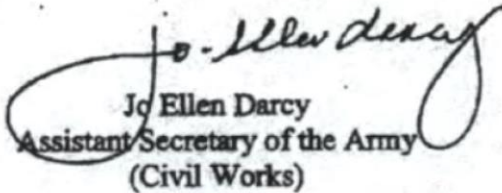
<sup>281</sup> Smith Tr. at 21 (Feb. 19, 2016). (emphasis added)

<sup>282</sup> Smith Tr. at 58-60 (Jan. 21, 2016).

<sup>283</sup> Schmauder Tr. at 34 (Feb. 17, 2016).

<sup>284</sup> Memorandum from Jo Ellen Darcy, Assistant Sec. Civil Works, U.S. Army, to U.S. Army Corps Chief of Engineers (Oct. 3, 2013).

making comments that will become part of the administrative record, when addressing the public or when responding to media and congressional queries. Because the need to speak with one public voice from this point forward is so essential, all communications with EPA and OMB during the interagency review of the preamble and rule text, as well as any comments, including those posted to the public docket, on or regarding the EPA-published science report, shall be reviewed by me or the Principal Deputy. I ensure that our respective offices will be properly represented at the upcoming SAB meeting.

  
Jo Ellen Darcy  
Assistant Secretary of the Army  
(Civil Works)

In the second memorandum, sent via email on April 3, 2015, Assistant Secretary Darcy reiterated that the Agency must “speak with one voice regarding the rule” by channeling all outside communications through her office.<sup>285</sup>

> President and the entire Administration. It remains critical, now more  
> than ever, for the Army, the Corps, and EPA to speak with one voice regarding the rule.  
> Likewise, it is essential for everyone involved to honor the  
> confidential and pre-decisional nature of the documents throughout the  
> entire interagency review process. All communications with EPA, OMB,  
> Congress, and the media during the interagency review process must  
> come from my office. I will however continue to reach out to the Corps  
> team for technical, legal, and policy input. Please accept my sincere  
> and heartfelt appreciation for your professionalism and expertise that  
> have allowed us to reach this significant milestone. I can't thank you enough.  
>  
> Jo-Ellen

Smith testified that these memoranda suppressed any constructive comments and concerns that conflicted with the EPA’s agenda for the rule. He stated:

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

<sup>285</sup> Email from Jo Ellen Darcy, U.S. Army, to Thomas Bostick, U.S. Army, *et.al.* (May 15, 2015; 05:13 p.m.).



A Because our comments typically were not considered, and when we would ask about it, we were told decisions have been made. Stop asking. And that was Mr. Schmauder.<sup>286</sup>

He also stated that the “gag orders” imposed on staff were uncommon for a rulemaking. Having served as the principal advisor to the Assistant Secretary of the Army for Civil Works on regulatory activities for almost 20 years, Smith had never seen this type of communication directive in the course of a rulemaking. Smith also testified that the directive’s prime purpose was not for constructive reasons, but to rush completion of the rule. Smith stated:

Q You previously told us that Ms. Darcy’s memos were interpreted as gag orders by the Corps. In your experience, are these types of communications directives typically issued in the course of a Corps rulemaking?

A No.

Q Have you ever seen this type of communications directive before?

A Not to me or the Corps on my tenure.

Q Do you know the purpose of their issuance in this rulemaking?

A To inform us that we should not comment on environmental, economic, tribal consultation, or any other issues that might affect the schedule or the ultimate policy goals EPA had for the rule.<sup>287</sup>

#### D. THE CORPS’ RULEMAKING EXPERTS WERE CUT OFF FROM THE DECISION MAKERS

The Corps’ rulemaking experts received very limited access to Assistant Secretary Darcy for WOTUS briefings. Although Jennifer Moyer served as head of the Army Corps’ rulemaking program, she testified that she briefed Darcy on the rulemaking only four times over the multi-year WOTUS process.<sup>288</sup> According to Chip Smith, such an infrequent briefing schedule is highly unusual—especially given the enormity and complexity of the rulemaking. He testified:

Q The committee understands that the chief of the Army Corps regulatory program only communicated with Ms. Darcy on four separate occasions regarding the rule during the entirety of the Waters of the United States rulemaking.<sup>289</sup> In your experience, is it common for the head of the regulatory program to provide such infrequent input—

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<sup>286</sup> Smith Tr. at 58-60 (Jan. 21, 2016).

<sup>287</sup> *Id.* at 80 (Feb. 19, 2016).

<sup>288</sup> Moyer Tr. at 14 (Dec. 17, 2015).

<sup>289</sup> This refers to testimony from Assistant Secretary Darcy, who told the Committee that she met with the Army Corps more than four times, but could not recall the details of the meetings. (Darcy Tr. at 25-27)

A No.

Q —in rulemaking of this magnitude?

A No.<sup>290</sup>

Chip Smith testified that Schmauder played a prominent role in the WOTUS process and Darcy relied exclusively on Smith for advice.<sup>291</sup> Smith stated:

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

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

Q And that's Mr. Schmauder?

A Yeah.<sup>292</sup>

Darcy confirmed Smith's statements. She testified:

Q Who primarily advised you throughout the rulemaking?

A I would say Mr. Schmauder.<sup>293</sup>

Moyer testified that in her experience, Army officials aside from the technical staff, like Schmauder, did not play a major role in drafting rules.<sup>294</sup> Likewise, Smith testified that having someone from the Army General Counsel's office so heavily involved in a rulemaking was unusual. Smith stated:<sup>295</sup>

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

A Absolutely.

Q Mr. Schmauder informed this committee that he himself drafted the Waters of the United States guidance and rule along with Mr. Peck of the EPA. In your time with the Corps, is it common for an attorney with the Office of General Counsel to draft a major

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<sup>290</sup> Smith Tr. at 21-22 (Jan. 21, 2016).

<sup>291</sup> *Id.* at 20.

<sup>292</sup> *Id.* at 71.

<sup>293</sup> Darcy Tr. at 21 (Mar. 29, 2016).

<sup>294</sup> Moyer Tr. At 16-17 (Dec. 17, 2015).

<sup>295</sup> Smith Tr. at 20-21 (Jan. 21, 2016).

rulemaking such as this?

A No. It has never been done before.

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

A No.

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

A No.

Schmauder lacked rulemaking experience, and had little knowledge of substantive parts of the rule and rulemaking process. Still, he played a major role on the WOTUS team. Schmauder testified:

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

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

Q But any other rules besides WOTUS?

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

Q You didn't draft the 2008?

A I did not. I did not.

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

A Say that again.

Q Of the Army staff—

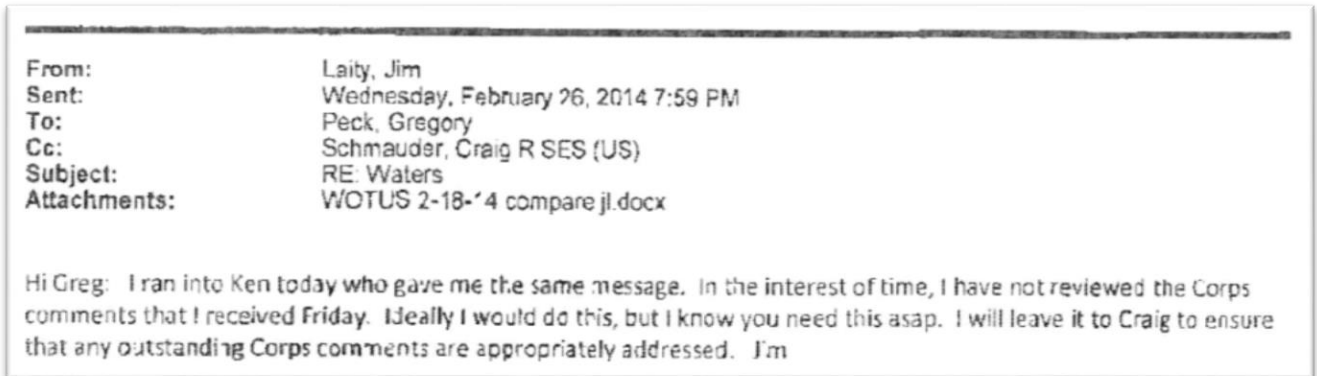
A      Chip Smith . . . .<sup>296</sup>

E. OIRA DID NOT TREAT THE CORPS AS AN EQUAL PARTNER WITH THE EPA IN THE WOTUS RULEMAKING

The WOTUS rule is presented as a joint rulemaking between the EPA and the Army Corps, but the Corps was excluded as the rule moved through the OIRA review process.<sup>297</sup> During the review, OIRA coordinated with Greg Peck, Chief of Staff of the Office of Water and point person for EPA on WOTUS, and Craig Schmauder at the Army.<sup>298</sup> With respect to communications between the Corps and OIRA, OIRA's Jim Laity testified:

I had been informed that the leadership of the Army . . . had designated Craig Schmauder as the primary contact person for my interaction with the agency and my review. Generally, we feel it's appropriate to respect the agency's internal processes and to deal with whomever the agency designates as the appropriate person to deal with OMB. So I did not have a lot of interaction with other Corps staff because it had been set up that Craig would be my point of contact.<sup>299</sup>

Documents show the Corps sought to engage with OIRA during the review, but OIRA did not review their comments. A February 2014 email shows that Laity relied on Schmauder to address the Corps' comments about the rule.<sup>300</sup>



With respect to this arrangement, whereby Schmauder was the point of contact for the Corps, Laity stated: "I assumed from the beginning that Craig [Schmauder] was fully in the loop

<sup>296</sup> Schmauder Tr. at 14-15 (Feb. 17, 2016).

<sup>297</sup> Gina McCarthy, Administrator, U.S. Environmental Protection Agency, and Jo-Ellen Darcy, Assistant Secretary for Civil Works, U.S. Army, *Reasons We Need the Clean Water Rule* (May 27, 2015, 10:08 a.m.), available at <https://blog.epa.gov/blog/2015/05/reasons-we-need-the-clean-water-rule/>.

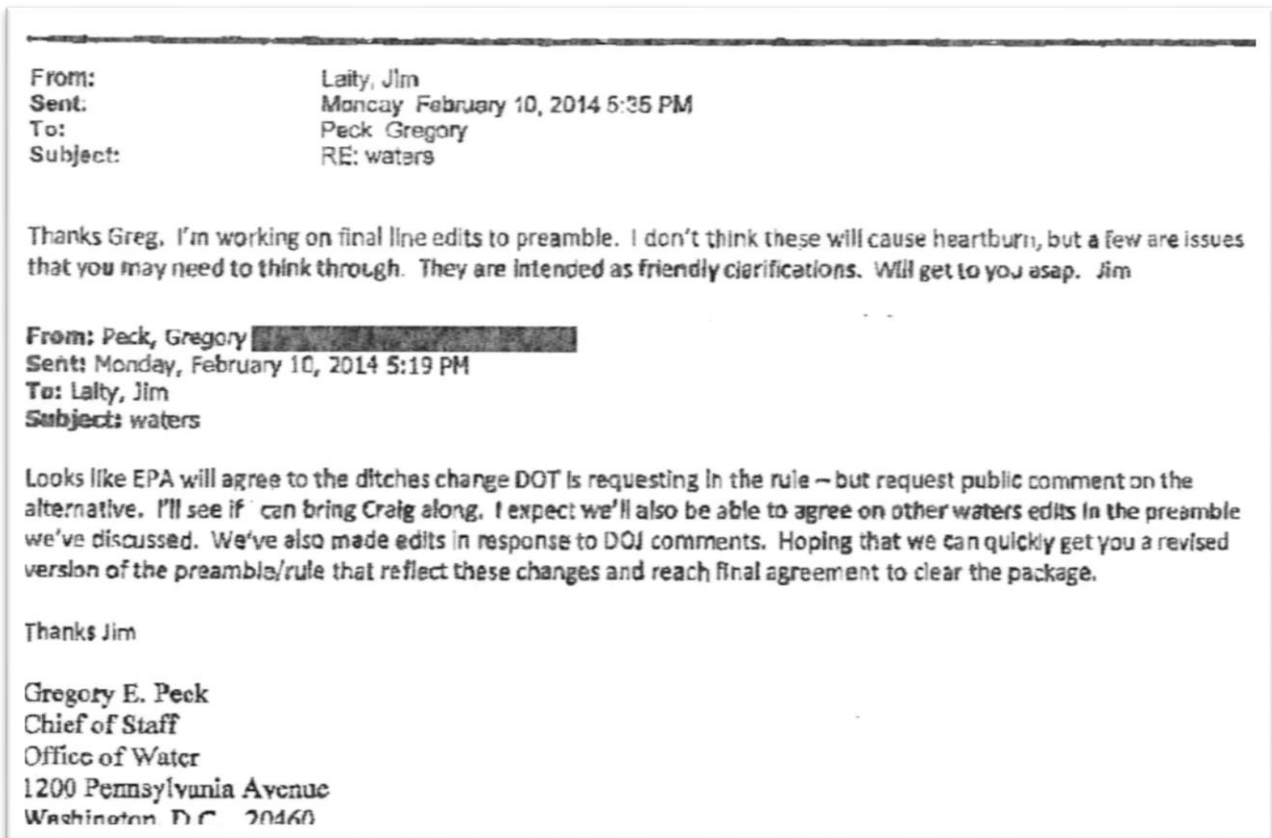
<sup>298</sup> Laity Tr. at 28 (Mar. 8, 2016).

<sup>299</sup> *Id.* at 136.

<sup>300</sup> Email from Jim Laity, OIRA to Craig Schmauder, Army, and Greg Peck, EPA (Feb. 26, 2014 07:59 p.m.) (OMB-000877).

in the decision-making process within the Army and the Corps, and that any interaction between the Corps and OIRA, it was appropriate to have Craig be the primary point of contact.”<sup>301</sup>

Even with Schmauder representing the Corps, the EPA assumed a leadership role in negotiations with OIRA. The documents show Schmauder was excluded. Emails show Peck sought to negotiate language in the proposed rule directly with OIRA, without involving Schmauder.<sup>302</sup>



When asked about those communications, Laity said “when I got emails like this, I did deal more directly with Greg [Peck]. He and I had been working on this issue together for many years, going back into the Bush administration, but I assumed that he was speaking on behalf of both agencies.”<sup>303</sup>

#### F. THE “CIVILETTI MEMORANDUM” DOES NOT CONTROL THIS JOINT RULEMAKING

The Civiletti Memorandum, issued in 1979, was promulgated in response to the question “whether the [CWA] gives the ultimate authority to determine the reach of the term ‘navigable waters’ for purposes of § 404 to [the Secretary of the Army], acting through the Chief of

<sup>301</sup> Laity Tr. at 151 (Mar. 8, 2016).

<sup>302</sup> Email from Jim Laity, OIRA to Greg Peck, EPA (Feb. 10, 2014 07:59 p.m.) (OMB-000856).

<sup>303</sup> Laity Tr. at 150 (Mar. 8, 2016).

Engineers, or to the Administrator of the Environmental Protection Agency.”<sup>304</sup> Then-Attorney General Benjamin Civiletti concluded: “Congress intended to confer upon the administrator of the Environmental Protection Agency the final administrative authority.”<sup>305</sup>

However, in so concluding, Civiletti wrote that “no specific provision of the Federal Water Pollution Control Act or specific statement in its legislative history speaks directly to this question,” and “the question is explicitly resolved neither in § 404 itself nor its legislative history.”<sup>306</sup>

The Civiletti Memorandum does not control the joint rulemaking process at issue in this report. Even if considered controlling, it would only extend to § 404, and not the entirety of the CWA. Additionally, the Memorandum only relates to administering the rule, and makes no determination as to the rulemaking process.

Some witnesses testified that the Civiletti Memorandum vested CWA rulemaking authority with the EPA. This position is belied by the fact that the EPA itself characterized the rulemaking as “joint” and consistently argued in favor of the Corps’ inclusion in both the rulemaking process and administration of the CWA.<sup>307</sup> Finally, regardless of the extent of the EPA’s authority with regard to § 404 of the CWA, it certainly does not extend to allow the EPA to apply data “out of context.”<sup>308</sup>

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<sup>304</sup> 43 Op. Att’y. Gen. 197 (1979), available at [https://www.epa.gov/sites/production/files/2015-08/documents/civiletti\\_memo.pdf](https://www.epa.gov/sites/production/files/2015-08/documents/civiletti_memo.pdf).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> See, e.g., Brief for Respondents at \*4-5, *Rapanos v. U.S.*, 547 U.S. 715 (2006) (No. 04-1034), 2006 WL 123765; Brief for Respondents at \*21, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (No. 99-1178) 2000 WL 1369439 (stating “the legislative history of the 1972 Act and the 1977 amendments supports the Corps’ construction of the term “Waters Of The United States”).

<sup>308</sup> Memorandum from Regulatory Program Chief Jennifer Moyer to Maj. Gen. Peabody, *Economic Analysis and Technical Support Document Concerning the Draft Final Rule on Definition of “Waters of the United States* (May 15, 2015). (emphasis added)



MEMORANDUM FOR DCG-CEO  
SUBJECT: Economic Analysis and TSD Concerning  
Draft Final Rule on Definition of WOUS

water bodies from FY 2013 and FY 2014. Without an explanation of the methodology or which language was used in this exercise, the Corps cannot verify or provide cogent comments on the results presented by EPA.

5. The document mixes terminology and disparate datasets. For example, stream mitigation costs provided by the Corps appear to have been extrapolated and applied in States where no in-lieu fee program or mitigation bank data exist; there is no explanation of how such data were used or applied to obtain the results presented. Also, the Section 404 data provided by the Corps has been used out of context as if it were applicable to all Clean Water Act (CWA) programs, despite the fact that this data is only meaningful for a specific authority under the CWA (Section 404) and does not represent data under Sections 303, 401, 402, or other programs implemented by EPA and the States for different purposes under the CWA. Compliance costs under Section 404 are presented as representing seventy percent of the draft final rule's total costs and Section 404 benefits representing eighty-seven percent of the draft final rule's total benefits. When presented in this manner, Section 404 costs and benefits appear to far outweigh all other CWA programs combined, which greatly diminish the magnitude of the other, very important CWA programs. Using Section 404 data in this manner and in the absence of data from other programs cannot yield an accurate estimate of the true costs and benefits of those other CWA programs.

G. GAO'S MAJOR RULE REPORT DOES NOT EVALUATE AGENCY COMPLIANCE WITH THE LAW

On July 16, 2015, the Government Accountability Office released an opinion on the WOTUS rulemaking, as required by the Congressional Review Act (CRA). The CRA requires GAO to issue a report on each major rule undertaken by an agency.<sup>309</sup> In its report, GAO notes that their "review of the procedural steps taken indicates that the agencies complied with the applicable requirements."<sup>310</sup> While GAO reviewed the rulemaking process, the report itself is limited to a very cursory examination of whether the agency addressed the rulemaking requirement or not. To avoid any confusion about the scope of its review, GAO included a disclaimer that stated it "does not analyze or comment on the substance or quality of rulemaking."<sup>311</sup> **GAO reports on major rules merely indicate that the rulemaking agencies stated they conducted proper rulemaking actions—they do not evaluate the quality of the agencies' compliance with applicable statutes or the underlying rule.**

The GAO report is therefore not useful for evaluating whether the rulemaking was procedurally valid at a substantive level. Several witnesses—some without any knowledge of the report—testified about the GAO's conclusions with respect to its review of the WOTUS

<sup>309</sup> GAO, DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS; ENVIRONMENTAL PROTECTION AGENCY: CLEAN WATER RULE: DEFINITION OF "WATERS OF THE UNITED STATES", GAO-15-750R 1, (July 16, 2015), available at <http://www.gao.gov/assets/680/671628.pdf>.

<sup>310</sup> *Id.* at 2.

<sup>311</sup> GAO, CONGRESSIONAL REVIEW ACT FAQs, available at <http://www.gao.gov/legal/congressional-review-act/faq>.



rule.<sup>312</sup> The GAO report on WOTUS asserts that the agencies *claimed* to have complied with rulemaking due diligence and legal requirements, but it is clear that while the agencies may have checked the boxes, these steps did not sufficiently comply with the spirit or intent of the law.

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<sup>312</sup> E.g., Laity Tr. at 47- 51 (Mar. 8, 2016) “Again, I don’t know anything about how GAO conducted this report...”, Smith Tr. 107-110 (Feb. 19, 2016) “I’m not going to opine on what GAO did.”

## THE EPA DISREGARDED SCIENCE WHILE DEVELOPING THE CLEAN WATER RULE

**FINDING:** The EPA made no effort to ensure the rule was based on sound science. The EPA did not conduct additional research (which the Corps believes was necessary) to justify the rule's conclusions. OIRA enabled the agencies to proceed with the rulemaking despite violation of its own Information Quality standards.

The Administrative Procedure Act (APA) requires agencies, in promulgating rules,<sup>313</sup> to make findings that support its decision, and “those findings must be supported by substantial evidence.”<sup>314</sup> Though “agencies may rely on comments submitted during the notice and comment period as justification for the action,” they may only do so when such comments “are examined critically.”<sup>315</sup> Further, courts have long recognized that “[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.”<sup>316</sup>

Because the lynchpin concept of the proposed rule is whether or not there is a “*significant nexus* between the wetlands and ‘navigable waters’” sought to be regulated by the agencies under the CWA, it follows that the scientific basis for the WOTUS rule, which defines what constitutes a significant nexus, should have been a top priority for the EPA and Corps in its development.<sup>317</sup>

### The Scientific Basis for the Rule Was Finalized After the Rule Was Drafted

The EPA assembled a Scientific Advisory Board (SAB) to review a draft report entitled the “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence” (Connectivity Report) in July 2013.<sup>318</sup> This “peer reviewed scientific literature” used in the Connectivity Report was purportedly to “help inform EPA and U.S. Army Corps of Engineers in their continuing policy work” and to “clarify what waters are covered by

<sup>313</sup> 5 U.S.C. §551(4); see WILLIAM S. JORDAN, III, AMERICAN BAR ASS'N, RULEMAKING (2011) (“The APA definition of a ‘rule’ is broad enough to encompass virtually any agency statement about what regulated parties must or should do in the future.”).

<sup>314</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, (1962).

<sup>315</sup> *Am. Wild Horse Pres. Campaign v. Vilsack*, 133 F. Supp. 3d 200, 211 (D.D.C. 2015); see also *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C.Cir.1984).

<sup>316</sup> *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

<sup>317</sup> *Rapanos v. United States*, 547 U.S. 715, 742, (2006) (holding that “Wetlands with only an intermittent, physically remote hydrological connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a ‘significant nexus’ in *SWANNCC*.”) (citing *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)). (emphasis added)

<sup>318</sup> Memorandum from Thomas M. Armitage, Designated Federal Officer, EPA Science Advisory Board Staff Office, to Christopher S. Zarba, Acting Director EPA Science Advisory Board Staff Office, July 29, 2013, [https://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/Final%20Determination%20memo\\_connectivity%20panel%20\(unsigned\).pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/Final%20Determination%20memo_connectivity%20panel%20(unsigned).pdf). (last visited Sept. 18, 2016).

the Clean Water Act.”<sup>319</sup> **This would have been impossible, however, as the Connectivity Report was finalized after the proposed rule was published, suggesting that the EPA’s policy decisions were foregone conclusions.**

The EPA deviated from established procedure by releasing the proposed rule before the SAB completed its review of the Connectivity Report. According to the SAB’s authorizing statute, the EPA Administrator is required to submit any rule proposed under the Clean Water Act along with the scientific and technical information underlying the rule to the SAB at the time it is provided to any other agency for review.<sup>320</sup>

Documents show the agencies moved forward with the rulemaking before determining whether the science actually supported their decisions. A September 13, 2013 email from Jim Laity to Margo Schwab and Dominic Mancini stated:

EPA is now sending the current version of the study for public peer review by the SAB, including a deadline for public comments to be considered by the SAB. This will be completed before the FINAL rule that relies on this. However, they want to submit the NPRM now, so **the public will not have had a chance to weigh in on it before the rule is proposed.** EPA argues that they are not using the connectivity study itself, but rather the “science on which it is based” as the basis for the proposed rule. What do you think?<sup>321</sup>

Dominic Mancini, the Deputy Administrator of OIRA, responded to Laity. He wrote:

**Unfortunately, I think for primarily political reasons folks thought this needed to happen in this kind of simultaneous way. I think the EPA ‘we are only using the science’ is pretty thin.**<sup>322</sup>

Jim Laity testified he had knowledge that the Connectivity Report—despite being considered the scientific basis for the rulemaking—was not finalized until January of 2015, well *after* the final rule was drafted. He stated:

Q During the rulemaking, were you aware that the connectivity report was created to serve as the scientific basis for the WOTUS rulemaking?

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<sup>319</sup> SCIENCE ADVISORY BOARD, SAB REVIEW OF THE DRAFT EPA REPORT CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Oct. 17, 2014), [https://yosemite.epa.gov/sab/sabproduct.nsf/fedgrstr\\_activites/AF1A28537854F8AB85257D74005003D2/\\$File/EP A-SAB-15-001+unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/fedgrstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EP A-SAB-15-001+unsigned.pdf).

<sup>320</sup> 42 U.S.C. § 4365(c)(1) (2014). “The Administrator, at the time any proposed criteria document, standard, limitation or regulation . . . is to be provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria . . . .”

<sup>321</sup> Email from Jim Laity, OIRA, to Margo Schwab, OIRA, and Dominic Mancini, OIRA (Sept. 13, 2013, 3:00 p.m.) (OMB-34473) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

<sup>322</sup> Email from Dominic Mancini, OIRA, to Margo Schwab, OIRA, and Jim Laity, OIRA (Sept. 13, 2013, 3:29 p.m.) (OMB-34473) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

A Yes.

Q The connectivity report was not finalized until January of 2015, well after the rule was drafted, and the agencies undertook drafting the final rule. At any time during the rulemaking, did you discuss the fact that the EPA had not finalized the science underlying the rule?

A Yes.<sup>323</sup>

In fact, the science was not finalized prior to the draft rule being published, despite Laity testifying to the Committee that Executive Order 12866 requires the agencies to use the “best available science” in *developing* their cost-benefit analysis. Laity stated:

Q All right. Jim, how does OIRA typically review an agency’s cost benefit analysis?

A We read the analysis. And there is a requirement in Executive Order 12866 to use best available science and economics. And we look at methodologies that the agency has used to characterize costs and benefits and whatever other impacts are included in the Economic Analysis, and we may make comments or ask questions about the methodologies that they’ve used.<sup>324</sup>

Laity asked the agencies why they felt it appropriate to proceed before finalizing the science. Laity testified “[the agencies] said there’s already been one review of the Connectivity Report, and they felt that, really, they could very easily, in full compliance with all of the requirements and our guidance on peer review and everything, have simply said that that was the Connectivity Report and we were done.” Realizing this preliminary peer review did not undergo public review and comment, Laity shared his concerns with Peck and Schmauder and proposed a resolution to release the results publicly.<sup>325</sup>

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<sup>323</sup> Laity Tr. at 68-69 (Mar. 8, 2016). (emphasis added)

<sup>324</sup> *Id.* at 57. (emphasis added)

<sup>325</sup> Email from Jim Laity, OIRA to Greg Peck, EPA (Dec. 12, 2013 07:19 p.m.).

Laity, Jim

**From:** Laity, Jim  
**Sent:** Thursday, December 12, 2013 7:19 PM  
**To:** Peck, Gregory; Schmauder, Craig R SES (US) [REDACTED]  
**Subject:** WOTUS  
**Attachments:** Corps OHWM Presentation (Mar 2013)\_48649661\_1-c.pdf

Let's talk tomorrow (Friday) to see where we are and next steps. Let me know a time that works for both of you.

A few more stray concerns for you to think about, these should not be show stoppers.

- 1) I understand that the Connectivity Report already went through one round of independent peer review and revision before being submitted to the SAB. I think it is important that we make the results of this peer review available to the public as part of the administrative record for the NPRM when it is published to counter the charge, currently circulating, including in several Congressional letters we have received, that we are letting the rule get ahead of the science, and should not propose the rule until the SAB review is complete. If we can show that the Report already went through a round of peer review (which was hopefully favorable) and was already revised once to address peer review comments, this will help a lot to address this concern. Please let me know asap if you see any problem with doing this. Also, can I see a copy of the first peer review report asap?

Laity also acknowledged the risk of this strategy by pointing to the peer review results as something “which was hopefully favorable.”<sup>326</sup> In fact, comments from the first peer review of the Connectivity Report did include negative feedback.<sup>327</sup> Experts cited various concerns about the Report, including:

1. The Report gives the false impression that all information necessary to regulate is available;<sup>328</sup>
2. The Report contains false and misleading data;<sup>329</sup>
3. Key literature was not included or ignored;<sup>330</sup>
4. The Report contains flaws and/or inadequacies in the scientific evidence it provides as justification;<sup>331</sup>

<sup>326</sup> *Id.*

<sup>327</sup> *Peer Review Meeting of EPA's Draft Report: Connectivity and Wetlands to Downstream Waters – A Review and Synthesis of the Scientific Evidence, Post-Meeting Comments* (Feb. 16, 2012).

<sup>328</sup> *Id.* Comments submitted by Dr. David J. Cooper at A-5. “The report gives the impression that we know most of what is needed to understand and regulate these tributaries and wetlands. I think this is only partially correct.”

<sup>329</sup> *Id.* at A-6. “I also ask EPA to remove concepts suggesting that riparian areas are “transition zones”. This is completely false and misleading.”

<sup>330</sup> *Id.* Comments submitted by Dr. Mark Wipfli at A-109. “However, I did not see literature discussed and cited that addresses the linkages between headwaters and estuaries and oceans, even though that point is stated in the first paragraph of the “Background” section of “Technical Charge to External Peer Reviews” document.” and comments submitted by Dr. Arnold van der Valk at 87. “There are a large number of papers that have been published in the landscape ecology literature on connectivity and how to measure it. This literature is largely ignored.”

<sup>331</sup> *Id.* Comments submitted by Dr. Mark C. Rains at A-67. “However, I do have comments regarding some flaws and/or inadequacies in the scientific evidence provided as justification.”

5. Certain analysis will lead to incorrect results;<sup>332</sup>
6. The Report fails to adequately address the effect of certain types of drainage on connectivity;<sup>333</sup>
7. The Report is missing literature citations and inconsistencies;<sup>334</sup> and
8. The Report contains terminology problems and significant problems with technical aspects of the conceptual framework.<sup>335</sup>

Documents show Laity described this situation to senior OIRA staff several months later, noting it violated Information Quality guidelines. In a March 16, 2014 email to Andrei Greenawalt, Dominic Mancini, and Cortney Higgins at OIRA, Laity wrote:

As you know we received a number of letters, including from Congress, complaining that EPA is jumping the gun by issuing a proposal before the SAB review of the Connectivity report is done. **Under the IQ guidelines, they are correct. Technically, this type of peer review should be available to inform public comments on the proposal.** However it turns out that EPA did an earlier peer review of the report. We are comfortable with them going ahead now, if they provide the peer review report from the earlier review in the docket. We can then argue that since SAB review is a second peer review, it is not necessary to wait for it to be finished as long as they provide us the results of the first peer review to inform public comment. We informed EPA of this early on and received no pushback so I assumed that they were in agreement, tho they never explicitly agreed.<sup>336</sup>

SAB Panel members themselves noted that “the usual protocol in science is not to release a report before the review is complete.”<sup>337</sup> One scientist stated: “I must say I am puzzled as to

<sup>332</sup> *Id.* Comments submitted by Dr. Walter K. Dodds at A-41. “Table 5-2, not only is considering a stream without riparian influence limiting, it will give incorrect results.”

<sup>333</sup> *Id.* Comments submitted by Dr. William G. Crumpton at A-17. “The report fails to adequately address the effect of the subsurface tile drainage on connectivity of these wetlands to downstream waters... [t]his is an extremely important issue...”

<sup>334</sup> *Id.* Comments submitted by Dr. James W. La Baugh at A-49. “The reason for the introduction of the concept of geographic isolation is missing. Also missing is a literature citation for the statement that vernal pools and coastal depressional wetlands are incorrectly referred to as geographically isolated.”

<sup>335</sup> *Id.* Comments submitted by Dr. Rains at A-71. “Throughout the document, there were terminology problems that make the basic conceptual framework and the scientific evidence difficult to follow... [t]here are significant problems with some of the technical aspects of the conceptual framework... [l]acking a proper conceptual framework in this regard, the document will fail to make a strong case not only for hydrological connectivity but also for all types of connectivity at spatial and temporal scales that matter in a regulatory environment.”

<sup>336</sup> Email from Jim Laity, OIRA, to Andrei Greenawalt, Dominic Mancini, and Cortney Higgins, OIRA, Mar. 16, 2014, 10:16 p.m. (OMB-051191) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

<sup>337</sup> SAB Panel Member Comments on the Proposed Rule, at 56 (Aug. 13, 2014) (comments of Dr. Mark Murphy) (emphasis added), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/\\$File/Compilation+of+preliminary+comments\\_8\\_14\\_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/$File/Compilation+of+preliminary+comments_8_14_14.pdf).

why the EPA has decided to release the Proposed Rule before receipt of our review of the Connectivity Report.”<sup>338</sup>

***Dr. Mark Murphy***

August 13, 2014

Subject: EPA Proposed Rule; Definition of “Waters of the United States” Under the Clean Water Act; 40 CFR Parts 110, 112, 116, et al.

In this light, I must say I am puzzled as to why EPA has decided to release the Proposed Rule before receipt of our review of the Connectivity Report (EPA 2013). While I was told at our December 2013 meeting that a draft rule was in preparation, I hardly expected that the draft would be released to the public before our review. The usual protocol in science is not to release a report before the review is complete, the purpose being to allow a frank and honest appraisal of the work before positions are ‘hardened’ and reputations are placed in jeopardy. The sequence employed by EPA suggests to the public that there is no critical input needed by the SAB - - just a few minor additions. If I believed this to be the case, I would be very dismayed.

Dr. Murphy was not alone in his concern regarding the EPA’s decision to release the proposed rule prior to receiving the SAB’s review of the Connectivity Report. According to Dr. Siobhan Fennessy, not only was she “surprised about the release date of the draft rule,” but also concerned that the draft “does not reflect the many suggestions made by the SAB panel to strengthen the EPA Connectivity Report.”<sup>339</sup>

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<sup>338</sup> SAB Panel Member Comments on the Proposed Rule, at 56 (Aug. 13, 2014) (comments of Dr. Mark Murphy) (emphasis added), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/\\$File/Compilation+of+preliminary+comments\\_8\\_14\\_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/$File/Compilation+of+preliminary+comments_8_14_14.pdf).

<sup>339</sup> SAB Panel Member Comments on the Proposed Rule, at 1 (Aug. 19, 2014) (comments of Dr. Siobhan Fennessy) (emphasis added), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/F771D14F819288BD85257D390079EAFD/\\$File/Fennessy+Comments+on+Proposed+Rule\\_8\\_19\\_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/F771D14F819288BD85257D390079EAFD/$File/Fennessy+Comments+on+Proposed+Rule_8_19_14.pdf).



**Preliminary Individual Comments from Dr. Siobhan Fennessy on the Scientific and Technical Basis of the Proposed Rule Titled “Definition of ‘Waters of the United States’ Under the Clean Water Act”**

**(August 19, 2014)**

Generally speaking I think the USEPA has done an excellent job in drafting the rule. It is based on sound science and will strengthen and clarify the regulatory scheme that protects the integrity of aquatic ecosystems. It is clearly written and its arguments cogently made. However, I was surprised about the release date of the draft rule, and to see that it does not reflect the many suggestions made by the SAB panel to strengthen the EPA Connectivity Report. While I understand the timing of the release is typical, it possibly weakens the value of the SAB process, which is designed to strengthen the scientific basis upon which the draft rule is based. I hope the draft rule can be modified to reflect the work of the SAB panel. A second, related issue is that the report does not use the connectivity gradient framework that was suggested by the SAB panel. Establishing the framework early in the draft rule would aid in the discussions about what constitutes a significant degree of connectivity, which could help define jurisdictional waters.

**The Connectivity Report Was Flawed and Scientifically Unsound**

The EPA, in developing the Connectivity Report, consistently disregarded science. According to Lance Wood, the Assistant Chief Counsel of the Environmental Law and Regulatory Programs with the Corps, there were numerous examples of legal, scientific, and procedural concerns pertaining to the EPA’s development of the WOTUS Rule, which “without correcting those flaws” left the rule “difficult to defend in court.”<sup>340</sup>

**Summary**

The draft final rule regarding the definition of WOTUS contains several serious flaws. If the rule is promulgated as final without correcting those flaws, it will be legally vulnerable, difficult to defend in court, difficult for the Corps to explain or justify, and challenging for the Corps to implement. The Corps has identified many serious areas of concern in the draft final rule to both the Department of the Army (DA) and the EPA, and Corps legal and regulatory staff has provided numerous edits or “fixes” to rule language to correct those errors. However, to date, the fixes have not been adopted, so the flaws remain.

The fundamental problem reflected in every one of the flaws described below is that the proposed rule that was published on April 21, 2014, is based on sound principles of science and law, but many provisions of the draft final rule have abandoned those principles and introduced indefensible provisions into the rule. The following is a summary of the most serious flaws in the draft final rule; the proposed fixes are shown in track changes in the attached “Revised Draft Final Rule,” which was provided most recently to DA and EPA on April 16, 2015.

<sup>340</sup> Memorandum from Lance Wood, U.S. Army Corps of Engineers, to Major General John Peabody, U.S. Army Corps of Engineers (Apr. 24, 2015).

The Waters Advocacy Coalition (WAC), which “represents a large cross-section of the nation’s construction, real estate, mining, manufacturing, forestry, agriculture, energy, and public health and safety sectors,”<sup>341</sup> found that “the Connectivity Report, the agencies’ purported scientific basis for the proposed rule, and the preamble’s Appendix A fail to address the ‘significance’ of connections between waters” as required by *SWANCC* and *Rapanos*.<sup>342</sup>

Nor did EPA allow the expert SAB Panel reviewing the Connectivity Report to evaluate whether the report adequately addresses the significance or importance of connections it identifies. EPA’s technical charge questions to the SAB Panel were focused on verifying the technical accuracy of the report’s findings that streams and most wetlands are connected to downstream waters. EPA did not, however, ask the important questions about the scientific significance of these connections for the health or integrity of downstream waters. Recognizing

Due to the EPA’s failure to ask “the important questions about the scientific significance of these connections for the health or integrity of downstream waters,” the House Committee on Science, Space, and Technology, pursuant to its authority under the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), submitted additional charge questions to the SAB Panel, specifically requesting that they evaluate the scientific significance of the connections.<sup>343</sup>

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<sup>341</sup> WATERS ADVOCACY COALITION, COMMENTS OF THE WATERS ADVOCACY COALITION ON THE ENVIRONMENTAL PROTECTION AGENCY’S AND U.S. ARMY CORPS OF ENGINEERS’ PROPOSED RULE TO DEFINE “WATERS OF THE UNITED STATES” UNDER THE CLEAN WATER ACT 2 (Nov. 13, 2014).

<sup>342</sup> *Id.* at 74.

<sup>343</sup> Letter from the Honorable Lamar A. Smith, Chairman, U.S. House of Representatives Committee on Science, Space, and Technology, to Dr. Amanda Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report (Nov. 6, 2013), *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/7FF38D8F9D02345485257C2300685787/\\$File/11-06-2013+Science+Committee+Letter+to+Dr++Rodewald+and+Dr++Allen.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/7FF38D8F9D02345485257C2300685787/$File/11-06-2013+Science+Committee+Letter+to+Dr++Rodewald+and+Dr++Allen.pdf).

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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November 6, 2013

Dr. Amanda Rodewald, Chair, Science Advisory Board Panel for the Review of the EPA Water Body Connectivity Report  
Dr. David Allen, Chair, EPA Science Advisory Board  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Dear Drs. Rodewald and Allen:

On September 17, 2013, the Environmental Protection Agency (EPA) announced the availability of the Draft Science Synthesis Report on the Connectivity of Streams and Wetlands to Downstream Waters (Draft Connectivity Report or Report), which synthesizes the peer-reviewed scientific literature on the connectivity of streams and wetlands relative to downstream waters.<sup>1</sup> On the same day, EPA also announced that it had sent a proposed rule on the scope of Clean Water Act (CWA) jurisdiction to the Office of Management and Budget (OMB) for interagency review. EPA states that the Report's findings will inform the upcoming rulemaking on CWA jurisdiction.

Along with the Report, EPA released technical charge questions to the Science Advisory Board (SAB) expert panel who will conduct a peer review of the Report.<sup>2</sup> EPA's charge questions are focused on verifying the technical accuracy of the Report's findings that streams and most wetlands are connected to downstream waters. EPA does not, however, ask the important questions about the significance of these connections to the health or integrity of downstream waters. It is critical that the SAB panel address such important scientific questions, including identification of key limitations or uncertainties in the science. The answers to these questions will assist policy makers in clarifying the scope of CWA jurisdiction over waters of the United States.

Despite Chairman Smith's direct request for this information, the EPA refused to answer and stated the questions "go beyond the scientific review that is the expert panel's statutory focus."<sup>344</sup>

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<sup>344</sup> Letter from Laura Vaught, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Lamar Smith (Dec. 16, 2013) (emphasis added) *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/E4735639227A41CE85257C43006DF51F/\\$File/Chairman+Smith.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/E4735639227A41CE85257C43006DF51F/$File/Chairman+Smith.pdf).



With respect to the questions posed in your November 6, 2013, letter, the EPA has begun an initial review and we believe many of the questions you raise are addressed in the existing charge questions provided to the expert panel. The charge questions were written broadly to encourage consideration by the expert panel members of all of the scientific information and conclusions in the Report.

Several of the questions posed in your November 6 letter go beyond the scientific review that is the expert technical panel's statutory focus. The panel is specifically charged with providing the Administrator advice on "the adequacy of the scientific and technical basis" of information supporting agency actions. 42 U.S.C. § 4365.

In fact, the EPA refused to address these questions despite SAB panel members specifically raising concerns that the proposed rule and the Connectivity Report failed to adequately address the significance of connectivity. Dr. Genevieve Ali, for example, noted that though "the draft rule does include a definition for 'significant nexus,'" the definition was "rather vague and subject to interpretation."<sup>345</sup>

***Dr. Genevieve Ali***

***4. The proposed rule defines other terms and excludes specified waters and features from the definition of Waters of the U.S. Please comment on the adequacy of the scientific and technical basis of the other definitions and exclusions.***

Here I chose to answer the fourth charge question first as it addresses the "definition of other terms"; including that of "significant nexus". The draft rule does include a definition for "significant nexus"; however, I find it rather vague and subject to interpretation. Indeed, the EPA science report made a very eloquent demonstration that connections exist between streams and wetlands, regardless of whether they are at the head of a hydrographic network or not, and located in riparian and floodplain settings or not. The science report also made a very strong case for the multiple nature of those connections with biological, chemical, and hydrological exchanges, and with surface and subsurface components in some cases. The SAB panel tasked with reviewing the science report went on to discuss that connectivity expresses itself over a continuum or gradient and as such, it is reasonable to assume that "all is connected" to a certain extent, although the magnitude, frequency and duration of the connections are highly variable. The EPA science report did not, however, explicitly discuss the notion of significance, and I find that the definition provided in the draft rule does not resolve the issue as it equates "significant" with "significantly affects the chemical, physical, or biological integrity" of a jurisdictional water, therefore never explaining what the root term "significant" means. The proposed rule goes on to say that "for an

Dr. Ali even addressed the fact that the Connectivity Report did not mention the term "significant" and went on to apply a mathematical formula to determine exactly how "practical significance" could be applied to the "significant nexus" requirement set forth in *Rapanos*.<sup>346</sup>

<sup>345</sup> SAB Panel Member Comments on the Proposed Rule, at 6 (Aug. 13, 2014) (comments of Dr. Genevieve Ali) (emphasis added), available at [https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/\\$File/Compilation+of+preliminary+comments\\_8\\_14\\_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/$File/Compilation+of+preliminary+comments_8_14_14.pdf).

<sup>346</sup> SAB Panel Member Comments on the Proposed Rule, at 7 (Aug. 13, 2014) (comments of Dr. Genevieve Ali) (emphasis added), available at

While the connectivity-related literature does not use the term “significant”, this term has mathematical (or statistical) meanings and it would be important for the Agencies to assess whether they can work with those meanings/definitions or not. For instance, the concept of “statistical significance” is usually associated with a statistical test and rejecting a null hypothesis and would not be of any use here. However, another interesting concept is that of “practical significance”, which basically asks the question of whether the differences between two groups of data are big enough to have **a real meaning**. I find that the concept of “practical significance” could be applied to the “significant nexus” idea as the notion of significance here is relative, i.e., the word “significant” is used to signify “with respect to” or “in comparison to” a system devoid of downstream connections. Each category (by rule) of jurisdictional water (e.g., tributaries, adjacent waters) could be associated with a very simple “Nexus Score” calculated as follows:

$$\text{Nexus Score} = \text{Score}_{\text{chem}} + \text{Score}_{\text{phys}} + \text{Score}_{\text{biol}} + \text{Score}_{\text{comm}} \quad (1)$$

Dr. Murphy also recognized the direct connection between the “significant” requirement under *Rapanos*’ “significant nexus” test and its applicability to the scientific analysis of the Proposed Rule.<sup>347</sup>

The legal record also seems to support this conclusion. A gradient in connectivity is clearly directed by a common-sense reading of the *Rapanos* decision. The Proposed Rule states in several places that the term “significant nexus,” used in the decision, is not a scientific term. That may be correct in the sense that the term is not found in the scientific literature; however, the phrase should be examined in the context of Justice Kennedy’s next several comments,

“The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’”

*Rapanos v. United States*, 547 U.S. 715 (2006)

Justice Kennedy, here and elsewhere, repeatedly relates the term ‘nexus’ and ‘significant nexus’ to ‘chemical, physical, and biological integrity,’ which *are* scientific terms. Nexus is

Documents show that despite the concerns that were raised, during the SAB panel’s review of the Connectivity Report, “the panel was explicitly told not to discuss the definition of significance” or even “the Proposed Rule itself.”<sup>348</sup>

[https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/\\$File/Compilation+of+preliminary+comments\\_8\\_14\\_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/$File/Compilation+of+preliminary+comments_8_14_14.pdf).

<sup>347</sup> SAB Panel Member Comments on the Proposed Rule, at 57 (Aug. 13, 2014) (comments of Dr. Mark Murphy) (emphasis added), available at

[https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/\\$File/Compilation+of+preliminary+comments\\_8\\_14\\_14.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/471B1FB87CF4798B85257D35006088C5/$File/Compilation+of+preliminary+comments_8_14_14.pdf).

<sup>348</sup> *Id.* at 58. (emphasis added)

During the SAB Review, the panel was explicitly told not to discuss the definition of significance; however, the cause-and-effect based definition discussed above is clearly implied throughout. For example, in section 3.1 of the SAB Review, the authors state:

“As noted in the many public comments to the SAB, the binary perspective in the (Connectivity) Report implies that any connectivity must *significantly affect* the biological, physical, or chemical integrity of downstream waters. Although connectivity is known to be ecologically important even at the lower end of the gradient, the frequency, duration, predictability, and magnitude of connectivity will ultimately determine the *consequences* to downstream waters.” (EPA 2014)

### The EPA Disregarded the Corps’ Recommendations and Did Not Conduct New Science

According to testimony, the Corps brought their concerns regarding the science to the EPA’s attention. According to Moyer, the Corps recommended the EPA “broaden the included science to support where the direction of the rule was headed” in the Connectivity Report. Moyer testified:

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.<sup>349</sup>

Despite these recommendations from the Corps, the EPA ultimately conducted no new science and failed to adequately broaden the science per the U.S. Army Engineer Research and Development Center’s (ERDC) request, according to Moyer. She stated:

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.

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<sup>349</sup> Moyer Tr. at 38-39 (Dec. 17, 2015). (emphasis added)



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.<sup>350</sup>

Chip Smith also testified as to the lack of new science conducted in reaction to changes that occurred late in the rulemaking. Smith stated:

Q You previously mentioned that changes were made late in the rulemaking to appeal to concerns of the USDA and DOT but that the Army and Corps did not study those concerns, establish potential solutions, propose options, or brief principals on those changes. Are these all things that you would consider a necessary part of the rulemaking process?

A Yes.

Q Can you explain why this didn't happen with respect to these changes?

A We would have needed to stop and do some science and evaluate why for decades we had regulated certain ephemeral and intermittent ditches and other water bodies adjacent to farmlands and then suddenly pulled them out of the final rule without any scientific justification whatsoever. It was entirely a policy call.

Q And it was a policy call not because science wasn't required to move forward with it, or was there some other reason why you say it was a policy call?

A It was a policy call so the EPA could offer USDA something to reduce the burden of regulation on farmers, real or perceived, so that USDA would chop and let OIRA move the rule forward.

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<sup>350</sup> *Id.* at 39 (Dec. 17, 2015). (emphasis added)

Q And it was EPA's belief that this effort to appeal to the farmers or ag community would allow the agencies to move forward with WOTUS generally?

A Yes.

Q Okay. Was it also a matter of timing?

A It was tied up with the schedule and the desire to get this done in May. As I think I previously testified, there were a whole suite of regulations, I think many of which are now out on the street. And we were told they had a queue set up and they needed to keep the order going so that one didn't tromp on the other. And so schedule did play a factor.

Q So schedule played a factor in not conducting the science that –

A Absolutely.

Q Okay.<sup>351</sup>

#### The EPA Limited Changes to the Final Connectivity Report and Ensured It Supported the Proposed Rule

Under the APA,<sup>352</sup> a final rule must be a “logical outgrowth” of the proposed rule. As stated by the D.C. Circuit, “[g]iven the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.”<sup>353</sup> Put differently, courts refuse “to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities.”<sup>354</sup>

The fact that the proposed rule was released for notice and comment prior to the conclusion of the Connectivity Report, which the agencies purported to be the scientific basis for the proposed rule, highlights that the agencies were likely incentivized to prevent the SAB, the Corps, or any other commenting party from altering the scientific basis behind the rule to the point that it would no longer be considered a “logical outgrowth.” For example, had the agencies conducted new science or allowed the SAB to respond to Chairman Smith's request for more information as to the significance of the connections identified in the Connectivity Report, such

<sup>351</sup> Smith Tr. at 36-37 (Feb. 19, 2016).

<sup>352</sup> 5 U.S.C. §§ 551-559.

<sup>353</sup> *Env'tl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005); *see also Shell Oil Co. v. EPA*, 950 F.2d 741, 750–51 (D.C.Cir.1991); *Northeast Maryland Waste Disposal Auth.*, 358 F.3d at 952 (stating a final rule is a “logical outgrowth” of a proposed rule only if interested parties “‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period”) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C.Cir.2003)).

<sup>354</sup> *Env'tl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005).

information may have required the agencies to significantly revise the rule, ultimately requiring the agencies to begin the notice and comment process anew.<sup>355</sup> Documents and testimony create the appearance that this is precisely what happened, which undermines the entire rulemaking process, particularly as the public was likely unable to provide comments on a proposed rule that reflected science contained in the final Connectivity Report.

### The Peer Review Process Was Flawed

Throughout the rulemaking, the agencies repeatedly showed disregard for the peer review process of the Connectivity Report. According to OMB, “[p]eer review is one of the important procedures used to ensure that the quality of published information meets the standards of the scientific and technical community.”<sup>356</sup>

OMB guidance lays out a thorough process that involves a critique of scientific works by experts to help clarify the hypotheses, validity of the design, robustness of methods, and quality, of the data.<sup>357</sup> The reviewers evaluate whether the conclusions follow from the analysis and provide feedback on the strengths and limitations of the product.<sup>358</sup> OMB also provides that it is essential to use the feedback received in the peer review process for improving the product and ensuring that the science behind government policy is valid.<sup>359</sup> It continues:

In addition, the credibility of the final scientific report is likely to be enhanced if the public understands how the agency addressed the specific concerns raised by the peer reviewers. Accordingly, agencies should consider preparing a written response to the peer review report explaining: the agency’s agreement or disagreement, the actions the agency has undertaken or will undertake in response to the report, and (if applicable) the reasons the agency believes those actions satisfy any key concerns or recommendations in the report.<sup>360</sup>

According to the guidance, “A peer review is considered completed once the agency considers and addresses the reviewers’ comments.”<sup>361</sup>

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<sup>355</sup> *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C.Cir.1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”).

<sup>356</sup> Memorandum, from Joshua Bolten, Director, Office of Management and Budget, “Issuance of OMB’s Final Information Quality Bulletin for Peer Review” 3 (Dec. 16, 2004) *available at*: <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

<sup>357</sup> Memorandum, from Joshua Bolten, Director, Office of Management and Budget, “Issuance of OMB’s Final Information Quality Bulletin for Peer Review” (Dec. 16, 2004) *available at*: <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 3.

<sup>361</sup> *Id.* at 21.

With respect to the Connectivity Report, the documents and testimony show the agencies treated the peer review process as a mere box to check, and did not meaningfully engage in addressing the comments that came out of the reviews.

The late completion of the peer reviewed scientific basis of the rule runs counter to OMB's guidance, which states:

If the scientific information is used to support a final rule then, where practicable, the peer review report shall be made available to the public with enough time for the public to consider the implications of the peer review report for the rule being considered.<sup>362</sup>

The guidance describes the public notice of the peer review study as "important":

When an information product is a critical component of rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened. If review occurs too late, it is unlikely to contribute to the course of a rulemaking. Furthermore, investing in a more rigorous peer review early in the process "may provide net benefit by reducing the prospect of challenges to a regulation that later may trigger time consuming and resource draining litigation."<sup>363</sup>

Despite the importance of peer review, OIRA failed to incorporate an evaluation of the peer review process into its Executive Order 12866 review. OIRA deferred to the EPA, not simply on whether the science was right, but also on whether they complied with the peer review process outlined in the OMB guidance. Laity testified:

Q The connectivity report was not finalized until January of 2015, well after the rule was drafted, and the agencies undertook drafting the final rule. At any time during the rulemaking, did you discuss the fact that the EPA had not finalized the science underlying the rule?

A Yes.

Q And what were those discussions like?

A We asked them about that. In fact, I think some of that's implicit in this email. And the answer that they gave was that they felt very comfortable that the substantive science was done. There had already, I think—let me just refresh my memory by looking at this, but I think there had already been one peer review of the connectivity report.

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<sup>362</sup> *Id.* at 26.

<sup>363</sup> *Id.* at 14-15.

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Q Did you or anyone else in OIRA, to your knowledge, engage with the EPA and Army Corps to ensure that the concerns from this peer review were addressed?

A No, I don't believe we did. I'm not a scientist, and my feeling was that, as long as they followed the process—which, I have to say, it seemed to me a very rigorous process that they were going through, both an internal peer review process first and then going through an external peer review—and that if the peer reviewers, who were scientists, were satisfied that the report represented the best available science, then that was good enough for me, and I didn't need to kind of look—I read, like I said, the executive summary of the report, made my judgments about its relevance to the rulemaking. But I felt like the process that they went through ensured that it was good science, and it wasn't my role to get down in the weeds and second-guess the science.<sup>364</sup>

Documents and testimony show OIRA's review process essentially involved asking the EPA whether they engaged in a peer review process, rather than conducting meaningful oversight of the process itself. Laity testified:

Q But you did say, on some level, OIRA does engage with an agency to evaluate the analysis it undertakes in a rulemaking, correct?

A Yes, it does. But, you know, we can't redo all the analyses. I mean, our job is to look and see, did they do a good job. And when you come to me with a report and say, this went through all this peer review and the peer reviewers generally were satisfied with it—I mean, I don't remember exactly what they told me, but I presume they told me that, or we would have had more discussions about it—and then you say, and, by the way, we're going to do a second round of peer review with our Science Advisory Board, and that's a very public process, that's a pretty gold-plated process for getting good science. So I was satisfied with that.<sup>365</sup>

Documents and testimony show OIRA was uncurious about much of the process and analysis underlying the rule. When asked about OIRA's involvement in the peer review process, Laity testified that he was unaware that the SAB did not have a copy of the proposed rule before it was submitted to OIRA.<sup>366</sup> Without reviewing the quality of the Connectivity Report, OIRA

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<sup>364</sup> Laity Tr. at 68-69, 71 (Mar. 8, 2016).

<sup>365</sup> *Id.* at 72.

<sup>366</sup> *Id.* at 74-75.

had little knowledge of who knew what, whether information was shared, and whether there was a consensus for the analysis or the underlying rule.

OIRA was further unaware that the Corps did not believe the Connectivity Report did not support the conclusions of the rule. Laity testified:

Q Were you aware that the Corps and Army took no part in the creation of the connectivity report?

A “No part” is a strong statement. I was aware that it was primarily an EPA product. I didn’t know for—I mean, I don’t know for sure that they had no part in it, but I was aware that it was primarily an EPA product.

Q Were you aware of the Army Engineer Research and Development Center or ERDC’s conclusions that the report science needed to be broadened in order to support the rule in terms of supporting the connectivity between tributaries, adjacent wetlands, and isolated water bodies?

A No.

Q Did you review any of ERDC’s recommendations throughout the rulemaking?

A Not that I recall.<sup>367</sup>

Testimony shows OIRA was also unaware the Economic Analysis was not a joint product of the EPA and Corps. OIRA simply assumed that it was a joint product.<sup>368</sup> Laity testified: “My understanding at the time, although I admit I never asked this question, was that it was a joint product. I wasn’t aware there was a disagreement, if there was.”<sup>369</sup>

Laity testified that he did not read the entire Connectivity Report,<sup>370</sup> instead basing his review on a reading of the Report’s executive summary. This occurred despite the fact that Executive Order 12866 specifically directs OIRA to review agency draft regulations before publication to ensure agency compliance with the Executive Order and holds that OIRA “is the repository of expertise concerning regulatory issues, *including methodologies and procedures.*”<sup>371</sup> Laity stated:

Q Did you read the connectivity report?

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<sup>367</sup> *Id.* at 81.

<sup>368</sup> *Id.* at 59 (“I definitely had the impression, although I’m not sure where I got it, that the Corps did the part where they looked at their database—it was their database, and they looked at their database, and they looked at the decisions, and then they made judgments about how the decisions would have been made differently.”).

<sup>369</sup> *Id.* at 59.

<sup>370</sup> *Id.* at 57.

<sup>371</sup> Exec. Order No. 12866, 58 Fed. Reg. 15315 (Oct. 4, 1993). (emphasis added)



A I read the executive summary. It was several hundred pages long. I'm not a scientist. I didn't read the whole thing. But I did read the executive summary, and I did have a sense of, sort of, from a 50,000 foot level what it said.

Q During the rulemaking, were you aware that the connectivity report was created to serve as the scientific basis for the WOTUS rulemaking?

A Yes.<sup>372</sup>

The documents and testimony obtained by the Committee show OIRA failed to conduct a thorough review of the basis for the rule, allowing EPA to push the rule through the regulatory process before its scientific basis was finalized, without consensus, and without transparency. OIRA simply read the executive summary, took EPA's word for the completeness of the work, and moved on. OIRA failed to ask whether the peer review comments were addressed or considered.<sup>373</sup> OIRA did not inquire into whether additional science was needed.<sup>374</sup> OIRA did not verify that the process complied with OMB guidance.

#### The WOTUS "Adjacency Limits" Are Not Based on Science

A significant provision in the final WOTUS rule provides that waters within 4,000 feet of the high-water mark of navigable waters subject to CWA jurisdiction could also fall under the Act's jurisdiction.<sup>375</sup> However, this expansion of jurisdiction under the CWA did not originate from, or develop as part of, the proposed rulemaking.<sup>376</sup> Documents and testimony show the limits were developed without scientific evaluation, were not vetted through the Corps, and did not go through the public comment process. In fact, the EPA's Connectivity Report itself advises against using specific distance thresholds in the rule.<sup>377</sup>

When asked about the development of the adjacency limits, the Army's Craig Schmauder suggested that the agencies were responding to the public's repeated requests for "bright lines." Schmauder testified:

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<sup>372</sup> Laity Tr. at 68 (Mar. 8, 2016).

<sup>373</sup> *Id.* at 78 ("In this case, OIRA did not really get involved in the science underlying the rule, other than to understand what the report said about the science. So we didn't have a lot of discussions or disagreements or anything about the science. So, I don't recall that we—that we really dug into the details of the peer review.").

<sup>374</sup> *Id.* at 82 (Mar. 8, 2016) ("Q At any point in your review, did you discuss a need to conduct additional science? A No.").

<sup>375</sup> Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) (to be codified at 40 C.F.R. pts 110, 112, 116, *et.al.*), available at <https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>.

<sup>376</sup> Schmauder Tr. at 89-93 (Feb. 17, 2016).

<sup>377</sup> Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, Office of Research and Development, U.S. Environmental Protection Agency, Sept. 2013, *available at* <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345#Download>.

Q How are these distance limits determined?

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

Q Sure.

A They were proposed by—well, first of all, I should say that the notion of having specific bright lines or distance limitations was raised in many of the outreach stakeholder-type discussions.

So the point I'm trying to make is that we were getting pretty good feedback in the outreach of stakeholders that people were uncomfortable with the concepts in the proposed rule. And many times they suggested clear bright lines. So we had that in mind. EPA proposed the bright lines that we had. They were initially raised, I think, as a straw man like 5,000-foot, and then we—I think EPA did some analysis and came up with the 4,000 foot bright line; while it would give everybody a bright line, we felt captured the bulk of the jurisdictional water bodies that that particular category wanted to regulate.<sup>378</sup>

Schmauder acknowledged, however, that these comments did not, in fact, seek specific distance limits. He testified:

Q Were those comments about bright lines specifically asking for [4,000 foot] distance limits?

A Not specifically, no. We certainly didn't provide any specific numbers in the proposed rule.<sup>379</sup>

Moyer testified that neither EPA nor the Corps solicited comments on the 4,000 foot standard. She stated:

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.<sup>380</sup>

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<sup>378</sup> *Id.* at 89-90.

<sup>379</sup> *Id.* at 92.

<sup>380</sup> Moyer Tr. at 96 (Dec. 17, 2015).

Schmauder stated that he was “informed” of the decision-making underlying the 4,000 foot adjacency limit, but could not “recall any of the details of the analysis” for the Committee.<sup>381</sup> He said that the EPA would have consulted Moyer at Army Corps about establishing this standard.<sup>382</sup>

Contrary to Schmauder’s testimony, however, Moyer testified that neither she, nor anyone at the Corps working on the WOTUS rule, participated in the formulation of the adjacency limits. Moyer stated:

Q Okay. So you are unaware of who decided those [4,000 foot] 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.<sup>383</sup>

Moyer testified the adjacency limits had no basis in science, and that problems arose regarding implementing the limits. She testified a “bright line” standard such as the adjacency limits is not supported by science. She stated:

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.**<sup>384</sup>

Laity testified that when he asked the EPA about the origin and basis of the adjacency limits, he was told that, rather than being based on science, they were merely “judgement calls” contrived by the EPA.<sup>385</sup> He stated:

The answer that I got when I said where do these [adjacency] lines come from was essentially that there—there isn’t any science that will say it

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<sup>381</sup> Schmauder Tr. at 90 (Feb. 17, 2016).

<sup>382</sup> *Id.* at 90.

<sup>383</sup> Moyer Tr. at 96 (Dec. 17, 2015).

<sup>384</sup> *Id.* at 73.

<sup>385</sup> Laity Tr. at p. 88 (Mar. 8, 2016).

should be 100 feet, if not 110 feet, or 4,000 feet, but not 3500 feet. But that if—if you don’t draw lines, then you’re basically left having case specific determination about everything, which was something that OIRA certainly agreed with the agencies that it would be better to move away from that.

And so they felt that this was basically a judgment call that’s coming out of the connectivity report, that these were lines that were a reasonable balance of essentially—that the standard for—that was established in Justice Kennedy’s opinion for what constitutes a jurisdictional water is that it has a significant nexus to a navigable, in fact, water.<sup>386</sup>

Moyer told the Committee that bright line delineations can be helpful in rulemakings, but in the case of WOTUS, bright lines are impractical and “hard to implement.” She testified:

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.<sup>387</sup>

The documents show OIRA itself acknowledged that public comments and a robust discussion of options would be “especially helpful” with respect to defining adjacency limits in the rule. An internal OIRA document titled “Waters of the US Outstanding Policy Issues” stated:

Definition of Adjacency: The rule proposes a revised definition of adjacency that is more precise and science based than the existing definition. However,

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<sup>386</sup> *Id.*

<sup>387</sup> Moyer Tr. at 146-147 (Dec. 17, 2015). (emphasis added)

the proposed definition retains significant ambiguity, which DOJ has suggested makes it vulnerable to legal challenge.

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OIRA staff recommends that the rule provide greater clarity on the definition of adjacency. This is an area where public comment may be especially helpful, so a robust discussion of options and request for comment would be in order.<sup>388</sup>

OIRA acknowledged issues with the agencies' implementation of new distance limits right before the rule's release. Documents show that on May 14, 2015, Laity emailed Dominic Mancini, OIRA's Deputy Administrator, about adjustments to the distance limits. Laity wrote: "I think this goes in the wrong direction . . . ." Mancini responded: "Thanks. Frustrating."<sup>389</sup>

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<sup>388</sup> OIRA, Waters of the US Outstanding Policy Issues (Jan. 9, 2014) (OMB-045601).

<sup>389</sup> Email from Dominic Mancini, OIRA, to Jim Laity, OIRA (May 14, 2015, 6:51 p.m.) (OMB-027016).

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**From:** Mancini, Dominic J.  
**Sent:** Thursday, May 14, 2015 6:51 PM  
**To:** Laity, Jim  
**Subject:** Re: Wotus

Thanks. Frustrating.

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Sent using BlackBerry

----- Original Message -----

From: Laity, Jim  
Sent: Thursday, May 14, 2015 06:37 PM Eastern Standard Time  
To: Mancini, Dominic J.  
Subject: RE: Wotus

Our original idea was to say that any waters in the flood plain out to 4000 feet are jurisdictional by rule (technically, "adjacent") and all other waters more than 100 feet away from jurisdictional waters are out -- no case by case.

What they have done instead (and I think this goes in the wrong direction) is to say that all waters out to 100 feet, and in flood plain out to 1500 feet, are jurisdictional, and all others out to 4000 subject to case -by-case determination. Plus now, they are saying that even beyond 4000 feet is subject to case -by-case if it is in the flood plain. Around large rivers, this will significantly expand the scope for case -by-case, while we would like to narrow it.

-----Original Message-----

From: Mancini, Dominic J.  
Sent: Thursday, May 14, 2015 10:02 AM  
To: Laity, Jim  
Subject: Wotus

What was our original idea about how to make the line brighter? Vlad was telling me about the change.



## A DISREGARD FOR THE RULEMAKING PROCESS

Federal agencies are subject to a number of requirements prior to, and upon issuing, a final rule. These requirements are meant to ensure that a rule is developed in a transparent manner while achieving the desired policy results. The documents and testimony show rulemaking agencies ran afoul of a number of statutes and executive orders in their development and promulgation of the WOTUS rule.

The Agencies Did Not Consider Alternatives Until After the Rule Was Drafted

**FINDING:** The agencies did not consider alternatives to the rule, and even went so far as to gut the discussion of alternatives after OIRA stated such discussion was necessary.

Under Executive Order 12866, agencies are required to identify and assess alternatives to direct regulations and to identify and assess alternative forms of regulation.<sup>390</sup> Specifically, when an agency is engaging in a significant regulatory action, the assessment must include a discussion of feasible alternatives and “why the planned regulatory action is preferable to the identified proposed alternatives.”<sup>391</sup> The presentation of alternatives is meant to occur prior to issuance of a proposed rulemaking rather than after the fact, or as a way to bolster the agencies’ argument in favor of a certain regulation.<sup>392</sup>

In the case of the WOTUS rule, the EPA did not consider alternatives until after the proposed rule was drafted. Jim Laity of OIRA identified this as a violation of standard practice. In an email, Laity wrote: “Based on the leaked draft, a lot of stakeholders are complaining that the rules reads like substantive decisions have already been made, and includes no ‘alternatives’ as required by EO 12866. This is a fair concern.”<sup>393</sup>

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<sup>390</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> Email from Jim Laity, OIRA, to Gregory Peck, EPA (Dec. 12, 2013, 7:19 p.m.).

**Laity, Jim**

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**From:** Laity, Jim  
**Sent:** Thursday, December 12, 2013 7:19 PM  
**To:** Peck, Gregory; Schmauder, Craig R SES (US) [REDACTED]  
**Subject:** WOTUS  
**Attachments:** Corps OHWM Presentation (Mar 2013)\_48649661\_1-c.pdf

Let's talk tomorrow (Friday) to see where we are and next steps. Let me know a time that works for both of you.

A few more stray concerns for you to think about, these should not be show stoppers.

- 1) I understand that the Connectivity Report already went through one round of independent peer review and revision before being submitted to the SAB. I think it is important that we make the results of this peer review available to the public as part of the administrative record for the NPRM when it is published to counter the charge, currently circulating, including in several Congressional letters we have received, that we are letting the rule get ahead of the science, and should not propose the rule until the SAB review is complete. If we can show that the Report already went through a round of peer review (which was hopefully favorable) and was already revised once to address peer review comments, this will help a lot to address this concern. Please let me know asap if you see any problem with doing this. Also, can I see a copy of the first peer review report asap?
- 2) Based on the leaked draft, a lot of stakeholders are complaining that the rules reads like substantive decisions have already been made, and includes no "alternatives" as required by EO 12866. This is a fair concern. I think we can address by adding targeted requests for comment (and perhaps offer alternatives) in each section of the rule. For example, in the adjacency discussion, we could propose the 100 year floodplain, but specifically request comment on other intervals. We could also request comment on whether the definition should specify only the riparian zone, only the floodplain, or both (as proposed). This is only an example. As you revise the rule, please think about other margins where you can reasonably request comment on specific alternatives.
- 3) The issues of "breaks" in tributaries not severing jurisdiction is causing a lot of heartburn and uncertainty. Can we be more specific about the circumstances where this applies. For example, a manmade break that conveys water from the upper to the lower part of a natural tributary through a pipe, culvert or similar structure should not sever jurisdiction. Perhaps this is enough, or if there are other specific situations, let's identify them explicitly.
- 4) Concern has been raised about uncertainty in the delineation of the OHWM, including a Corps powerpoint on this topic being provided (attached). It would be great if we can provide more clarity here.

Let's talk tomorrow. Jim

The email shows the rule was already drafted when the EPA began inventing alternatives that might satisfy the requirements under Executive Order 12866. Laity testified about the email when he appeared before the Committee for a transcribed interview. He stated:

Q In this email, you tell Mr. Peck and Mr. Schmauder that, quote, "a lot of stakeholders are complaining that the rules read like substantive decisions have already been made, and includes no 'alternatives' as required by Executive Order 12866. This is a fair concern," close quote. Can you explain your comment that this is a fair concern with respect to the rule at this stage?

A Executive Order 12866 requires that agencies present both their preferred—this is at the proposed rule stage—present both their

preferred regulatory option and reasonable alternatives to the regulatory option. And, in implementing the Executive Order requirements, there is always a rule of reason where, sort of, the bigger and more important the rule is, the more effort one puts into things like the cost-benefit analysis and developing the reasonable alternatives and so on.

This was a very important rule, and I'm expressing the opinion there that it is important that the proposed rule include some regulatory alternatives and that, I guess—I don't remember the details of what led me to write this email, but I guess that we were hearing either in the press or—I think you know we have a process where stakeholders can come in and talk to us about a rule under review. And maybe we were hearing from stakeholders that they have—I had forgotten this, but I guess the rule was leaked and that they had seen it and had concerns of this nature.

Q And you would expect at the proposed rule stage, like you said, per the Executive Order, that the agencies to this point have assessed and considered alternatives?

A The Executive Order requires that the proposed rule present a range of alternatives. And I do feel I need to add that the proposed rule did, in fact, when it went out, include a number of substantive alternatives and a fairly detailed discussion of them in order to request informed public comment on those alternatives.

Q So when you say this is a fair concern, you don't recall why you said that it was a fair concern that it did not include alternatives?

A What—

Q Or were you referring to the—

A If you read on in that paragraph, I go on to suggest specific ways in which the rule can request comment on specific alternatives. So, you know, "this is a fair concern" essentially is a way of saying: I think that you should consider requesting comment on some of these alternatives, and here they are, here are examples.

And, actually, the final proposed rule that was published in the Federal Register had quite a bit more substance than this and addressed a fairly broad range—I think it had four other major alternatives to the proposed rule—as well as the specific requests for comments on some of the smaller issues that are mentioned in this paragraph, like breaks in jurisdiction and stuff like that.

Q Were you concerned at all with the comment that it reads like substantive decisions had already been made?

A You know, sometimes when I'm writing emails, we all know each other pretty well, and I speak colloquially or informally or carelessly. And so I think that my intention in writing this email was to get the attention of the agencies and convince them that it would be appropriate to include some regulatory alternatives in the proposed rule, which they agreed to do.<sup>394</sup>

Documents and testimony show OIRA's subsequent assertions that the proposed rule ultimately did include some alternatives ignores the fact that the agencies should have considered and included alternatives in their development of the rule in the first instance, as required.

In fact, OIRA negotiated specific language with the EPA, including four recommended alternatives to include in the proposed rule for public comment. These were outlined in an internal OIRA memorandum from January 2014.<sup>395</sup>

Isolated Waters (aka "other waters" – note this is shorthand for "isolated, non-navigable, intrastate" waters, which were specifically addressed in SWANCC; navigable and interstate waters are always jurisdictional regardless of whether they are isolated or not ): The proposed rule would continue to require a case-by-case demonstration of a "significant nexus" to navigable or interstate waters to assert jurisdiction over isolated waters. Unlike either the 2008 or 2011 guidance, the proposed rule would also allow some grouping of isolated waters for determining significance, and offers vague criteria for such grouping. This makes it somewhat more likely that isolated waters could be found jurisdictional, which is a significant policy goal of environmental and sportsmen groups. However, the scientific and legal basis for asserting jurisdiction over many types of isolated waters remains weak, and the proposed rule would do little to resolve regulatory uncertainty regarding such waters. **OIRA staff recommends that EPA establish categorically that isolated waters are not jurisdictional, but remain subject to protection under state and local law.** This would address some concerns raised by other agencies, including USDA, DOT, and DOI. The four new options on which comment is requested are :

(continued next page)

<sup>394</sup> Laity Tr. at 64-67 (Mar. 8, 2016).

<sup>395</sup> *Id.*



1. Disallow grouping of isolated waters for purposes of determining “significant nexus” (so that all determinations would be done on one water at a time) and state that this would likely have the effect of making few if any isolated waters jurisdictional. This is the closest of the options to OIRA’s recommendation above, but there is a key difference. By not establishing that isolated waters are *categorically* excluded from jurisdiction, this option would not provide regulatory certainty. Regulated entities are distrustful of the agencies and would likely see their unwillingness to categorically exclude isolated waters as an indication that they wish to preserve the option of asserting jurisdiction on a case-by-case basis.
2. Identify some types of isolated waters (eg, prairie potholes, Carolina and Delmarva bays, vernal pools) as categorically jurisdictional, and others as categorically non-jurisdictional. It appears, however, that some isolated waters would remain undetermined and would be subject to case-by-case determinations based on the significant nexus standard. This is a promising step in the right direction. We are not opposed to the agencies identifying some types of isolated waters as jurisdictional if the science supports it, but we strongly recommend that they provide regulatory certainty by affirming categorically in the rule that waters not determined to be categorically jurisdictional are categorically non-jurisdictional. That is, we strongly recommend that they eliminate case-by-case determinations. We also believe that such an approach would be viewed favorably by the Court, which has criticized the agencies in the past for not clarifying jurisdiction through rule making.
3. Identify “eco-regions” where all isolated waters would be aggregated for purposes of case-by-case significant nexus determinations, which would make it likely that they would be found jurisdictional. It is not clear whether the rule would prohibit such aggregation in the remaining areas, or leave it up to the case-by-case judgment of field staff, as in the lead proposal (and the current status quo). This option also does not provide regulatory certainty, and would likely be viewed as a significant expansion of jurisdiction relative to the current status quo.
4. Identify all “isolated” waters as categorically jurisdictional. This is the only one of the EPA options that eliminates case-by-case determinations and thus provides regulatory certainty regarding isolated waters. However, it would be viewed as a massive expansion of jurisdiction by the regulated community and would likely be rejected by the Court.

OIRA staff continue to believe that the best option would be to identify all isolated waters as categorically non-jurisdictional, and that this should be the lead option in the regulatory text. While the Court did not explicitly preclude assertion of jurisdiction over at least some isolated waters, there is language in both the decisions suggesting that the Court would generally find it a tough case to make that “isolated, non-navigable, intrastate” waters have a significant nexus to navigable waters. While environmental groups would not like this option, and regulated entities will not like the assertion of jurisdiction over all tributaries and adjacent waters, we believe this is a reasonable compromise between these two hardened positions. EPA staff have indicated to us, however, that they do not support, and believe their policy officials do not support, an outcome that would be perceived by environmental groups as “less protective than what the Bush Administration did.” They argue that by categorically excluding some or all isolated waters, they would be removing at least hypothetical protection for these waters that the Bush administration left in place. Leaving aside the question as to

Specifically, OIRA recommended that providing a categorical exemption for isolated waters would provide the added clarity called for in the rulemaking, and meet the goal of increasing regulatory certainty.<sup>396</sup> Documents show, however, that after this negotiation and addition of alternatives and before the proposed rule was publicly released on April 21, 2014, the EPA did an entire re-write the alternatives discussion, striking this option in its entirety. OIRA staff discussed their concerns that the draft again failed to meet the requirements of EO 12866 because it did not include a sufficient discussion of alternatives. In a March 16, 2014 email to Andrei Greenawalt and Dominic Mancini, Jim Laity wrote:

The other waters section of the preamble has been entirely written in a way that I no longer find acceptable.

There are two fundamental problems with this rewrite. First, the earlier version had four distinct alternative options for addressing other water that spanned a reasonable range of possible approaches. Presenting alternatives in *[sic]* required by EO 12866 for economically significant rules, and the leaked draft was criticized by stakeholder groups in our meetings with the public for failing to comply with this requirement. The addition of specific, well-defined options not only informs public comment but signals to the public that there are well-developed alternatives that the agency is considering and it puts the rule writing agency in a realistic position to finalize one of the presented options without a new proposal. For these reasons the inclusion of these options was critical to my support of the previous draft. As an aside, I believe it was also critical to the buy-in of several other agencies that shared our concerns, such as DOJ and DOT and while the SBA still believes a SBREFA panel is required, they were also very supportive of including the new options.

In place of these four distinct options the new preamble now has a long, disorganized series of requests for comment on just about everything they could possibly request comment on regarding other waters. While almost all the important ideas are in there somewhere (I say almost bc one that is critical to OIRA's preferred option is now missing entirely), **the new discussion does not provide any coherent alternatives to the proposed approach, and gives the public no organized alternatives to react to. It also no longer conveys the sense that alternatives are fully fleshed out ready for prime time approaches that the agency might reasonably adopt in the final rule.** It is my judgement that for the agency to adopt an approach that was significantly different from the proposed approach based on this version of the preamble would be legal vulnerable and not fair to the public, and the agency would likely feel (and we would agree) that a NODA or re-proposal was necessary.

The second big problem is that **the OIRA preferred option (at least my**

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<sup>396</sup> OIRA, Waters of the US Outstanding Policy Issues (Jan. 9, 2014) (OMB-045601-6).



**preferred option) has disappeared entirely.** That is it cannot even be pieced together from the disjointed series of requests for comment that remain. In a nutshell, the option is that all other water would either be categorically jurisdictional or categorically non-jurisdictional, so that case by case determinations and all the uncertainty and resource intensive transactions that they entail for both the government and regulated entities would be eliminated.<sup>397</sup>

Mancini responded:

I note that **they explicitly deleted the characterization of these as alternative for consideration, which can only make it harder to finalize something other than their proposal.** I can't see how that could be a good thing, whatever folks' policy coming in. I would also note that this is more or less significant rewrite of the entire package and even if we could become more comfortable with this I think it would take a while to process.<sup>398</sup>

Laity replied. He stated that the EPA should include something to signal to the public that it is at least considering one option that would not be a major jurisdictional expansion. Laity wrote:

Yes, this language is what is left of OIRA's preferred option. What's missing is the idea that waters for which the science is inconclusive would also be non-jurisdictional by rule, until the science evolves further. Since it is likely that there will be a large share of isolated waters in this category, without this provision there will still be lots of case by case determinations with all the problems they entail. I am not asking the agency to make this choice now, in fact, I deliberately dropped the idea of pushing this to be a "co-proposed" option bc I knew it would be difficult for [sic] them to accept and it doesn't need to be to keep it on the table for the final rule. **But it does need to be clearly described in a coherent option to inform public comment and signal to those who will characterize this a [sic] major jurisdictional expansion that the agency is at least seriously considering one option that would not be.**

I also note that Justice Kennedy, whose opinion forms the basis of the rule, said that in order for a nexus to be significant it might be more than "speculative or insubstantial." This language is used repeatedly throughout the proposal in both rule and preamble text. In my mind, where the science is inconclusive any nexus to navigable waters cannot by definition be more than speculative. Thus I think the approach I favor is actually the most true to Kennedy's opinion. I also think senior staff in OW [EPA Office of Water] were willing to present it as one option bc they realize this too, as much as

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<sup>397</sup> Email from Jim Laity, OIRA, to Andrei Greenawalt, OIRA, and Dominic Mancini, OIRA (Mar.16, 2014, 04:33 p.m.) (OMB-051166) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

<sup>398</sup> Email from Dominic Mancini, OIRA, to Jim Laity, Andrei Greenawalt and Cortney Higgins, OIRA, Mar. 17, 2014, 12:09 a.m. (OMB-051193) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

they would like to leave open the possibility of claiming jurisdiction over everything.<sup>399</sup>

Documents show that the EPA's re-write was done personally by EPA Administrator McCarthy. After a call with Administrator McCarthy to discuss OIRA's concerns, Shelanski emailed his staff. He wrote: "One additional point: Gina made clear this was her doing not staff's."<sup>400</sup>

Despite OIRA's substantial concerns, Shelanski allowed the proposed rule to move forward without including OIRA's most meaningful text. In an email to Andrei Greenawalt and Jim Laity on March 23, 2014, Shelanski wrote:

I've had a lot of back and forth over the last 2 days with Gina about the edits Jim sent on 3/21. Email is not the place to rehash the details, but the short story is this: she wanted to stick with the draft before those edits, and planted her feet pretty hard on that; I explained why we did not want to do that; she and I discussed the issues (she has some good points); I then sent my own edits which do 2 things (1) clarify that case-by-case is for subcategories where science shows neither presence NOR ABSENCE of significant nexus for the class as a whole; and (2) that EPA is taking comment on the appropriate use of case-by-case determinations generally. The strongest 2 of Jim's edits on non-jurisdictionality are out but the rest of most there [sic].

Gina has no [sic] accepted those edits. I think this is a reasonable compromise at this stage.<sup>401</sup>

#### WOTUS Was Based On a Flawed NEPA Analysis

Documents and testimony show the EPA and the Army failed to comply with a law mandating that regulations substantially affecting the human environment, such as WOTUS, receive enhanced analysis and scrutiny. Specifically, the National Environmental Policy Act (NEPA) formally "declares that it is the continuing policy of the Federal Government...to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . ."<sup>402</sup> NEPA requires a federal agency to prepare an environmental impact statement (EIS) for any major federal action "significantly affecting the quality of the human environment."<sup>403</sup> All federal agencies must determine if a NEPA analysis is necessary or not.<sup>404</sup>

<sup>399</sup> Email from Jim Laity, OIRA, to Andrei Greenawalt, Dominic Mancini, and Cortney Higgins, OIRA, Mar. 17, 2014, 1:08 a.m. (OMB-051195) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

<sup>400</sup> Email from Howard Shelanski, OIRA, to Dominic Mancini, OIRA (Mar. 17, 2014, 11:52 a.m.) (OMB-051213) (unredacted version on file with U.S. Dept. of Justice).

<sup>401</sup> Email from Howard Shelanski, OIRA, to Andrei Greenawalt and Jim Laity, OIRA (Mar. 23, 2014, 05:36 p.m.) (OMB-051253) (unredacted version on file with U.S. Dept. of Justice). (emphasis added)

<sup>402</sup> The Nat'l Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970; 42 U.S.C. § 4331(a) (2006).

<sup>403</sup> *Id.* § 4332(2)(C); *State of N.C. v. F.A.A.*, 957 F.2d 1125, 1128 (4th Cir. 1992).

<sup>404</sup> 42 U.S.C. § 4332(2).

To determine the need for an EIS, an agency must first prepare an Environmental Assessment (EA).<sup>405</sup> An EA is generally “a concise public document that (1) provides sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact (FONSI); (2) aids agency compliance with NEPA when no EIS is required; and (3) facilitates preparation of an EIS when one is necessary.”<sup>406</sup> The EA must include a discussion of the need for the proposed rule, alternatives to the rule, impacts of both the rule and the alternatives, and a list of individuals and agencies consulted during the process.<sup>407</sup>

If an EIS is necessary, notice of the agency’s intent to prepare it is first published in the *Federal Register*.<sup>408</sup> Elements of an EIS include: a statement expressing the purpose and need for the proposed regulation; alternatives to the rule; a description of the affected environment; an analysis of likely environmental consequences; and a list of the person(s) preparing it.<sup>409</sup> The agency preparing the EIS must also request comments from all interested entities, including federal, state, local and tribal governments, and the public.<sup>410</sup>

If the agency decides no EIS is required because the proposed action will not have a significant impact on the human environment, the agency produces a FONSI.<sup>411</sup> Unlike the more detailed EIS, a FONSI simply presents reasons why the agency determined no significant environmental impact would occur due to the rule.<sup>412</sup>

The following chart outlines the NEPA process:<sup>413</sup>

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<sup>405</sup> 40 C.F.R. § 1508.9 (1991).

<sup>406</sup> LINDA LUTHER, Cong. Research Serv., RL33152, The National Environmental Policy Act (NEPA): Background and Implementation; CRS (2011) available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33152.pdf>.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 18.

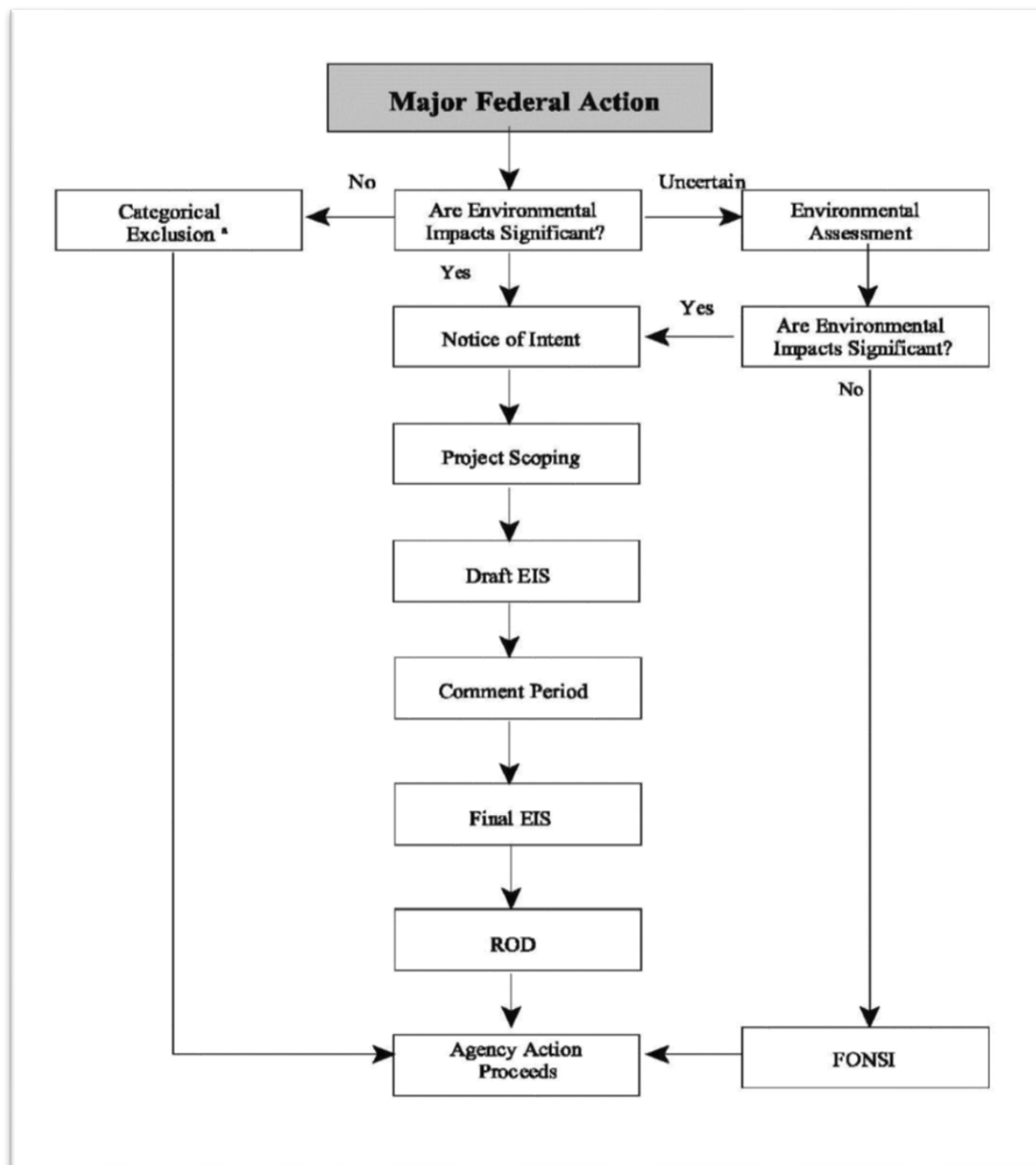
<sup>409</sup> *See e.g., id.*

<sup>410</sup> *Id.*

<sup>411</sup> 40 C.F.R. § 1508.13 (1991).

<sup>412</sup> U.S. Environmental Protection Agency, National Environmental Policy Act Review Process, available at <https://www.epa.gov/nepa/national-environmental-policy-act-review-process#ea> (last visited Oct. 24, 2016).

<sup>413</sup> Certain projects recognized as having no significant economic impacts, such as landscaping or the installation of traffic signals, are excluded from the requirement that an EA or EIS be prepared. These recognized exclusions are called “Categorical Exclusions.” *See* LINDA LUTHER, Cong. Research Serv., RL33152, The National Environmental Policy Act (NEPA): Background and Implementation; CRS (2011).



Source: Cong. Research Serv., “The National Environmental Policy Act (NEPA): Background and Implementation,” Report No. RL33152 (2011).

The final NEPA documents, including the EA and EIS/FONSI, are submitted to the OIRA for interagency review at the same time.<sup>414</sup>

<sup>414</sup> Smith Tr. at 11-12 (Feb. 19, 2016).

A. THE ARMY DISREGARDED NEPA PROVISIONS TRIGGERED BY SIGNIFICANT NEW CHANGES AND PREDETERMINED NEPA ANALYSES

**FINDING:** The Army went to unusual lengths to avoid completing an Environmental Impact Statement after its own experts recommended such an analysis was necessary, in violation of NEPA. The Army pulled its primary WOTUS staffer off the rule entirely and retaliated against him after he recommended to conduct the analysis.

While the Corps traditionally prepares NEPA analyses for its rulemakings, Chip Smith of the Army prepared the first NEPA analysis for the WOTUS rule because the Corps' regulatory staff were busy trying to meet the demand of the rule's timeline.<sup>415</sup> The assignment reflects Smith's knowledge and expertise of NEPA. In particular, his background includes reviewing hundreds of environmental assessments.<sup>416</sup> Smith summarized his NEPA experience when he testified to the Committee in a transcribed interview. He stated:

I've reviewed over 500 [NEPA-related documents] and I've written frankly, I can't tell you an exact number . . . but several dozen environmental assessments and several environmental impact statements.<sup>417</sup>

Smith further testified his expertise focuses on rulemaking pertaining to wetlands, such as WOTUS.<sup>418</sup>

Smith's involvement with WOTUS started in February 2009, when the Corps began meeting with the EPA Administrator and other top level EPA staff to discuss the rulemaking.<sup>419</sup> Smith continued on as the primary Army regulatory liaison to the Corps, working through 2014 to prepare the EA for the final rule, which had previously anticipated a FONSI based on the substance of proposed rule.<sup>420</sup>

Around early 2015, though, "last minute" modifications greatly "changed the dynamics" of the rule by significantly shrinking the EPA's jurisdiction over certain wetlands and water bodies.<sup>421</sup> Such substantial revisions to the rule unsurprisingly rendered Smith's work on the EA inconsistent with the new draft.<sup>422</sup> The changes to the rule caused it to significantly impact the human environment and thus require preparation of an EIS under NEPA. Smith testified:

But I had enough information about what the final rule was going to be look[ing] like to know that a couple of key changes in my professional

<sup>415</sup> Moyer Tr. at 115-116 (Dec. 17, 2015).

<sup>416</sup> Smith Tr. at 10 (Jan. 21, 2016).

<sup>417</sup> *Id.* at 10.

<sup>418</sup> *Id.* at 13.

<sup>419</sup> *Id.* at 11-12.

<sup>420</sup> *Id.* at 74.

<sup>421</sup> *Id.* at 73-74.

<sup>422</sup> *Id.*

opinion resulted in an adverse effect to the quality of the human environment, which is the threshold [for an EIS], and that is basically eliminating jurisdiction over tens of thousands, possibly hundreds of thousands of acres of wetlands and waters we currently had jurisdiction over. And that is a threshold, at least in my opinion, for stepping back, studying it, and doing an environmental impact statement, and those were just last minute changes that were made.<sup>423</sup>

Smith also testified about the new questions raised by the rule changes, and the process that needed to be followed for a proper EIS. He stated:

Well, at that point, we had questions about the impacts on reservation communities, EJ communities, water quality, where jurisdiction would be lost. We had questions about the acres and what parts of the country would be most affected. We needed to do, well, I felt like we needed to do field work, mapping analysis, and working more closely with States and tribes and ask them, what—how might these—how might this proposal affect your community? And because of the uncertainty and because of the lost jurisdiction, the quantity of waters and wetlands that we would no longer regulate, I felt that was an adverse effect that met the threshold under NEPA where we had to do an EIS.<sup>424</sup>

Smith also testified to the importance of conducting an EIS. He stated:

Q Was it also discussed as to whether an [Environmental Impact Statement] or not doing an [Environmental Impact Statement] would affect the substantive portions of the rule or justification for the rule? Or was their concern simply timing?

A My concern was timing and substance. Because when you do an EIS, you do robust predecisional public consultation, you do scientific studies as necessary, you evaluate data, you consult with tribes, and you do a more robust Economic Analysis and collect information to inform development of options and alternatives, selection of an option, which would be different kinds of rules, and then inform the final rule.

So, in my mind, it was very important because of the uncertainties about data, in my view, the lack of the science we needed to support all of the aspects of rule, the fact that we did no tribal consultation, I thought an environmental impact statement was the correct, under NEPA, finding.<sup>425</sup>

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<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 141-142.

<sup>425</sup> Smith Tr. at 18-19, (Feb. 19, 2016).



Documents show Smith was not the only person who believed an EIS was necessary in after the new changes. In an April 27, 2015 memorandum to Assistant Secretary Darcy, Army Major General John Peabody forcefully argued for an EIS.<sup>426</sup> Specifically, Major General Peabody warned that “the Corps would need to prepare an Environmental Impact Statement (EIS) to address the significant adverse effects on the human environment that would result from the adoption of the rule in its current form.”<sup>427</sup> Jennifer Moyer, too, recommended an EIS in light of the changes.<sup>428</sup> She testified:

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.**<sup>429</sup>

Documents and testimony show that although the EPA is exempt from NEPA, its control and influence over the Corps’ NEPA process began early and persisted through the final stages of the rule.<sup>430</sup> The extra time needed to complete an EIS clashed with Administrator McCarthy’s mandated May 2015 deadline to complete WOTUS. Smith testified:

Q Were you ever told in any way or feel pressured to avoid the completion of an EIS or the recommendation to complete an EIS?

A We were reminded—“we”—I was reminded by both Mr. Schmauder and Mr. Peck in our gang-of-eight meetings that a FONSI was expected; it was important that we keep things moving. And it was sort of unspoken that a recommendation for an EIS would adversely affect the schedule because that would take a couple of years.<sup>431</sup>

By late April 2015, Smith submitted the draft EA recommending an EIS, despite not receiving supporting documentation from the EPA. He testified:

Q To your knowledge, did the Corps have any deadlines to produce or deliver the EA?

A I personally had a deadline to get it done before the end of April so that the final rule could be promulgated in I believe May was the

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<sup>426</sup> Memorandum from John W. Peabody, Maj. Gen. U.S. Army, to EPA Asst. Sec. for Civil Works (Apr. 27, 2015).

<sup>427</sup> *Id.*

<sup>428</sup> Moyer Tr. at 115-116 (Dec. 17, 2015).

<sup>429</sup> *Id.* at 131-132. (emphasis added)

<sup>430</sup> Smith Tr. at 76 (Jan. 21, 2016).

<sup>431</sup> Smith Tr. at 18 (Feb. 19, 2016).

goal, which I met by turning my draft in on the 27<sup>th</sup> [of April] to obtain guidance on how to proceed.

Q And who set that timeline or that goal?

A The Administrator of EPA is what I was told by Craig Schmauder and Greg Peck from EPA.<sup>432</sup>

When Smith submitted his EA, he advised that further work on it required preparation of an EIS instead of a FONSI, and sought instruction on how to proceed. He testified:

So I took my draft [EA] and I turned it in as a courtesy and said I can only take it so far because I'm still waiting for some key EPA documents, but based on what the rule says, in my opinion, there will be an adverse effect on the quality of the human environment. We've met the threshold for an EIS. What would you like me to do?<sup>433</sup>

Following his recommendation of an EIS, Smith was promptly removed from all work on WOTUS and his work on the EA was disregarded.<sup>434</sup> He testified:

I was prepared to finish the environmental assessment, but I was told that, since my answer was not what the Administrator of EPA wanted, I would not be allowed to finish it.<sup>435</sup>

Smith testified about being removed from the WOTUS team. He stated:

Q We previously spoke about your change in duties during the course of the rulemaking, specifically that Ms. Darcy removed you from working on the rule and clean water issues. You mentioned that part of her reasoning for your removal was your recommendation of an EIS instead of a FONSI. How did Ms. Darcy communicate this specific justification to you?

A She told me in a face-to-face meeting in July—the date escapes me. Maybe it was early August. It might be in my earlier testimony. It was the second face-to-face I had—that she was disappointed in my recommendation and she had lost confidence in my ability to support her position on the rule and that the rest of my portfolio would remain the same but I would not work on the rule or its implementation.

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<sup>432</sup> *Id.* at 13.

<sup>433</sup> Smith Tr. at 74 (Jan. 21, 2016).

<sup>434</sup> Schmauder Tr. at 171 (Feb. 17, 2016).

<sup>435</sup> Smith Tr. at 7-8 (Feb. 19, 2016).

Q You also said that part of her reasoning was because you raised issues of science and economics in the run-up to promulgation of the final rule. What gave you that impression?

A The four times we were given the opportunity to brief the Assistant Secretary, we would bring up issues and we would not receive guidance or follow-on support to have the issues addressed. And we would hear primarily, though, from Mr. Schmauder, who would say that he and EPA had discussed the issues and made the decisions and we need not worry further about our science or economic concerns.<sup>436</sup>

Testimony shows that Smith's removal from the NEPA process after recommending an EIS arose from the fact that it was predetermined that a FONSI was needed—in spite of the science, facts, and law to the contrary—to expedite the rulemaking and not interfere with Administrator McCarthy's hard deadline. The fact that the decision to issue a FONSI was predetermined is reflected in Craig Schmauder's testimony to the Committee. Schmauder stated:

Q Do you know why Mr. Smith was not asked to draft the second EA? If it was a matter of timing of Mr. Smith not finishing his analysis by a certain date, why wasn't he given more time?

A It was not my understanding that he said he needed more time. It was my understanding that he said that he no longer could support an EA to support this rulemaking.

Q So, by "this rulemaking," you mean he was no longer able to support making an EA FONSI. Is that correct?

A Completing an EA that would lead to a FONSI, probably yes.

Q Was that decision to have an EA FONSI drafted predetermined based on the rule?

A The proposed rule went out and said that the proposed rule said that we believed that the rule changes would be supported by an EA FONSI in the proposed rule.<sup>437</sup>

Smith testified that Schmauder expected that the result of Smith's work would be a FONSI, despite Smith's insistence that the process was not pre-determined. Smith stated:

Q You mentioned when you were last here that Mr. Schmauder referred to the EA as the EA FONSI. Is that correct?

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<sup>436</sup> *Id.* at 19-21.

<sup>437</sup> Schmauder Tr. at 146-147 (Feb. 17, 2016).

A Correct.

Q Did he ever respond as to why he was using that terminology?

A I would correct him at every chance I got in meetings, and he would simply say, "It's my expectation this will result in a FONSI."<sup>438</sup>

The decision to fix the outcome of the NEPA analysis not only constituted an effort by EPA and top Army Civil Works officials to ignore the science and facts, but also violated NEPA. Smith stated:

Rather than get wrapped up on the controversial statement by Mr. Schmauder, under the law, the National Environmental Policy Act, you do not pre-decide the outcome of a FONSI or an EIS. You do your environmental assessment, and, based on your assessment, you can make the choice. So it would not be correct, in accordance with the law and regulations, to predetermine an outcome to an environmental assessment.<sup>439</sup>

But that is what the agencies did. In fact, in an amendment to his transcribed interview testimony,<sup>440</sup> Laity recalls that Administrator Shelanski discussed making sure that last-minute changes to the rule would comport with a FONSI in a high-level call with White House officials:

Q Did you become aware at any point in the rulemaking that the Army had changed its determination from an environmental assessment finding that there may be a significant impact to a finding of no significant impact?

A No, I wasn't aware of that. I was aware -- I mentioned to you the discussion that we had late in the rulemaking process about the 4,000-foot bright line and the Army's concern that that might cut out waters that they felt had traditionally considered jurisdictional. And I believe I remember as part of that discussion that the question came up of, if that were left the way it was, that that might cause the Army to have a concern about its finding of no significant impact. And I don't know if the decision to change that was made above my level and I don't know what factors went into that or what the Army's view was after that. But I do know that that was changed in the way that the Army was requesting so that waters beyond the 4,000-foot level -- 4,000-foot limit -- if they were in a 100-year floodplain, which can be very big, it can be way more than 4,000 feet for large rivers, that those could potentially be included subject to a case-by-case determination.

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<sup>438</sup> Smith Tr. at 9-10 (Feb. 19, 2016).

<sup>439</sup> *Id.* at 9.

<sup>440</sup> Letter from Tamara Fucile, Office of Management and Budget, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform (Apr. 28, 2016) transmitting "Addendum to March 8, 2016 Transcribed Interview of Jim Laity" (Apr. 27, 2016).

So I was not aware that there was any further concern after that decision was made.

Q So when you say that was made above your level, do you mean within OIRA and OMB or do you mean within the agencies?

A I don't know exactly where that decision was made, but I know that it was discussed within the agencies and within the EOP.

Q And how did you find out that that was being discussed within the EOP?

A I was invited to sit in on a phone call among some senior officials in which it was discussed. And at that time, I don't recall where the decision was made. I was not -- I was an observer on the phone call. My boss, Howard Shelanski, was speaking for OIRA. But I was there, kind of like as his adviser. And shortly after that phone call the decision was made to make that change, but I don't know who made it or exactly the dynamics of how that happened.

Q Do you recall who else was on that call?

A Christy Goldfuss, I believe was on the call, she's the head of CEQ. And I believe Brian Deese was on the call. He's a senior adviser in the chief of staff's office, I think. I'm not actually sure what his title is. I cannot remember -- I have feeling that there were two or three other people at senior levels on the call, but I can't remember who they.

Q Was anybody from the agencies present on that call?

A No.

Q Do you recall whether you discussed anything besides the finding of no significant impact and adjacency limits?

A Just to be clear, we did not discuss the finding of no significant impact. That didn't come up at all on the call. What came up was the issue of whether the requirement in the rule would be changed so that waters outside of the 4,000-foot limit could still be considered jurisdictional if they were within the 100-year floodplain.<sup>441</sup>

Laity later changed his answer, stating “. . . the call was about whether to modify the draft limit to allow a case-specific jurisdictional determination for waters beyond 4,000 feet that were still within the 100-year floodplain of a navigable water. I now recall, however, that **one of the points in favor of making this modification was that the Corps believed it would be more consistent with their FONSI. The final rule did include this modification, consistent with the Corps' FONSI.**” This shows that OIRA and the White House worked to shape

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<sup>441</sup> Laity Tr. at 110-112 (Mar. 8, 2016).

changes to the rule to fit a pre-determined FONSI instead of requiring the agencies to pursue additional analysis and a proper NEPA analysis based on the last-minute changes.

#### B. THE FINAL EA WAS PRODUCED BY STAFF WITH NO WOTUS EXPERIENCE

After Smith was removed from the NEPA process, responsibility for drafting the EA was assigned to Gib Owen, a Corps planner with no prior experience working on WOTUS.<sup>442</sup> Regarding Owen's WOTUS experience, Smith testified:

Q We understand that Gib Owen, a gentleman who had no prior experience with the [WOTUS] rulemaking, was then brought on to complete the second EA. Is that correct?

A Correct.<sup>443</sup>

According to Schmauder, Owen did not rely on the previous work from Smith, but instead, "essentially started from scratch."<sup>444</sup> In accordance with the EPA's expectations, and those of Assistant Secretary Darcy and Craig Schmauder, Owen's EA recommended a FONSI, which Darcy thereafter adopted.<sup>445</sup>

Testimony shows Owen assuming responsibility for drafting the EA raised several problems. First, neither Smith nor Moyer ever worked with Owen on any prior EA,<sup>446</sup> and neither one of them were familiar with his background, experience, or expertise with NEPA analysis.<sup>447</sup> Smith testified he would not have recommended Owen as "qualified" to complete a NEPA analysis. He stated:

Q Would you have included Mr. Owen on your list of recommendations to Mr. Lee of qualified regulators to complete the NEPA analysis?

A No. He's a planner with no regulatory experience, to my knowledge.<sup>448</sup>

In fact, soon after assuming responsibility for the EA, Owen began asking questions of such an elementary nature that it indicated a lack of requisite knowledge and background to undertake the complicated regulatory endeavor of drafting an EA.<sup>449</sup> Moyer found the rudimentary nature of Owen's questions "interesting." She testified:

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<sup>442</sup> *Id.* at 15-16.

<sup>443</sup> *Id.* at 11.

<sup>444</sup> Schmauder Tr. at 171 (Feb. 17, 2016).

<sup>445</sup> Moyer Tr. at 131 (Dec. 17, 2015).

<sup>446</sup> Smith Tr. at 11 (Feb. 19, 2016).

<sup>447</sup> Moyer Tr. at 118 (Dec. 17, 2015).

<sup>448</sup> Smith Tr. at 15-16 (Feb. 19, 2016).

<sup>449</sup> Moyer Tr. at 117-118 (Dec. 17, 2015).



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

Q Can you keep your voice up?

A Sure. And some information on the numbers of jurisdictional determinations of each type that we do. And some basic regulatory program information.

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.<sup>450</sup>

Moreover, although Owen had no prior experience with WOTUS before this assignment, he completed his EA in only one or two weeks.<sup>451</sup> This was unheard of, according to Smith.<sup>452</sup> Smith told the Committee that an EA usually takes as few as three to four months, or as long as several years.<sup>453</sup> According to Smith, for a rulemaking as complex, time-consuming, and significant as WOTUS, an EA taking over a year would be reasonable.<sup>454</sup>

The agencies sent the final WOTUS rule to OIRA to initiate final review before completing the NEPA analysis.<sup>455</sup> Specifically, the final rule was submitted to OIRA on April 6,

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<sup>450</sup> *Id.*

<sup>451</sup> Smith Tr. at 12 (Feb. 19, 2016).

<sup>452</sup> *Id.* at 12.

<sup>453</sup> *Id.* at 12-13.

<sup>454</sup> *Id.* at 13.

<sup>455</sup> *Id.* at 11-12.

2015, weeks before Owen assumed responsibility for drafting the EA that was originally due to be completed by April 27, 2015.<sup>456</sup> Smith testified:

Q We understand that you were supposed to deliver or submit your EA around April 27, 2015, and that Mr. Owen was brought on after that date. Is that your understanding?

A That's correct.

Q The rule was submitted to OMB for interagency review on April 6, 2015. Can you explain why it was submitted to OMB before the EA was completed?

A I can't explain it.

Q Is that typical procedure in a rulemaking?

A No.

In fact, as late as May 13, 2015, Schmauder was sending OIRA officials "the current draft" EA with EPA input.<sup>457</sup> According to Smith's testimony, submitting the EA well after the final rule was not only atypical rulemaking procedure, but also emphasized the insufficient manner in which the rule was finalized and rushed out.<sup>458</sup>

### The Economic Analysis of the WOTUS Rule Was Flawed

Documents show that EPA worked to ensure the WOTUS rule was not found to be economically significant. Under Executive Order 13563, President Obama reaffirmed Executive Order 12866, and continued requiring federal agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)."<sup>459</sup> Under Executive Order 12866, a "cost-benefit analysis" or "Economic Analysis," as federal agencies may call it, is triggered by a significant regulatory action which may "have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs,

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<sup>456</sup> *Id.* at 11-12.

<sup>457</sup> Email from Craig Schmauder, Army, to Vlad Dorjets, OIRA, and Greg Peck, EPA, (May 13, 2015, 07:03 p.m.) (OMB-026752).

<sup>458</sup> Smith Tr. at 11-12 (Feb. 19, 2016).

<sup>459</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011). As noted in the order this supplements and reaffirms Exec. Order No. 12,866, "Regulatory Planning and Review," which was referenced by several individuals throughout the Committee's investigation. Please note this concept originated under the Reagan Administration in 1981 for further information please see Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 Geo. Mason L. Rev. 575 (2015), available at [http://masonlec.org/site/rte\\_uploads/files/Manne/Readings/Administraton%20Unbound/Cecot%20%26%20Viscusi\\_Second%20Round.pdf](http://masonlec.org/site/rte_uploads/files/Manne/Readings/Administraton%20Unbound/Cecot%20%26%20Viscusi_Second%20Round.pdf).

the environmental, public health or safety, or State, local, or tribal governments or communities.”<sup>460</sup>

#### A. THE EPA PUSHED BACK AGAINST THE APPROPRIATE SIGNIFICANCE DETERMINATION

As development of the WOTUS proposed rule was underway, there was considerable email traffic and internal communications regarding the significance designation and how the WOTUS rule should be characterized for purposes of analysis. Jim Laity explained to the Greg Peck that the rule was economically significant based on the EPA’s own Economic Analysis. He explained further that because the guidance was listed as “economically significant,” “it may raise eyebrows if the rule is not similarly characterized.”<sup>461</sup>

**From:** Laity, Jim [REDACTED]  
**Sent:** Tuesday, September 17, 2013 3:35 PM  
**To:** Peck, Gregory  
**Subject:** Please call asa [REDACTED]

We would like the CWP rule submitted as “economically significant.” I understand that we will have further discussions in the context of review on how to characterize the costs, and I don’t mean to prejudge that discussion. But the guidance (about to be withdrawn) is listed as “economically significant” and I’m afraid it may raise eyebrows if the rule is not similarly characterized. You do include an EA that shows costs well in excess of \$100 million.

Administrator McCarthy and the EPA had serious reservations about this designation. Laity explained to OIRA Administration Shelanski right before the proposed rule’s issuance why the designation was unavoidable, citing “[t]hese [costs] are well within the kinds of costs that are appropriate to analyze and be transparent under the EOs.”<sup>462</sup>

**From:** Laity, Jim  
**Sent:** Thursday, November 07, 2013 10:04 AM  
**To:** Shelanski, Howard  
**Cc:** Mancini, Dominic J.; Higgins, Cortney; Greenawalt, Andrei  
**Subject:** WOTUS

I understand Gina is concerned about calling it economically significant. Let me know if you need more info.

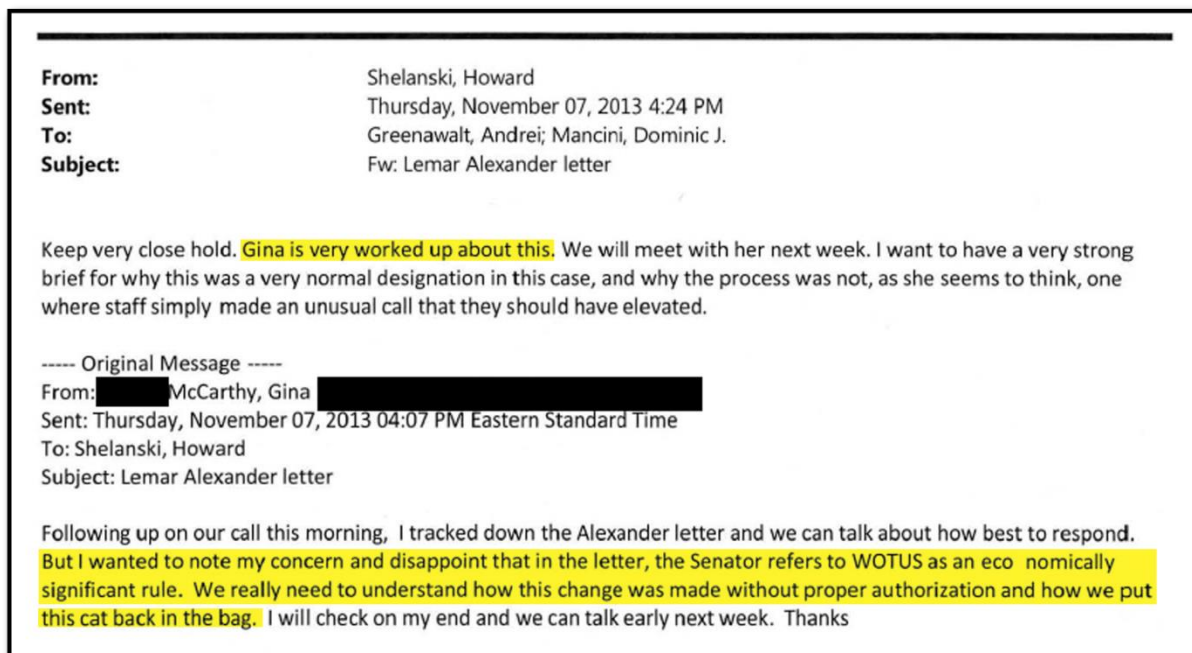
Short answer is accompanying economic analysis shows costs of \$134 to \$231 million and benefits of \$301 to \$398 million. EPA argues that these are “indirect” costs. This is not an important distinction to us. There is a wide variation in exactly how rules work together to impose costs. Many do not impose costs “directly” in the sense that they are implemented through other rules, but we generally look at the practical effects of the rule in question. The costs and benefits here are the extra administrative and control costs (and corresponding benefits) associated with CWA permitting of entities that would not need a permit but for this rule. These are well within the kinds of costs that are appropriate to analyze and be transparent about under the EOs.

<sup>460</sup> Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).

<sup>461</sup> Email from Jim Laity, OIRA, to Gregory Peck, EPA, (Sept. 17, 2013, 03:35 p.m.) (OMB-006816).

<sup>462</sup> Email from Jim Laity, OIRA, to Howard Shelanski, OIRA (Nov. 7, 2013, 10:04 a.m.) (OMB-041462-3).

Documents show Administrator McCarthy was concerned about classifying the rule as economically significant and she pressed OIRA on what she believed was an improper classification for the rule. On November 7, 2013, Administrator Shelanski wanted to put together a “brief” to convince McCarthy that the economically significant designation was proper.<sup>463</sup> He also wrote: “Gina is very worked up about this.”<sup>464</sup>



Documents show OIRA assumed early that the EPA’s failure to list the rule as economically significant was an error given the high cost of the rule.<sup>465</sup>

<sup>463</sup> Email from Gina McCarthy, EPA, to Howard Shelanski, OIRA (Nov. 7, 2013, 04:07 p.m.) (OMB-041464); *see also* Email from Howard Shelanski, OIRA, to Andrei Greenawalt, OIRA, and Dominic Mancini, OIRA (Nov. 7, 2013, 04:24 p.m.) (OMB-041464).

<sup>464</sup> *Id.*

<sup>465</sup> Email from Jim Laity, OIRA, to Howard Shelanski, OIRA (Nov. 7, 2013, 07:05 p.m.) (OMB-041465).

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**From:** Laity, Jim  
**Sent:** Thursday, November 07, 2013 7:05 PM  
**To:** Shelanski, Howard  
**Cc:** Greenawalt, Andrei; Mancini, Dominic J.; Higgins, Cortney  
**Subject:** Significance Determination for Waters of the US Rule  
**Attachments:** Waters of the United States NPRM Significance Determination.docx

Howard, The attached memo provides additional background and considerations. I feel very strongly that this rule is economically significant and must be classified as such for the sake of transparency. Also, there was nothing improper in OIRA changing the designation in ROCIS at the time the rule was submitted, after first consulting with senior EPA Office of Water career staff who agreed to the change. Frankly, we thought the non-economically significant designation was simply a mistake and EPA staff did not suggest otherwise.

Feel free to call if you need further info. Jim

The Committee obtained an internal memorandum to OIRA Administrator Shelanski stating that the debate between “indirect” and “direct” costs was irrelevant for purposes of the significance determination, given the rule’s high cost.<sup>466</sup>

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<sup>466</sup> Memo attached to Email from Jim Laity, OIRA, to Howard Shelanski, OIRA (Nov. 7, 2013, 07:05 p.m.) (OMB-041467).

#### Considerations for Significance Determination

- This rule is economically significant because it is accompanied by an economic analysis (prepared by the agencies) that shows both costs and benefits exceeding \$100 million per year. EPA's argument that these are "indirect" effects is irrelevant to the significance determination under EOs 12866 and 13563.
- Many types of rules that are deemed economically significant are not self-implementing and have effects that might also be characterized as "indirect." NAAQs, effluent guidelines, and water quality standards are common examples.
- EPA is concerned that they may be vulnerable to a procedural challenge over their unwillingness to conduct a formal SBREFA panel for this rule. SBA Advocacy believes that they should. This remains an unresolved issue during interagency review. It turns on whether the economic impacts are "direct" or "indirect." Courts have found some types of impacts (eg, market effects on upstream suppliers and downstream customers) to be "indirect" and not subject to RFA analysis. It is unclear how a court would classify the effects of this rule, but it is important to EPA to call them "indirect."
- However, the SISNOSE determination under the RFA and the "economically significant" determination under EO 12866 are not connected. The terms "direct" and "indirect" are not used in the EO. The SISNOSE determination does not depend on a \$100 million threshold. Typically, EPA estimates the number of small entities with costs exceeding 1% and 3% of revenues and then determines whether these numbers are "substantial." There is no bright line threshold for this SISNOSE determination.
- Under the EO, significance determinations are ultimately the responsibility of OIRA, not the rule-writing agency. It would be very awkward for OIRA to defend publicly a determination that this rule is not "economically significant" given the history and accompanying economic analysis. This would not be consistent with OIRA practice and would raise serious precedential issues.

Documents show the debate over indirect versus direct costs became an important sticking point in the creation of the rule. The agencies argued throughout the WOTUS rulemaking that they were not beholden to certain requirements, including those in the Small Business Regulatory Enforcement Fairness Act (SBREFA), because the WOTUS rulemaking was merely a definitional rule requiring legal interpretation, and not a traditional rulemaking. Therefore, the agencies argued, the rule would not impose additional direct cost. CEQ explained how the Department of Justice previously made the argument with respect to the Greenhouse Gas rulemaking. An email from Manisha Patel at CEQ to Jim Laity on November 4, 2013 stated:

I wanted to share with you that I heard the SBA might be raising again the question of whether the WOTUS rulemaking would require a Small Business Advocacy Review Panel under the Regulatory Flexibility Act. In the interest of a smooth and efficient interagency review, I'd like to provide some institutional memory on the subject for our newer CEQ folks.

I remember that this same question was raised with respect to the WOTUS rulemaking awhile back. Those that were here at that time might recall that CEQ hosted a meeting among EPA, SBA, DOJ and OMB on this topic because DOJ was preparing to file a brief in the GHG litigation asserting



the US Government’s position that rulemakings that established definitions or scope (such as the tailoring rule or the WOTUS rule) did not have significant economic impact on a substantial number of small entities (SISNOSE) because such rules do not impose any direct regulatory requirements. I believe the brief articulating that legal position was filed, though the DC Circuit didn’t take up the issue.<sup>467</sup>

This interpretation gives agencies a method for disposing of policies, as outlined in SBREFA, created to protect especially vulnerable stakeholders—small businesses—from overly burdensome and overreaching regulation, and which promote thoughtful and effective implementation of the law.

Documents show that once the EPA conceded that the rule was, in fact, major, it still fought to construe all costs of the rule as “indirect,” even within two weeks of the rule’s release, despite the so-called “battle” the agencies had already undergone on the issue. Dorjets wrote: “Greg [Peck] is now proposing to say the rule is major but that all costs are indirect. I don’t see us reopening that battle of whether costs are direct or not so this seem acceptable. Do you agree?”<sup>468</sup>

#### B. THE EPA USED INCONSISTENT BASELINES, MISUSED THE TERM “INDIRECT COSTS,” AND UTILIZED AN INAPPROPRIATE BENEFITS TRANSFER TECHNIQUE

Documents show the Corps had concerns the Economic Analysis relied on outdated data and had not been revised based on new changes in 2014.<sup>469</sup>

123-124	Discuss-critical4	EPA’s Economic Analysis is characterized as addressing the costs and benefits of the proposed rule. This analysis was done in 2010 based mostly on 2009-2010 data, and for a version of the draft Guidance that ultimately was tabled. The analysis has not be revised to specifically evaluate the benefits and cost of the proposed rule, which is very different from the proposed Guidance . Is this a significant, potential weakness that opponents can use to derail this effort?
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<sup>467</sup> Email from Manisha Patel, CEQ, to Jim Laity, OIRA, *et al.*, (Nov. 4, 2013, 1:33 p.m.) (OMB-051157) (unredacted version on file with U.S. Dept. of Justice).

<sup>468</sup> Email from Vlad Dorjets, OIRA, to Jim Laity, OIRA (May 15, 2015, 12:00 p.m.) (OMB-027030).

<sup>469</sup> Memo attached to Email from Charles Smith, Army Corps, to Jim Laity, OIRA (Jan. 23, 2015, 12:49 p.m.) (OMB-046648).

As the rule progressed through the notice and comment period, in January 2015, the Corps again raised concerns with the Economic Analysis.<sup>470</sup>

- EPA still must produce a new/revised Economic Analysis for the proposed rule **(preliminary indications based on analysis using the proposed rule language are that the expansion of jurisdiction may double overall, and increase from 17% to 70% for isolated/other waters, increasing costs to the local/Tribal/State governments, applicants, and the Nation)**

In developing an Economic Analysis, OMB Circular A-4 denotes the importance of identifying a baseline: “benefits and costs are defined in comparison with a clearly stated alternative.”<sup>471</sup> This normally will be a ‘no action’ baseline: what the world would be like if the proposed rule is not adopted.”<sup>472</sup>

The Small Business Administration (SBA’s) Office of Advocacy noted in its comment letter on the regulation that it appeared an incorrect baseline was used for the Economic Analysis.<sup>473</sup>

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<sup>470</sup> Memo with Army Corps comments attached to Email from Craig Schmauder, Army Corps, to Gregory Peck, EPA, and Jim Laity, OIRA (Feb. 21, 2014, 04:28 P.M. EST) (OMB-045176).

<sup>471</sup> [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf); *see also* OIRA, Office of MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, REGULATORY IMPACT ANALYSIS: FREQUENTLY ASKED QUESTIONS (FAQS) (2011), *available at* [https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4\\_FAQ.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf).

<sup>472</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR A-4 2 (2003), *available at* [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

<sup>473</sup> WINSLOW SARGEANT, CHIEF COUNSEL, OFFICE OF ADVOCACY, SBA, COMMENT LETTER ON THE PROPOSED DEFINITION OF “WATERS OF THE UNITED STATES” UNDER THE CLEAN WATER ACT 5 (Oct. 1, 2014), *available at* <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

The “existing regulations” that the agencies refer to in this reasoning is the 1986 rule defining the scope of waters of the United States. Compared to the 1986 definition, the proposed changes represent a narrowing of coverage. However, in the economic analysis accompanying the rule, the agencies assess the regulation vis-à-vis current practice and determine that the rule increases the CWA’s jurisdiction by approximately 3 percent.<sup>24</sup> The agencies’ certification and economic analysis contradict each other.

Advocacy believes that the proper baseline from which to assess the rule’s impact is current practice. Guidance from the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA’s Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.<sup>25</sup> It states that “The baseline should be the best assessment of the way the world would look absent the proposed action.”<sup>26</sup> The 1986 regulation has been abrogated by several Supreme Court cases and is no longer in use.<sup>27</sup> The Corps and EPA also issued a guidance document in 2008 which sought to bring jurisdictional determinations in line with these Supreme Court cases.<sup>28</sup> The 1986 regulation does not represent the current method for determining jurisdiction and has not served that purpose for more than thirteen years. Using an obsolete baseline improperly diminishes the effects of this rule. Advocacy agrees with the agencies’ economic analysis that uses current practice as the appropriate baseline for evaluating the rule.

Further, prior to issuance of the final rule, OIRA’s Vlad Dorjets acknowledged the “dubious” nature of the EPA’s indirect cost language and incorrect baseline.<sup>474</sup>

**From:** Dorjets, Vlad  
**Sent:** Wednesday, April 29, 2015 8:58 AM  
**To:** Mancini, Dominic J.; Shelanski, Howard  
**Cc:** Johnson, Katie B.; Laity, Jim  
**Subject:** RE: SBA Advocacy's Position on WOTUS

The final rule had the same language as the proposed rule which I understand was the result of extensive discussion. The language says that that fewer waters will be subject to the CWA under the rule than are subject to it under current regulation and thus there will not be any adverse economic impact on small businesses. The language goes on to say that the rule is not designed to “subject” any entities of any size to specific regulatory burden - rather it is clarifying a definition - so all costs are indirect.

I find the lanugage dubious at best but realize the ship may have sailed. Specifically, per Circular A-4, the baseline should be current practices in place following the SCOTUS cases and not current regulations. Moreover, the Economic Analysis confirms that there will be an approximate 4.65% increase in positive JDs annually to the new rule when compreaed to the current field practice. I’m also inclined to think that the impact on JDs and subsequent permitting costs are, in fact, a direct r esult of the rule and should thus be accounted for but also recognize that it would be very difficult to quantify those costs and benefits.

Committee staff asked Laity about EPA’s inconsistent statements regarding change in jurisdiction under WOTUS. He testified:

Q Do you know why the EPA changed its methodology from using the existing regulation, which resulted in narrowing the jurisdiction,

<sup>474</sup> Email from Vlad Dorjets, OIRA, to Dominic Mancini, OIRA, and Howard Shelanski, OIRA (Apr. 29, 2015, 08:58 a.m.) (OMB-034284).

whereas the Economic Analysis uses current practice and results in a 3 percent increase of jurisdiction?

A It is my observation that the agency was not consistent in how they presented which baseline in different contexts, and I don't have any opinion about that or any comment about that. I am not responsible for statements that the agency makes to the public.<sup>475</sup>

Laity also testified to the Committee that in his 20 years with OIRA, he could not recall any other rulemaking where an agency had used different baselines. He stated:

Q Have you experienced other rulemakings where agencies have employed different baselines for different analyses?

A Not that I can think of right now.<sup>476</sup>

CEQ also had concerns with the baseline. CEQ's Katie Renshaw communicated those concerns to Vlad Dorjets in an email on May 8, 2015.<sup>477</sup>

**From:** Renshaw, Katie  
**Sent:** Friday, May 08, 2015 6:07 PM  
**To:** Dorjets, Vlad  
**Cc:** Tarquinio, Ellen; Jensen, Jay; Mallory, Brenda; Patel, Manisha; McConville, Drew  
**Subject:** RE: Clean Water Rule (WOTUS) Economic Analysis  
**Attachments:** Draft Final Clean Water Rule Economic Analysis CEQ v2.docx

Vlad-

Thank you for the opportunity to review EPA's economic analysis for the Clean Water Rule. CEQ's comments are in the attached and summarized below:

1. The agencies characterize the baseline dataset (the FY13 and FY 14 JDs) as field practice based on the 2008 EPA and Corps jurisdiction guidance. Stakeholders have uniformly argued that the status quo case -by-case approach has likely resulted in fewer positive JDs than could theoretically be possible under a robust application of the 2008 guidance. To the extent that the stakeholders are correct, could the agencies acknowledge that uncertainty and regional differences may have led to inconsistent application of the 2008 guidance?
2. The EA for the proposed rule was based on an analysis of negative JDs from FY09 and FY10. In response to comments that that dataset represented a period of decreased economic activity, in the final rule, the agencies instead use an analysis of JDs from FY13 and FY14. By changing this baseline the agencies make it difficult to compare the impacts of the proposed rule to the final rule. Is there anything that the agencies can do or provide that would facilitate this type of comparison? In other words, is it possible to clarify whether the increase in covered waters from the proposed rule (~3% increase in jurisdiction) to the final rule (~5% increase in jurisdiction) has resulted from the changes made to the rule or from the change in baseline?

<sup>475</sup> Laity Tr. at 86 (Mar. 8, 2016).

<sup>476</sup> *Id.* at 143.

<sup>477</sup> Email from Katie Renshaw, CEQ, to Vlad Dorjets, OIRA, (May 8, 2015, 6:07 p.m.).

Another method for conducting economic analysis is through benefit-transfer. OMB's own guidance cautions against its use. The guidance states:

[A]lthough benefit-transfer can provide a quick, low-cost approach for obtaining desired monetary values, the methods are often associated with uncertainties and potential biases of unknown magnitude. It should therefore be treated as a last-resort option and not used without explicit justification.<sup>478</sup>

According to OIRA, the EPA utilized the benefit-transfer method incorrectly and misused the term “indirect” costs, which yielded incorrect results from the analysis. Amanda Thomas, the OIRA economist charged with reviewing the Economic Analysis, emailed Vlad Dorjets on May 5, 2015: “I’m not sure I would agree with EPA’s approach to benefit transfer of benefits.”<sup>479</sup>

**From:** Thomas, Amanda  
**Sent:** Tuesday, May 05, 2015 6:59 PM  
**To:** Dorjets, Vlad  
**Cc:** Laity, Jim  
**Subject:** RE: Clean Water Rule (WOTUS) Economic Analysis  
**Attachments:** Draft Final Clean Water Rule Economic Analysis (2).docx

Vlad, please find attached my comments on the economic analysis. Most are minor comments, but I’m not sure I would agree with EPA’s approach to benefit transfer of benefits. The studies examine wetlands in specific areas of the country; the regions are: Iowa, Western Kentucky, South Carolina, South Dakota, California, Wisconsin, Nebraska, and Minnesota. Trying to extrapolate the regional/state specific results to nationally might be a stretch (since I wrote that part of the Circular A4, I should know).

Going forward, we can try:

- 1) Hear EPA out and see if we come to a conclusion that what they did is reasonable (if we have time); and
- 2) Ask EPA to move the wetlands mitigation benefits to a sensitivity case or elevate to Howard about make this section of benefits analysis a sensitivity case or remove the quantified estimates. I suspect that EPA will push back since this benefit category is the bulk of the benefits.

I think I can live with the rest of the analysis.

Thanks,  
Amanda

In a May 14, 2015 email, Thomas stated that the EPA used the term “indirect costs” inappropriately, acknowledging the term had been “contentious” in the WOTUS rulemaking.<sup>480</sup> She also states that the EPA’s extrapolation of study results is “very questionable” and does “not

<sup>478</sup> OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR A-4 24 (2003), available at [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

<sup>479</sup> Email from Amanda Thomas, OIRA, to Vlad Dorjets, and Jim Laity, OIRA (May 5, 2015, 6:59 p.m.) (OMB-034287).

<sup>480</sup> Email from Jim Laity, OIRA, to Amanda Thomas, OIRA, and Vlad Dorjets, OIRA (May 15, 2015, 6:32 p.m.) (OMB-027011).



meet the requirements” of OMB Circular A4. Laity acknowledged her concerns, but noted “[t]hese are good issues but unlikely we will make progress on either of them.”<sup>481</sup>

**From:** Laity, Jim  
**Sent:** Thursday, May 14, 2015 6:32 PM  
**To:** Thomas, Amanda; Dorjets, Vlad  
**Subject:** RE: Revised Rule/Preamble and Economic Analysis

Amanda, These are good issues but I think it unlikely we will make progress on either of them. I can give you more background later, but we essentially accepted both at proposal and they will likely argue that it is reopening old battles if we raise now.

**From:** Thomas, Amanda  
**Sent:** Thursday, May 14, 2015 6:16 PM  
**To:** Dorjets, Vlad  
**Cc:** Laity, Jim  
**Subject:** RE: Revised Rule/Preamble and Economic Analysis

Vlad, I have two main concerns:

- 1) The RIA uses the term “indirect cost” inappropriately. In the parlance of RIAs, indirect costs mean costs that are borne by those who are not regulated. The affected entities identified in the RIA are regulated entities. The correct terminology should be “costs that flow from changes in scope of the regulation,” not “indirect” costs. I understand that this is a contentious issue and I’m happy to be flexible about how to describe the costs, but I recommend that we don’t be technically incorrect.
- 2) I recommend that the benefits estimated using the benefit transfer technique be “illustrative” rather than main estimates to be included in the executive summary. The extrapolation of the study results is very questionable, thereby not meet the requirements specified in the A4 regarding the use of benefit transfer technique. So I would recommend that (a) the benefit transfer benefits be deleted from the executive summary tables and be only discussed as illustrative; (b) the Section 9 discussion of the benefit transfer estimates have prominent “illustrative” caveats sprinkled throughout.

I will be in the office until Monday and I’m out of the office until the move date. So, please let me know what the next steps are. Thanks!

Amanda

When questioned about inconsistencies in the use of jurisdictional determinations, Jennifer Moyer testified that she could not explain why the jurisdictional determinations used in the rule were not those utilized in the Economic Analysis:

Q Can you explain what the case specific jurisdictional determinations, what were they?

A 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

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<sup>481</sup> *Id.*



associated with the JDs that were looked at associated with the Economic Analysis.

Q Okay. So what was looked at for the Economic Analysis specifically are not the same as what you would see in the preamble.

A Right.

Q Okay. Okay.

Q Do you know why the EPA used a different set of JDs in the preamble?

A No.<sup>482</sup>

#### C. THE ECONOMIC ANALYSIS WAS NOT PROVIDED ALONG WITH THE FINAL RULE FOR REVIEW

Documents show the EPA did not provide OIRA the Economic Analysis along with the final rule for review because it had not yet finalized the analysis. Because of the rushed timeline, however, OIRA sent the final rule out for interagency review without the supporting documentation. EPA's Gregory Peck acknowledged the problem in an email to Vlad Dorjets on April 7, 2015. Peck stated: "[U]nsurprisingly, [the agencies] are already starting to ask about when the Economic Analysis (RIA?) will be made available . . . ."<sup>483</sup>

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<sup>482</sup> Moyer Tr. at 40-41 (Dec. 17, 2015).

<sup>483</sup> Email from Gregory Peck, EPA, to Vlad Dorjets, OIRA (Apr. 7, 2015, 03:25 p.m.) (OMB-039142); *see also* Email from Vlad Dorjets, OIRA, to Gregory Peck, EPA (Apr. 7, 2015, 02:05 p.m.) (OMB-039142).

**From:** Peck, Gregory <[REDACTED]>  
**Sent:** Tuesday, April 07, 2015 3:25 PM  
**To:** Dorjets, Vlad  
**Cc:** Schmauder, Craig R SES (US); Srinivasan, Gautam  
**Subject:** Re: WOTUS Distribution

Vlad - we are working quickly to complete an economic analysis (not an impact analysis since the cost threshold is not triggered) and a Response to Comments Document. We should have the economic analysis to you shortly but perhaps not before the 20th? I'll keep you apprised of that work. We were anticipating working with Army to provide OMB with the response to comments but did not anticipate that document would be reviewed by other agencies - is that your expectation?

Several agencies have asked us to meet in order to respond to rule questions - should we defer to OMB to schedule those meetings? DOT, DOJ, and USDA staff would like to meet before the comment period closes. We're glad to take the lead to schedule these discussions if that helps you?

Thanks!

Greg

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**From:** Dorjets, Vla <[REDACTED]>  
**Sent:** Tuesday, April 7, 2015 2:05 PM  
**To:** Peck, Gregory  
**Subject:** FW: WOTUS Distribution

Greg - I just distributed the rule to the agencies and people set out below. Unsurprisingly, they are already starting to ask about when the economic analysis (RIA?) will be made available and whether EPA will be submitting a response to public comment document. Can you please let me know what I should tell them? Thanks.

Documents show it was not until April 27, 2015—only one month before the rule was released—that EPA provided OIRA with its final Economic Analysis for the rule.<sup>484</sup>

**From:** Owens, Nicole <Owens.Nicole@epa.gov>  
**Sent:** Monday, April 27, 2015 6:00 PM  
**To:** Laity, Jim; Dorjets, Vlad  
**Cc:** Nickerson, William; Muellerleile, Caryn; Eisenberg, Mindy  
**Subject:** Clean Water Rule Economic Analysis  
**Attachments:** Draft Final Rule Econ Analysis 27APRIL2015.docx

Hello -

Attached is EPA's formal submission of economic analysis for the Clean Water Rule (RIN 2040 -AF30). I am having trouble with ROICS. Caryn or I will touch base tomorrow to make sure this gets uploaded in ROCIS. In the meantime, again, our submission is attached.

Let me know if you have any questions,  
Nicole

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<sup>484</sup> Email from Nicole Owens, EPA, to Vlad Dorjets, and Jim Laity, OIRA (Apr. 27, 2015, 06:00 p.m.) (OMB-039144).

## The EPA Failed to Comply with the Regulatory Flexibility Act

**FINDING:** Disagreement over the EPA’s interpretation of the costs of the rule and its impact on small businesses continued throughout the rulemaking. OIRA and the EPA intentionally avoided compliance with the Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA). The agencies construed the rulemaking as “definitional” to avoid its obligations under the RFA, altogether.

Under the Regulatory Flexibility Act (RFA), when an agency undertakes a rulemaking the agency must conduct analysis to determine whether the rule will have a significant impact on small entities.<sup>485</sup> The RFA provides agencies discretion to certify “that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>486</sup> The agency is required to provide a justification for its certification to the Chief Counsel of the Small Business Administration (SBA) Office of Advocacy (Advocacy).<sup>487</sup>

While all agencies have this RFA requirement, the EPA has more stringent standards and must conduct additional small entity analysis and convene a small business advocacy review (SBAR) panel<sup>488</sup> under SBREFA unless it makes such certification.<sup>489</sup> . The Chief Counsel for Advocacy may waive the SBAR panel requirement based on the agency’s consideration of the concerns collected from small entities.<sup>490</sup>

Documents and testimony show that in this case, the EPA not only ignored comprehensive evidence suggesting the WOTUS rule would, in fact, have a significant impact on small businesses, but deliberately engaged in an accommodation with OIRA to avoid its obligation to conduct a regulatory flexibility analysis and on-the-record hearings about the rule’s impact on small entities.

The EPA’s justification for certifying that the rule would not have a significant economic impact on a substantial number of small entities was stated in response to questions from the Senate Committee on Environment and Public Works. The justification was based on the notion that the “action will not affect small entities to a greater degree than the existing regulations.”<sup>491</sup>

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<sup>485</sup> 5 U.S.C. §§ 601-12.

<sup>486</sup> 5 U.S.C. § 605(b).

<sup>487</sup> *Id.*

<sup>488</sup> 5 U.S.C. § 609(b).

<sup>489</sup> Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, §§ 201- 224, 110 Stat. 857 (as amended by Pub. L. No. 110-28, § 8302, 121 Stat. 205) (1996).

<sup>490</sup> 5 U.S.C. § 609(e).

<sup>491</sup> *Oversight of the Army Corps of Engineers’ Participation in the Development of the New Regulatory Definition of “Waters of the United States” Before the Subcomm. on Fisheries, Water, and Wildlife of the S. Comm. on Environment and Public Works, 114th Cong. 129-130 (2015) (Responses by Jo-Ellen Darcy, U.S. Assistant Secretary to the Army, to additional questions by Senator Rounds).*

**B. How could you certify that the rule “will not have significant economic impacts on a substantial number of small entities?”**

Response:

As stated in the preamble, under the Regulatory Flexibility Act, the impact on a substantial number of small entities that is of concern is any significant adverse economic impact on

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small entities, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives “which minimize any significant economic impact of the proposed rule on small entities.” 5 U.S.C. § 603. The scope of jurisdiction in this rule is narrower than that under the previous regulations. See 40 CFR § 122.2 (defining “waters of the United States”). Because fewer waters will be subject to the CWA under the Rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action will not have a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

**C. Why did you fail to do a regulatory impact analysis of the rule?**

Response:

See Response to previous question.

When EPA made its certification, Cass Sunstein served as Administrator of OIRA. According to testimony during transcribed interviews with OIRA officials, Administrator Sunstein accepted the initial EPA certification despite internal concerns that it might be inappropriate. Laity testified:

- Q So considering the Office of Advocacy in this case did say that the agency improperly certified the rule, that in and of itself did not rise to the level of you questioning the EPA certification?
- A I personally—and again I’m not speaking for OIRA—I personally did have some questions about the agency certification.
- Q And when you say you’re making that statements on your personal behalf, why are you not making it in your capacity as an OIRA staffer engaged in review of that rule at the time?
- A I guess I’m being particularly careful here because I don’t speak for OIRA, the political leadership of OIRA speaks for OIRA. And the political leadership of OIRA was comfortable with and accepted—after internal discussions accepted the agency’s determination that

it was appropriate to certify. It was largely a legal determination that turned on this discussion of what is a direct and indirect effect and what is the appropriate baseline. And ultimately I'm not a lawyer and I'm not an RFA specialist, so that decision was made appropriately within OIRA at the appropriate level.

Q Do you recall who engaged in those discussions?

A I believe that the—I don't remember the details of the discussions, but it was Cass Sunstein who made the decision that OIRA was comfortable with the agencies certifying the rule.<sup>492</sup>

Laity testified that he had concerns about the EPA's certification. He stated:

I did have questions about how the agency had chosen to make the certification determination, but I discussed those questions internally with the agency and then internally in OIRA. As I just explained to you, the process, as I see it, my policy level decisionmaker, Cass Sunstein, made a decision, and I had no reason to question that decision. He's a lawyer.<sup>493</sup>

Advocacy's Chief Counsel, Winslow Sargeant, opposed the certification.<sup>494</sup> In a comment letter on the proposed rule, he argued that (1) the agencies used an incorrect baseline for determining their obligations under the RFA; (2) the rule imposes direct costs on small businesses; and (3) the agencies improperly certified the rule because it will have a significant economic impact on small businesses.<sup>495</sup>

Documents show the Advocacy staff expressly informed OIRA of their concerns regarding the WOTUS rule prior to its issuance.<sup>496</sup> As early as March 2012, OIRA officials were aware of Advocacy's concerns. Noting in an internal memo that the SBAR panel process "would require a significant resource commitment" and "could extend the rulemaking schedule by several months," OIRA staff wrote:

*Regulatory Flexibility Act Compliance:* The preamble states that the proposed rule will not have a significant impact on a substantial number of small entities (SISNOE) because it does not "directly" regulate any small

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<sup>492</sup> Laity Tr. at 120-121 (Mar. 8, 2016).

<sup>493</sup> Laity Tr. at 138 (Mar. 8, 2016).

<sup>494</sup> WINSLOW SARGEANT, CHIEF COUNSEL, OFFICE OF ADVOCACY, SBA, COMMENT LETTER ON THE PROPOSED DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT 4 (Oct. 1, 2014), *available at* <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

<sup>495</sup> WINSLOW SARGEANT, CHIEF COUNSEL, OFFICE OF ADVOCACY, SBA, COMMENT LETTER ON THE PROPOSED DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT 4 (Oct. 1, 2014), *available at* <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

<sup>496</sup> Environment and Natural Resources Division, OIRA, Comments on the Feb. 17, 2012, Draft Guidance on Identifying Waters Protected by the Clean Water Act (Mar. 14, 2012) (OMB-051121) (unredacted version on file with U.S. Dept. of Justice). *See also* Email from Kia Dennis, SBA, to Jim Laity, OIRA (Sept. 23, 2013, 02:57 p.m.) (OMB-041198). *See also* Email from Winslow Sargent, SBA to Chris Lu, (Mar. 2, 2012, 01:06 p.m.) (OMB-041294).

entity (or anybody else). Rather it simple (*sic*) clarifies the extent of Clean Water Act jurisdiction. SBA does not agree. They believe the rule expands jurisdiction relative to the status quo (as reflected in the Economic Analysis accompanying the rule) and that small entities discharging into newly jurisdictional waters will experience a “direct” regulatory impact that at least requires substantive analysis under the RFA to determine if it is significant. The determination of “direct” v. “indirect” effects is a longstanding point of contention between SBA and EPA, and OIRA staff has generally supported SBA in reading the RFA more broadly. However, the current case is particularly challenging because it is difficult to identify any specific water body that would fail a case-by-case jurisdictional determination under the existing status quo, but would be made jurisdictional by the rule. As noted above, one of the main advantages (and purposes) of the rule is that it clears up substantial ambiguity regarding jurisdiction, but this very fact makes it hard to determine if the rule has a SISNOSE or not. OIRA staff recommends that counsel from EPA, the Corps, SBA, and the EOP discuss the issue and try to reach consensus on whether or not the rule requires substantive analysis under the RFA. If it does, the agencies will need to analyze the impacts of the rule on small entities, and if they cannot determine that there is no SISNOSE, will need to conduct a Panel process pursuant to the Small Business Regulatory Enforcement and Fairness Act. This could be done concurrently with the public comment period and the agencies consideration of public comments, but it would require a significant resource commitment that is not currently planned, and could extend the rulemaking schedule by several months.<sup>497</sup>

Documents also show Advocacy staff continued to communicate their concerns directly to OIRA through the rulemaking process.<sup>498</sup>

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<sup>497</sup> OIRA, Waters of the US Outstanding Policy Issues at 5 (Jan. 9, 2014) (OMB-045601).

<sup>498</sup> Email from Kia Dennis, SBA, to Jim Laity, OIRA (Sept. 23, 2013, 02:57 p.m.) (OMB-041198).



From: Dennis, Ki [REDACTED]  
Sent: Wednesday, September 25, 2013 2:57 PM  
To: Laity, Jim  
Subject: RE: Interagency Review of Joint EPA/Corps Proposed Rule on Clean Water Act Jurisdiction

Jim,

I will send you Advocacy's line item comments next week, however, we disagree with the certification of this rule. This rule will increase the number of waters that are subject to CWA and increase costs to small businesses. Per SBREFA EPA is required to conduct a panel before promulgating this rule.

Moreover, even if we were to agree that the rule could be certified, EPA/Army Corp has not met the statutory requirements for a certification. They must provide a factual basis for the certification that includes discussion of the small entities that would be affected, the basis for the determination that there is no significant economic impact or that an insubstantial number of small business would be affected and any other information that has led to the conclusion that certification is appropriate. The agencies have not done so.

In fact, Advocacy staff continued objecting to the EPA's certification throughout promulgation of the final rule. Prior to the final issuance of the rule in 2015, Advocacy staff once again notified OIRA and stated the EPA had failed to respond to their comments individually and was required to do so. According to an email from OIRA's Vlad Dorjets, the EPA did not do so because the agency's position was "the RFA only requires agencies to respond to SBA's comments individually in a Final Regulatory Flexibility Analysis (FRFA)" and that provision would not apply "because the Agency is certifying no SISNOSE and not preparing a FRFA."<sup>499</sup>

From: Dorjets, Vla [REDACTED]  
Sent: Wednesday, May 13, 2015 7:36 PM  
To: Dennis, Kia  
Subject: RE: Clean Water Rule / WOTUS Economic Analysis

Kia,

You should have received passback to comment. I asked EPA and the Corps about responding to your comments individually and they feel that the RFA only requires agencies to respond to SBA's comments individually in a Final Regulatory Flexibility Analysis (FRFA), per 5 U.S.C. § 604(a)(3). Because the Agency is certifying no SISNOSE and not preparing a FRFA, that provision wouldn't apply. Hopefully, the consolidated responses meet your needs.

<sup>499</sup> Email from Vlad Dorjets, OIRA, to Kia Dennis, SBA, (May 15, 2015 07:36 a.m.) (OMB-006175).

Documents showed that Advocacy staff disagreed, and took the position that the EPA was in fact required to respond to their comments.<sup>500</sup>

From: Dennis, Kia [REDACTED]  
Sent: Friday, May 15, 2015 8:15 AM  
To: Dorjets, Vlad  
Subject: RE: Clean Water Rule / WOTUS Economic Analysis

Vlad,

I understand that the statute can be interpreted the way EPA has interpreted it. However, the language in EO 13272 directs agencies to respond to our comments regardless of whether they have certified or done an IRFA unless the agency can say it isn't in the public's best interest to do so. I've pasted it below. This isn't a heavy lift and for no other reason EPA should include a response to ward off this claim of failure to comply with the RFA in the event of litigation.

(c) Give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Consistent with applicable law and appropriate protection of executive deliberations and legal privileges, an agency shall include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule that preceded the final rule; provided, however, that inclusion is not required if the head of the agency certifies that the public interest is not served thereby.

Dorjets was unsure how to handle Advocacy's objection, especially at this late stage in the process—less than two weeks prior to the rule's release. In an email forwarding Advocacy's concerns to the EPA and the Corps, Dorjets wrote: "Passing along SBA's response. Not sure I want to get in the middle of this but let me know if you think that's best."<sup>501</sup>

Documents and testimony show that a major point of disagreement regarding the EPA's certification centered around direct versus indirect costs. Direct costs are the actual costs of complying with a regulatory requirement whereas indirect costs are "ripple effects in the economy as a whole that ultimately result from the regulation."<sup>502</sup> In justifying WOTUS, the EPA relied heavily on the notion that the rule's effects were indirect, though the rule's summary of economic impacts itself concedes that the rule may result in direct costs from other programs as a result of implementation.<sup>503</sup> It states:

Entities currently are, and will continue to be, regulated under these programs that protect 'WOTUS' from pollution and destruction. Each of

<sup>500</sup> Email from Kia Dennis, SBA, to Vlad Dorjets, OIRA, (May 15, 2015 08:15 a.m.) (OMB-006175).

<sup>501</sup> *Id.*

<sup>502</sup> REFORMING REGULATORY IMPACT ANALYSIS 36 (Winston Harrington, Lisa Heinzerberg, and Richard D. Morgenstern eds., 2009).

<sup>503</sup> Economic Analysis of the EPA-Army Clean Water Rule, U.S. EPA and U.S. Department of the Army, May 20, 2015, available at [https://www.epa.gov/sites/production/files/2015-06/documents/508-final\\_clean\\_water\\_rule\\_economic\\_analysis\\_5-20-15.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf).

these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations.<sup>504</sup>

Documents show OIRA engaged in internal and high-level talks regarding the EPA's certification. One email from Dominic Mancini to Administrator Shelanski and Jim Laity stated a concern about the EPA's interpretation of "indirect effects."<sup>505</sup>

**From:** Mancini, Dominic J.  
**Sent:** Thursday, November 07, 2013 10:25 AM  
**To:** Laity, Jim; Shelanski, Howard  
**Cc:** Higgins, Cortney; Greenawalt, Andrei  
**Subject:** RE: WOTUS

Thanks Jim, a couple of additional thoughts:

-Even the jurisdictional guidance was designated as economically significant when we were reviewing it, under the theory that if followed, it would lead to a larger number of facilities having to get a permit. That is the whole point.

-There is a history behind calling these effects indirect, and I would have concerns with that interpretation. Once they finalize this rule, there is no other regulation that EPA would need to pass before there would be permitting conditions imposed. "The permits, not this rule, would impose the burden" to me is a pretty weak argument, especially since it is the same agency issuing the permits in at least some cases. I'm also pretty sure the case law on this issue, in this case interpreting the RFA since indirect costs are so important there, is not clear. This issue doesn't have to be resolved fully here but just wanted to clarify the other moving parts in this discussion.

Howard I know you are busy the next couple of days, but if you think it useful I would be happy to discuss with EPA.

Thanks,  
Dom

In an email to CEQ, Jim Laity explained the EPA's difference of opinion regarding whether the rule directly impacted small entities. According to Laity, "it is clear that a new federal water quality standard imposes 'direct' effects on small entities because any discharger, including small dischargers, must have permit conditions as necessary to ensure that the standard is not violated."<sup>506</sup> Laity's email to Manisha Patel at CEQ on November 4, 2013 stated:

If EPA's argument were only that there is no SISNOSE this would be a factual question that could be resolved through analysis and I don't think it would be problematic. The issue is that EPA believes that in determining SISNOSE, it is only required to consider "direct" effects. On its face, this argument is supported by several court precedents, but the issue is what constitutes an "indirect" effect. I believe that courts have clearly established upstream and downstream economic effects on non-regulated entities (eg, higher prices for inputs) are "indirect" effects and not subject to RFA analysis. The more difficult case is when a rule does not mention "small

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<sup>504</sup> *Id.*

<sup>505</sup> Email from Dominic Mancini, OIRA, to Jim Laity and Howard Shelanski, OIRA (Nov. 7, 2013, 10:25 a.m.) (OMB-041462).

<sup>506</sup> Email from Jim Laity, OIRA, to Manisha Patel, CEQ (Nov. 4, 2013, 5:48 p.m.) (OMB-051156) (unredacted version on file with U.S. Dept. of Justice).

entities” as regulated parties (that is regulates somebody else on its face) but through, a larger interconnected set of regulations has the effect of imposing regulatory requirements directly on small entities. For example, in my mind it is clear that a new federal water quality standard imposes “direct” effects on small entities because any discharger, including small dischargers, must have permit conditions as necessary to ensure that the standard is not violated. **By changing a WO standard, the effect is that some permits for small entities will likely have to be changed. EPA has never agreed with this perspective, however.**<sup>507</sup>

The agencies were aware of Advocacy’s concerns during the rulemaking process. In October of 2014, Greg Peck of EPA stated in an email “It’s a significant legal and policy concern that SBA continues to conclude in writing that another federal agency has certified its proposed rulemaking in error.”<sup>508</sup>

Documents show that despite OIRA’s own internal recommendations and Advocacy’s objections, no consensus ever occurred. Advocacy’s position was ignored and OIRA did not challenge the EPA in order to allow the rule to move forward. Instead of evaluating the EPA’s compliance with the RFA and SBREFA, OIRA undertook an informal evaluation of the “value” of an SBAR panel.<sup>509</sup>

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**From:** Laity, Jim  
**Sent:** Wednesday, April 29, 2015 11:02 AM  
**To:** Dorjets, Vlad; Mancini, Dominic J.; Shelanski, Howard  
**Cc:** Johnson, Katie B.  
**Subject:** RE: SBA Advocacy's Position on WOTUS

While I have some concerns about certifying this rule, and not doing a SBREFA panel, OIRA agreed not to challenge EPA on this at the proposed stage. Our main reason for going along is that it is hard to see what value added a SBREFA panel would have. It is very difficult to determine what small entities will be affected, and whether any such effects would be “significant.” The rule is based on legal and scientific interpretation, not cost -benefit analysis. EPA did do a “SBREFA-like” outreach to small entities and the comments received were not very useful.

As Vlad notes, the preamble language in the proposal describing their basis for certification was carefully negotiated; it seems reasonable that they stick to the same language here. SBA will make their own decisions about what to do after the rule is published.

Documents show OIRA struck a deal with the EPA to conduct “informal outreach” to the small business community in lieu of conducting additional analysis under SBREFA. OIRA recognized the problem with the EPA’s certification and offered that conducting an informal, off-the-record, and non-judicially-reviewable outreach meeting would suffice for SBREFA

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<sup>507</sup> *Id.* (emphasis added)

<sup>508</sup> Email from Gregory Peck, EPA, to Jim Laity, OIRA (Oct. 1, 2014, 3:12 p.m.) (OMB-051264) (unredacted version on file with U.S. Dept. of Justice).

<sup>509</sup> Email from Jim Laity, OIRA, to Vlad Dorjets, OIRA, *et al.* (Apr. 29, 2015, 11:02 a.m.) (OMB-034284).

purposes so long as the results of the meeting were made public. As OIRA noted in an internal document, “voluntary outreach” from an EPA perspective had substantial benefits because an SBAR panel required by SBREFA would be judicially reviewable under the RFA,<sup>510</sup> whereas these “outreach” panels would not allow an aggrieved or adversely affected small entity to challenge the EPA’s compliance with these requirements.<sup>511</sup>

Regulatory Flexibility Act Compliance: The preamble states that the proposed rule will not have a significant impact on a substantial number of small entities (SISNOE) because it does not “directly” regulate any small entity (or anybody else). Rather it simply clarifies the extent of Clean Water Act jurisdiction. SBA does not agree. They believe the rule expands jurisdiction relative to the status quo and that small entities discharging into newly jurisdictional waters will experience a “direct” regulatory impact that at least requires substantive analysis under the RFA to determine if it is significant.

OIRA staff notes that EPA has already convened a “SBREFA-like” outreach meeting to small entity representatives to solicit input on ways to minimize adverse impacts to small entities as well as on the other rule-related questions identified in the Regulatory Flexibility Act. We recommend that EPA provide a draft report of this outreach effort, including recommendations to the Administrator, to OIRA and SBA for comment as part of the interagency review process. The goal would be to produce a consensus version of the report to be included in the administrative record for the proposed rule. The proposed rule would also make clear that this is a “voluntary” outreach effort on the part of EPA which is not judicially reviewable under SBREFA, and would be accompanied by a formal certification of no SISNOE.

Laity testified about that internal OIRA document, titled “Interagency Working Comments on Draft Language under EO12866 and 13563 Interagency Review Subject to Further Policy Review.” He stated:

Q In the same paragraph you recommend that, quote: “The proposed rule would also make clear that this is a voluntary outreach effort on the part of EPA which is not judicially reviewable under SBREFA,” unquote. Can you explain why you made this specific recommendation?

A The recommendation was—I know it’s a little hard to parse this sentence—but the recommendation was that the proposed rule would make clear that this is a voluntary outreach effort on the part of EPA. It was essentially a descriptive statement to say that a voluntary effort is not judicially reviewable under SBREFA. So I wasn’t suggesting or wasn’t intending to suggest that that should be emphasized in the preamble. That’s really up to EPA what they wanted to say about that. I was telling my boss Dom that I wanted

<sup>510</sup> Interagency Working Comments on Draft Language under EO12866 and 13563 Interagency Review Subject to Further Policy Review 2, Attachment, Email from Jim Laity, OIRA, to Dominic Mancini, OIRA (Dec. 11, 2013, 3:39 p.m.).

<sup>511</sup> 5 U.S.C. § 611(a).



to make sure that EPA was clear that this was not a regular SBREFA report, that it was a voluntary report.<sup>512</sup>

To increase the formality of the outreach meeting, OIRA had the EPA draft a document entitled “Final Summary of the Discretionary Small Entity Outreach for EPA’s Planned Proposal Revised Definition of Waters of the United States.” Between November 26, 2013, and December 2, 2013, Laity and Greg Peck of the EPA exchanged a series of emails regarding the Small Business Outreach Report, including one referencing their agreement.<sup>513</sup>

From: Laity, Jim [REDACTED]  
Sent: Wednesday, November 27, 2013 12:49:30 AM  
To: Peck, Gregory  
Subject: WOTUS.

Meant to get back to you sooner. Howard will call Gina soon to discuss process and timing for resolving the five policy level issues that I mentioned earlier today. Have a good Thanksgiving. Jim

Ps. If u can get me a draft small entity outreach report soon, I will try to make that work per our earlier agreement. I will offer SBA the opportunity to make comments (we might have some too) and try to convince them this is a good way forward.

An internal OIRA memorandum discussing outstanding issues prior to the release of the proposed WOTUS rule stated that Advocacy was not a party to this agreement, but instead “might be persuaded that it is an acceptable substitute for a full SBREFA process.”<sup>514</sup>

We were reminded by EPA that there was an agreement at the time we were reviewing the draft guidance to not convene a SBREFA panel, but rather to convene a “voluntary, SBREFA -like” process including outreach to small entities and a report to the Administrator. SBA was not a party to that agreement, but might be persuaded that it is an acceptable substitute for a full SBREFA process. EPA did convene an outreach meeting to small entities in 2011, which OIRA and SBA also attended, and has now provided a draft report which we are currently reviewing.

Testimony shows the use of an informal outreach meeting appears to be unique to WOTUS. OIRA staff could not recall other instances where outreach panels were conducted. For example, Laity testified:

Q Are you aware or have you ever worked out similar arrangements for other rules that informal or, as you put it, voluntary outreach be conducted when an agency certifies a rule?

<sup>512</sup> Laity Tr. at 127-128 (Mar. 8, 2016).

<sup>513</sup> Email from Jim Laity, OIRA, to Gregory Peck, EPA, (Nov. 27, 2013, 12:49 a.m.) (OMB-009704).

<sup>514</sup> Waters of the US Outstanding Policy Issues, Internal Memo, OIRA on Waters of the US Outstanding Policy Issues (Jan. 9, 2014) (OMB-045605).



A No.

Q Then why did you do it in this case, because the policy recommendation from your superiors or for my other reason?

A This is a very high visibility rule that a lot of stakeholders had a lot of interest in, and we knew that there was going to be a lot of scrutiny of it. And so even though the agency had made a legal determination which my boss, who was a lawyer, agreed with that these were indirect effects and that it was proper for the agency to certify the rule, I think everybody involved, including EPA and OIRA, agreed that it would be appropriate to provide voluntarily as rigorous an outreach and sort of formal outreach opportunity to small entities as we could and adopt a SBREFA-like process.<sup>515</sup>

SBREFA requires the Chief Counsel for Advocacy to “identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule.”<sup>516</sup> The EPA’s certification of the rule and use of an informal outreach meeting rather than pursuing a formal SBREFA process meant that it had discretion in the invitation process and it is unclear to what level it truly engaged with Advocacy, which repeatedly raised objections. Laity testified:

Q Who decided which small business industry representatives to invite to the EPA’s outreach meeting? Do you recall?

A Under SBREFA, what happens is the EPA and the Small Business Office of Advocacy consult. Usually EPA prepares an initial list first, and then the Office of Advocacy often suggests initial names for that list. It’s usually very collegial, and EPA usually accepts whatever names Advocacy wants to add to the list.

My understanding, because we were trying to make this as much like SBREFA as possible, is that a process something like that happened where they collaborated on inviting the small—identifying and inviting small entity representatives. OIRA typically does not get involved in that process, so I don’t know the details of it.

Q When you say “they,” you meant the Office of Advocacy was involved in creating that invite list?

A I believe so, but I don’t know that for a fact.

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<sup>515</sup> Laity Tr. at 129-130 (Mar. 8, 2016).

<sup>516</sup> 5 U.S.C. § 609(b)(2).

Q Okay. Going back to your November 27 email, which I believe was exhibit 6, you stated that “I will offer SBA the opportunity to make comments, paren, (we might have some too) and try to convince them that this is a good way forward,” quote. Can you explain this comment?

A As I’ve said, we were trying to make the process as much like SBREFA as possible, and so having them participate in the drafting of the report through making comments was consistent with that. I was also aware that they were raising concerns that it would have been better not to certify the rule and to have an actual SBREFA process, and so I wasn’t sure if they would agree.

You know, the first part had happened like over a year earlier when we had the outreach, and they did participate. I believe they helped craft the list of invitees. They certainly showed up for the outreach meeting, so they had been cooperating up to that point. But they had informed us that they didn’t agree during the review of the proposed rule. Now, I don’t know if they ever formally agreed to this at an earlier stage or not. All I know is that Cass formally agreed to it.

I don’t know what the Small Business Administration’s earlier position was, but at the time of the proposed rule review, they were raising concerns about it, so I wasn’t sure if they were going to follow through or not. But I was telling Greg that I would do my best, consistent with OIRA’s position here and agreement, to have them participate in this process.

Q And did you end up having that conversation with somebody at the Office of Advocacy?

A Yes.

Q With whom?

A Kia Dennis.

Q And how did she respond?

A She thanked me for the opportunity to provide comments; she said she would have to consult internally; and then she got back to me at some point later and said that advocacy would not provide comments on the report.<sup>517</sup>

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<sup>517</sup> Laity Tr. at 140-142 (Mar. 8, 2016).

Stakeholder associations that participated in the session expressed that the rule would, in fact, have a significant economic impact on a substantial number of small entities and that the rule would impose direct costs.<sup>518</sup> Those present felt “strongly that the EPA should complete a regulatory flexibility analysis, and complete a formal Small Business Advocacy Review Panel.”<sup>519</sup> Notwithstanding these assertions, Advocacy’s concerns, and internal concerns at OIRA, the Administration proceeded with the rule without conducting on-the-record, small business outreach, as required by SBREFA.

## The WOTUS Rule is a Product of a Flawed Comment Review

While the APA provides substantial statutory requirements for rulemaking, there is no specific requirement that agencies must respond to every comment that is received. Rather, courts have held that agencies must respond to comments that are material to issues raised in the rulemaking<sup>520</sup> and “those comments that raise significant problems.”<sup>521</sup> In instances where the comments inform the agency so that changes occur, these changes in the final rule must be a “logical outgrowth of the rulemaking proceeding.”<sup>522</sup>

### A. PUBLIC COMMENTS MAY HAVE BEEN MISCHARACTERIZED

Following the proposed rule stage of WOTUS, both the EPA and the Corps were responsible for evaluating and addressing public comments. Testimony shows that public comments may have been mischaracterized in their review. Specifically, the agencies placed public comments into buckets by category and used those general categories (rather than the comments themselves) to draw conclusions about potential changes to the rule. Moyer testified:

Q 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

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<sup>518</sup> EPA, SUMMARY OF THE DISCRETIONARY SMALL ENTITY OUTREACH FOR PLANNED PROPOSED REVISED DEFINITION OF “WATERS OF THE UNITED STATES” 13, *available at* [https://www.epa.gov/sites/production/files/2014-06/documents/small\\_entity\\_report.pdf](https://www.epa.gov/sites/production/files/2014-06/documents/small_entity_report.pdf).

<sup>519</sup> *Id.* at 10.

<sup>520</sup> *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

<sup>521</sup> *North Carolina v. Federal Aviation Administration*, 957 F.2d 1125, 1135 (4th Cir. 1992) citing *Action on Smoking and Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C.Cir.1983).

<sup>522</sup> *United Steelworkers of America, Etc., v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

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?<sup>523</sup>

Moyer also testified that as the Corps went through the comment process, they identified that pieces of the rule missed the mark and the public felt that more guidance was necessary. Moyer stated:

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

A 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.**<sup>524</sup>

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<sup>523</sup> Moyer Tr. at 63-64 (Dec. 17, 2015). (emphasis added)

<sup>524</sup> Moyer Tr. at 64 (Dec. 17, 2015). (emphasis added)

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.<sup>525</sup>

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<sup>525</sup> Moyer Tr. at 71-72 (Dec. 17, 2015).

## B. REVIEW OF PUBLIC COMMENTS WAS RUSHED

**FINDING:** Public comments were not fully reviewed and considered before agencies drafted the final rule. The agencies contrived a unique process for considering and responding to public comments, despite arguments from Army Corps and EPA staff in favor of including such responses in the rule's preamble, as is customary.

The timeframe of the comment review process raises questions as to whether the agencies conducted a full review of unique comments before the final rule was issued. The final rule was announced on May 27, 2015, but as a January 2015 memo from the Corps to OIRA notes, the comment process was going to require a substantial amount of work, and in fact, at that time, the agencies had not yet initiated their substantive review of the comments.<sup>526</sup>

**Summary of Comments to Date (As of 1/22/15; 100% of comments have been skim-read for sorting only by the Corps, not for evaluation and response; evaluation process just initiated on January 20th)**

- 38% unique individual
- 22% agricultural interests
- 20% NGOs
- 13% environmental organizations
- 6% local and state governments
- 1% businesses
- <1% congressmen/governors/Tribes

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<sup>526</sup> Email from Charles Smith, Army Corps, to Jim Laity, OIRA, (Jan. 23, 2015, 12:49 p.m.) (OMB-045174-7).



### **Comment Summary:**

As of 22 January 2015:

- ~900,000 comment letters (docket still processing mass mail campaigns); by far, more comments have been submitted on this proposed rule than any action in the history of OASA(CW) and USACE
- ~900,000 comment letters processed into the docket
- ~20,000 unique comment letters which must all be considered and addressed in a "response to comments" document
- Of the ~20,000, predict ~2,000 substantive comment letters which generally contain multiple individual substantive comments to consider for the final rule policy decisions (~10% of the total unique comment letters are substantive)
- As an example, it took the Corps ~8 months to work through a total of 26,500 comment letters on the Nationwide Permits for 2012, consisting of only 300 unique comment letters containing ~2,000 individual substantive comments
- 75 recent letters (526 individuals) from Congress (members and committees), State officials, and key organizations reveal the following (Sec 6 from EA attached)

Documents also show the EPA chose an uncharacteristic process for conducting the review and responding to public comments. In an April 14, 2015 email, Jim Laity stated that public comments are generally discussed in a rulemaking preamble.<sup>527</sup> For WOTUS, however, EPA chose to address public comments in a "massive separate response" which was "unlikely to be finished" in time for OIRA to review.<sup>528</sup>

This decision came from the top, according to an email from Jim Laity, who wrote in an email: "EPA staff said it was Gina's personal decision to write the preamble this way, and she was fully informed that this was 'atypical' for a final rule preamble."<sup>529</sup>

According to Jennifer Moyer's testimony, despite concerns that doing so would be contrary to standard agency process, the EPA and Army decided that comments could be addressed after the final rule entered interagency review.<sup>530</sup>

### **C. OIRA DID NOT REVIEW WHETHER COMMENTS WERE ADDRESSED**

Witnesses from OIRA have differing perspectives on whether they are responsible for reviewing how an agency addresses public comments. Administrator Shelanski testified that OIRA does review public comments.<sup>531</sup> Administrator Shelanski also testified that OIRA would

<sup>527</sup> Email from Jim Laity, OIRA, to Howard Shelanski, Dom Mancini, and Katie Johnson, OIRA (Apr. 14, 2015, 6:27 p.m.).

<sup>528</sup> *Id.*

<sup>529</sup> *Id.*

<sup>530</sup> Moyer Tr. at 33 (Dec. 17, 2015).

<sup>531</sup> *Accountability and Transparency Reform at the Office of Information and Regulatory Affairs Hearing Before the Subcomm. on Gov't Operations of the H. Comm. On Oversight and Gov't Reform*, 114<sup>th</sup> Cong. (Mar. 15, 2016)

review the final WOTUS rule to ensure agencies captured public comments accurately. He stated:

Q When asked about WOTUS during the Committee's March 3rd, 2015, oversight hearing, you testified that part of what OIRA does when it reviews final rules is to look to see how the agency has reacted to and addressed important public commentary. **"So we look forward to doing so when the rule comes back to us for final review."**

A Yes.

Q Is this a fair characterization of OIRA's activities?

A Part of what we do when we review a final rule is look to see how public comment has been addressed.<sup>532</sup>

Contrary to Administrator Shelanski's testimony, other OIRA witnesses testified that responding to public comments is the responsibility of the agency<sup>533</sup> and that OIRA does not review how an agency addresses public comments. For example, Jim Laity testified:

Q We understand that part of OIRA's job is to look to see how the agency has reacted to and addressed important public commentary. Can you explain this process? In other words, how does OIRA ensure that an agency has appropriately considered and responded to public comments?

A OIRA is charged with a lot of things in review of the rule, but it is not charged with ensuring that agencies have appropriately responded to public comments. That's a responsibility under the Administrative Procedures Act. So we don't ensure that.<sup>534</sup>

Furthermore, contrary to Administrator Shelanski's testimony, Laity testified OIRA did not engage in any effort to evaluate whether the agencies conducted a full review of the public comments or address them in the final WOTUS rule. Laity stated:

Q In the case of the final WOTUS rule, did you speak with the EPA or Army with respect to how they ultimately incorporated or addressed public comments?

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(Administrator Shelanski testimony) ("Once an agency drafts the final rule for publication, OIRA again plays an important role by ensuring that the agency takes account of the public comments on the earlier proposal, that the final rule logically follows from the proposed rule and those public comments and that the agency's final rule is well-grounded in the record evidence and meets applicable economic analytical requirements. Such accountability is essential to ensuring that agencies heed public comment and issue rules that are effective and efficient.").

<sup>532</sup> Shelanski Tr. At 105 (May 13, 2016). (emphasis added)

<sup>533</sup> Laity Tr. at 31-36 (Mar. 8, 2016).

<sup>534</sup> *Id.* at 31 (Mar. 8, 2016).

A I don't recall having conversations about how they had responded to public comments.<sup>535</sup>

\* \* \*

Q Do you typically ask agencies whether they have completed their review of substantive or major comments when a rule is sent to OIRA for final review?

A No, we assume that that's the case.<sup>536</sup>

Documents and testimony show OIRA was unable to review the agencies' responses to comments because the EPA was still in the process of preparing its response to comments document when it submitted the rule to OIRA for final review. Typically, OIRA reviews the agency's final summary and the agencies' responses in the final rule. This did not occur with WOTUS since the comments were not all addressed in the preamble. Laity testified:

As I said, we don't get involved in the review of the public comments. We are—first of all, a final rule always contains a fairly substantive summary of the substantive comments and the agencies' responses and we review that. And then we frequently look at a selection. There's usually way too many comments for us to read, but we look at a selection of public comments from key stakeholders in order to understand for ourselves sort of in the commenters' own words what issues the commenters' have raised. But we really don't get involved in the agency's job of responding to public comments.<sup>537</sup>

On April 7, 2015, Dorjets emailed Peck: "unsurprisingly [agencies] are already starting to ask about when the Economic Analysis (RIA?) will be made available and whether EPA will be submitting a response to public comment document."<sup>538</sup> In comments on the final rule from April 21, 2015, CEQ stated:

[The EA], the Response to Comments document and the [TSD] were not included with the final rule when it was submitted to OMB. **The lack of these companion documents made the rule difficult to analyze and understand the full implications. Mindful that we are on a fast turn, we view this as an incomplete package.**<sup>539</sup>

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<sup>535</sup> *Id.* at 35 (Mar. 8, 2016).

<sup>536</sup> *Id.* at 36 (Mar. 8, 2016).

<sup>537</sup> *Id.* at 34 (Mar. 8, 2016).

<sup>538</sup> Email from Vlad Dorjets, OIRA, to Gregory Peck, EPA (Apr. 7, 2015, 2:05 p.m.) (OMB-039142).

<sup>539</sup> Email from Katie Renshaw, CEQ, to Vlad Dorjets, OIRA (Apr. 21, 2015, 4:30 p.m.) (OMB-024605-6). (emphasis added)

Documents also show that as of May 13, 2015, the EPA was still working on Economic Analysis, rule, preamble, NEPA analysis, and a response to comments document. In a May 13, 2015 email, Peck stated the response to comments document would accompany the final rule when published.<sup>540</sup>

#### D. THE AGENCIES RUSHED THE REVIEW OF PUBLIC COMMENTS

The public submitted approximately 1.1 million comments about the WOTUS rulemaking. According to the Corps' analysis, about 21,000 of these comments were unique.<sup>541</sup> An analysis of the comments described letters in opposition as "long, complex, meaty."<sup>542</sup>

##### Reasons for Opposition (letters are long, complex, meaty)

- 21 letters from Congress oppose the rule a/o ask that it be withdrawn
- 9 letters from Congress request rewriting, additional clarity, more time
- 10 letters from States oppose the rule a/o ask that it be withdrawn
- 10 letters from States request rewriting, additional clarity, more time

The Corps made a significant effort to complete the review in the very limited period of time, but resources and time were both limited. The agencies completed their review of unique public comments in a mere five months.<sup>543</sup> By way of comparison, it took the agencies eight months to review only 2,000 unique comments for the 2012 Nationwide Permit rule, for which the Corps brought in a roughly equivalent number of additional staff to help expedite review. Moyer testified:

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?

<sup>540</sup> Email from Gregory Peck, EPA, to Vlad Dorjets, OIRA, and Craig Schmauder, Army (May 13, 2015, 2:11pm) (OMB-005933).

<sup>541</sup> Moyer Tr. at 63 (Dec. 17, 2015). ("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.")

<sup>542</sup> Email from Chip Smith, Army, to Let Mon Lee, Army (Jan. 22, 2015, 11:06 a.m.) (OMB-045176).

<sup>543</sup> The comment period for WOTUS closed on Nov. 14, 2014. Five months later in Apr., 2015, WOTUS was submitted to OIRA for review. WOTUS was finalized two months later, in June, 2015.

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.<sup>544</sup>

Notwithstanding this effort, Craig Schmauder admitted that the Corps did not complete their review of public comments before the final rule was promulgated and was unaware of the Corps' standard procedures for review. He testified:

Q So when you were discussing your review then, versus the addressing, we'll speak to the review portion, you believe that the review that the Corps was conducting was complete before the final rule was promulgated?

A No. I don't believe their review of it was completed. I think they were still reviewing as we were finalizing up the rule.

\* \* \*

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<sup>544</sup> Moyer Tr. at 30-31 (Dec. 17, 2015).

Q Were you aware that that's not the Corps' standard process for acknowledging or addressing comments received in the public comment period?

A I was not aware of the Corps' standard procedures.<sup>545</sup>

The documents show email from December 2014 between Corps staff and OIRA that discussed some of the complexities that the Corps was dealing with in attempting to respond to the comments.<sup>546</sup>

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<sup>545</sup> Schmauder Tr. at 135-136 (Feb. 17, 2016).

<sup>546</sup> Email from Chip Smith, Army, to Jim Laity and Stuart Levenbach, OIRA (Dec. 1, 2014, 9:20 am) (OMB-034370-034371).



-----Original Message-----

From: Smith, Charles R CIV (US)

Sent: Monday, December 01, 2014 9:20 AM

To: Laity, Jim; Levenbach, Stuart

Subject: FYSA: Comment Info on WoUS Rule (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Confidentially and informally, I briefed Ms Darcy last week that as of 24 Nov 2014:

- \* ~750,000 to 1 million (EPA still processing) comments anticipated; by far, more comments have been submitted on this proposed rule than any action in the history of OASA(CW) and USACE
- \* ~700,000 comments processed into electronic docket so far
- \* ~15,000 unique comment letters thus far; we predict over 25,000 once all are processed (some letters are dozens to 100 pages long)
- \* As an example, it took the Corps ~8 months to work through a total of 25,000 comments on the Nationwide Permits for 2012 (1,200 unique)
- \* 71 recent letters (522 individuals) from Congress (members and committees) out of the 700,000 letters recorded (not read) thus far, State officials, and key organizations reveal the following:

Reasons for Opposition (letters are long, complex, legal/science/technical, meaty)

- \* 21 letters from Congress oppose the rule a/o ask that it be withdrawn
- \* 9 letters from Congress request rewriting, additional clarity, more time
- \* 8 letters from States oppose the rule a/o ask that it be withdrawn
- \* 8 letters from States request rewriting, additional clarity, more time
- 5 letters from key organizations oppose the rule a/o ask that it be withdrawn
- 14 letters from key organizations request additional clarity, more time

Sample of Reasons cited for opposition:

- \* Expansion of jurisdiction
- \* Legal questions related to constitution, CWA and SWANCC & Rapanos decisions
- \* Federalism, infringement on the roles and responsibilities of States
- \* Adverse impacts to economic development and use of private property
- \* Adverse & significant impacts on small businesses
- \* Adverse & significant impacts on agriculture
- \* Inadequate, inaccurate Economic Analysis
- \* Concerns about MS4s and jurisdiction, perceived to be tremendous scope and cost change
- \* Lack of clarity, vague new terms
- \* Lack of consultation with States, Tribes, and the Public BEFORE the rule was drafted

Reasons for Support (very short & general):

(continued next page)

- \* 3 letters from States support the rule (clean water, recreation)
- \* 1 organization (Dame Juliana League) supports the rule
- \* Desire for clean Water
- \* Hunting, fishing, & recreation

Schedule - EPA is still pressing to submit the final rule to OMB by 15 January 2015 (with holiday leave periods accounted for, ~24 working days from today). If you have questions about the schedule and its urgency I can explain in a call.

chip

#### E. THE EPA DRAFTED THE FINAL RULE BEFORE COMPLETING THE PUBLIC COMMENTS REVIEW

The APA requires that the solicitation for public comments is more than an exercise in compliance.<sup>547</sup> Agencies are expected and required to consider public comments (rather than simply collect them), read them, and provide text to explain why the agency will not deviate from its prefabricated plan.<sup>548</sup> Documents and testimony show the EPA opted instead to simply release the rule on an arbitrary, politically motivated time table.

The documents and testimony show the EPA drafted the final rule before conducting a robust analysis of the public comments.<sup>549</sup> According to Moyer, the EPA had no qualms about simply checking the box of public comment review after the final rule was submitted to OIRA for a final review. She testified:

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

<sup>547</sup> 5 U.S.C. 553(b) establishes the right to comment on agency rulemaking.

<sup>548</sup> See e.g., *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) ("We find a critical defect in the decision-making process in arriving at the standard under review ... in the subsequent seeming refusal of the agency to respond to what seem to be legitimate problems with the methodology of these tests.").

<sup>549</sup> Peck and Schmauder provided the draft final rule to the Team of Eight in Jan., 2015, while the Corps was reporting review of unique comments had not commenced as of Jan. 20, 2015. See email from Charles Smith, Army Corps, to Jim Laity, OIRA, (Jan. 23, 2015, 12:49 p.m.) (OMB-045174).

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.<sup>550</sup>

The rule went to OIRA for final review without either agency completing a response to public comments, meaning that public comments were not fully considered before the draft final rule was vetted by the Administration, and consideration of the public comments were likely not fully incorporated into the final rule.

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<sup>550</sup> Moyer Tr. at 33-34 (Dec. 17, 2015).

## Recirculation of the Final Rule

Under regulatory requirements, if a rule changes significantly enough between its proposed stage and its final stage, to the point that the final version is not a “logical outgrowth” of the original proposal, then the rule must be resubmitted as a new rulemaking.<sup>551</sup>

Chip Smith testified there had been discussions about recirculating the rule for a second round of public comment after substantive changes were made to the rule, but that recirculating was ultimately decided against. He testified:

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

A In gang of eight meetings, both myself and others, at least on the Corps side, talked about recirculating it. We thought the changes being proposed were significant and not in sync with the draft rule, and that the public really should have an opportunity to comment on those, what we believed were significant changes.

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

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

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

A No.<sup>552</sup>

Jim Laity testified that re-circulation of a rule is possible when substantive changes are made in the final stages of the process, as happened in WOTUS, but that such a recirculation did not occur in that case. Laity testified:

Q In the case that a rule is submitted for interagency review, and I’m talking about in the final rule stage, and substantive or policy changes or technical changes are made to that rule after interagency review, are agencies given a second opportunity to review the updated rule?

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<sup>551</sup> See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978) (striking down EPA regulations because they were not a “logical outgrowth” of the proposed rules); see also 5 U.S.C. § 553(b)-(d) (2000) (setting out the rulemaking process).

<sup>552</sup> Smith Tr. at 38-39 (Jan. 21, 2016).

A You mean after interagency review of the final rule?

Q Correct.

A It's very rare that there are substantive changes to a rule after interagency review of the final rule. Once we conclude a review, that is the version that is supposed to be published in the Federal Register.

What sometimes happens is the agency will find minor technical mistakes or corrections that they want to fix and they will usually inform us of that. And we would make a judgment at that point about whether or not what was being represented as a minor technical fix really was. And we would certainly maintain the prerogative to say that's more than a minor technical fix and you have to reopen the interagency review, but that typically doesn't happen.

Q Did that happen with respect to this rulemaking?

A I don't recall that it did.<sup>553</sup>

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<sup>553</sup> Laity Tr. at 39-40 (Mar. 8, 2016). (emphasis added)

## FAILURE TO COMPLY WITH STATE, LOCAL, AND TRIBAL CONSULTATION REQUIREMENTS

**FINDING:** The agencies failed to comply with various rulemaking obligations, including Executive Orders requiring consultation with states and local governments and tribes.

The preamble to the WOTUS rule recognizes that “[s]tate, tribal, and local governments have well-defined and longstanding relationships with the Federal government in implementing CWA programs . . . .”<sup>554</sup> State and local governments, leaders of Native American tribal nations, and staff within the Corps, however, articulated “pretty clear and strong comments” that they were not consulted prior to the issuance of the WOTUS Rule.<sup>555</sup>

Failure to consult with state, local, and tribal governments is not only a contradiction to the rulemaking’s own guiding principle, but also clashes with various statutes, executive orders, and, perhaps most significantly, the Nation’s founding principle of federalism.

### The Agencies Failed to Comply with Executive Order 13132 and Principles of Federalism

The CWA states that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution.”<sup>556</sup> Congress expressly retained language to ensure that the concept of federalism envisioned by the Founders was not lost as the Nation’s water pollution laws shifted towards federal control.<sup>557</sup> Furthermore, the preservation of federalism was not meant to merely be guidance, as multiple sections of the CWA require consultation with appropriate local and State agencies prior to issuing regulations.<sup>558</sup> For example, Section 501 of the CWA, which deals with administering the Act, requires, in part, that “the Administrator shall, *in consultation with the appropriate State* water pollution control agencies, establish regulations.”<sup>559</sup>

In addition to the various state consultation requirements under the CWA, Executive Order 13132 requires federal agencies to consult with state and local governments when issuing rules which have federalism implications, and sets forth certain guidelines agencies must follow in the formulation and implementation of such policies. Promulgated on August 4, 1999, EO 13132 was implemented “to ensure that the principles of federalism established by the Framers

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<sup>554</sup> Definition of “Waters of the United States” Under the Clean Water Act, 80 Fed. Reg. 37,054, 37,055 (June 29, 2015).

<sup>555</sup> Email from Vlad Dorjets, OIRA, to Tera Fong, OMB (May 12, 2015, 1:10 p.m.) (OMB-039660).

<sup>556</sup> Clean Water Act, 33 U.S.C. § 1251(b).

<sup>557</sup> Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

<sup>558</sup> 33 U.S.C. §§ 1252-54, 1361(e)(1).

<sup>559</sup> 33 U.S.C. 1361(e)(1). (emphasis added)



guide the executive departments and agencies in the formulation and implementation of policies.”<sup>560</sup>

In addition to requiring “strict adherence to constitutional principles,” this Executive Order mandates that “[n]ational action limiting the policymaking discretion of the States shall be taken only where . . . the national activity is appropriate in light of the presence of a problem of national significance.”<sup>561</sup> Further, in instances of “significant uncertaint[y]” as to whether national action is authorized, or even appropriate, the Order requires agencies to “*consult* with appropriate State and local officials to determine whether Federal objectives can be attained by other means.”<sup>562</sup>

Once an agency has determined that their policymaking has federal implications, EO 13132 requires that, before promulgating a final rule, the promulgating agency must “consult with appropriate state and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve state prerogatives and authority . . . .”<sup>563</sup> EO 13132 further proscribes the promulgation of rules with “federalism implications” or “substantial direct compliance costs on state and local governments,” unless the federal government “consulted with State and local officials *early* in the process of developing the proposed regulation.”<sup>564</sup>

**WOTUS has federalism implications under EO 13132.** The Executive Order defines “policies that have federalism implications” as “regulations . . . that have substantial direct effects on States (individually or collectively), on the relationship between the national government and the States, or on the distribution of power and responsibilities.”<sup>565</sup> Despite the Supreme Court recognizing that “the entire land area of the United States lies in some drainage basin and . . . any plot of land containing such a channel may potentially be regulated as a “water of the United States,”<sup>566</sup> the Corps and the EPA found that the WOTUS Rule “does not have federalism implications” and “will not have substantial direct effects on the states.”<sup>567</sup> The agencies’ decision that the WOTUS rule does not have federalism implications is particularly questionable given the Court’s recognition that the WOTUS Rule could “put the property rights of ordinary Americans entirely at the mercy of EPA employees.”<sup>568</sup>

The WOTUS rule greatly expands the federal government’s jurisdiction under the CWA over waterways and drinking water supplies throughout the United States. According to a complaint filed by thirteen states challenging the rule, “[t]he Final Rule’s displacement of state

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<sup>560</sup> Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999) (defining “policies that have federal implications” as “regulations, legislative comment or proposed legislation, and other policy statements or actions that have substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities”).

<sup>561</sup> Exec. Order No. 13132, 64 Fed. Reg. 43256 (Aug. 4, 1999).

<sup>562</sup> *Id.* (emphasis added)

<sup>563</sup> *Id.*

<sup>564</sup> Exec. Order No. 13132, 64 Fed. Reg. 43257-58 (Aug. 4, 1999). (emphasis added)

<sup>565</sup> Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999).

<sup>566</sup> *Rapanos v. U.S.*, 547 U.S. 715, 722 (2006).

<sup>567</sup> 80 Fed. Reg. 37,054.

<sup>568</sup> *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, S., concurring).

authority over water quality and related land and water resources imposes harm upon the States.”<sup>569</sup>

Lance Wood, the assistant chief counsel of the Environmental Law and Regulatory Programs with the Corps, stated in a April 24, 2015 memorandum that the “assertion of CWA jurisdiction over millions of acres of isolated waters could be seen as “regulatory over-reach.”<sup>570</sup>

It will be difficult, if not impossible, to persuade the federal courts that the implicit, effective determination that millions of acres of truly isolated waters (which have no shallow subsurface or confined surface connection to the tributary system of the navigable or interstate waters) do in fact have a “significant nexus” with navigable or interstate waters. Consequently, the draft final rule will appear to be inconsistent with the Supreme Court’s decisions in *Rapanos* and *SWANCC*. As a result, this assertion of CWA jurisdiction over millions of acres of isolated waters may well be seen by the federal courts as “regulatory over-reach,” which undermines the legal and scientific credibility of the rule.

Given that “[a]ny piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act,”<sup>571</sup> it is clear that the rule displaces “state authority over water quality and related land and water resources”<sup>572</sup> and, thus, has federalism implications which requires consultation with the States.

#### The Agencies Failed to Properly Consult with State and Local Governments as Required by the Clean Water Act, Executive Order 13132, and *California Wilderness*

Documents and testimony show that during the rulemaking, the agencies made minimal efforts to consult with state and local governments—despite the fact that the WOTUS rule would significantly impact states and localities across the entire United States<sup>573</sup>—and failed to request, let alone utilize, scientific data from the states and local governments most closely connected to the regulated waterways.<sup>574</sup>

In determining what constitutes “consultation” for purposes of notice and comment rulemaking, courts have held for states and local governments during judicial review of agencies’ interpretation of a statutory term, emphasizing the interpretation of consultation to mean

<sup>569</sup> Complaint, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. June 29, 2015), 2015 WL 3955508 (Filed by the States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and the New Mexico Environment Department and New Mexico State Engineer).

<sup>570</sup> Memorandum from Lance Wood, U.S. Army Corps of Engineers, to Major General John Peabody, U.S. Army Corps of Engineers (Apr. 24, 2015) at 10.

<sup>571</sup> *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012) (Alito, S., concurring).

<sup>572</sup> Complaint, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. June 29, 2015), 2015 WL 3955508, at 46.

<sup>573</sup> Smith Tr. at 17-18 (Feb. 19, 2016) (describing the rule as “the most important rulemaking...in 20 years, according to both the Corps and the Army and testimony...the Administrator and Assistant Secretary make to Congress”).

<sup>574</sup> Smith Tr. at 136 (Jan. 21, 2016) (stating “there’s no actual direct State or tribal data requested and used in the analysis”).

conferring prior to taking action, not after.”<sup>575</sup> In *California Wilderness Coalition v. U.S. Department of Energy*, the Ninth Circuit held that the Department of Energy (DOE) failed to engage in “consultation with the affected states,” as required by § 216 of the Energy Policy Act of 2015, rejecting that the agency’s use of notice and comment complied with the provision.<sup>576</sup>

As in *California Wilderness*, during the WOTUS rulemaking the EPA and the Corps merely contacted states and local governments through general outreach meetings and webinars. According to Chip Smith, such informal communications are not considered “consultations” that would “satisfy the Executive Order and other legal obligations of the rulemaking agencies.”<sup>577</sup> In fact, where the court in *California Wilderness* felt that *in person* conferences were not sufficient to meet the state consultation requirements, the agencies, in drafting the WOTUS Rule, failed to even go that far and instead relied on the aforementioned webinars and letters, without any in-person meetings. Smith testified:

Q Would you consider informal outreach meetings and webinars or other group meetings to satisfy the type of meaningful predecisional consultation that would satisfy the Executive order and other legal obligations of the rulemaking agencies?

A No. The Army course we teach specifies face to face, government to government consultation between district engineer and chairman, chief, Governor, or President. Informal communications, letters, Webinars, are not consultations; they are education tools. And all of this needs to be predecisional, not after rules are promulgated.<sup>578</sup>

Testimony shows that in addition to failing to provide proper consultation opportunities, the agencies failed to utilize the contact they had with states in order to garner actual input related to state data to use in their evaluations. Chip Smith further testified:

There’s—oh, the big one, well, another big one for me was **there’s no actual direct State or tribal data requested and used in the analysis**. It was all done through surrogate economic evaluation methods, like willingness to pay, ability to pay, and that sort of thing.<sup>579</sup>

According to Smith’s testimony, he suggested to his superior on multiple occasions that the EPA and the Corps’ consultation with state and local governments was insufficient, yet was only met with indifference. When discussing the absence of state, local, and tribal data in the rule’s Economic Analysis, Smith testified:

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<sup>575</sup> *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072 (9th Cir. 2011).

<sup>576</sup> *Id.*

<sup>577</sup> Smith Tr. at 26 (Feb. 19, 2016).

<sup>578</sup> *Id.*

<sup>579</sup> Smith Tr. at 137 (Jan. 21, 2016). (emphasis added)

Q So let's pick the time period getting closer to the finalization of the rule. Let's say between August of 2014 and forward, as you were creating those drafts, did you, the concerns that you raised in those bubble boxes, were they the subject of discussion internally between you and Mr. Schmauder or anybody else at the Army in which the concerns that you raised were the subject of the discussion?

A Yes.

Q And how often did those take place?

A I would say between August and Thanksgiving, several times a month. After that, just a couple times.

Q And who was in the discussion with you about these concerns in your draft?

A Craig Schmauder, the Army team, and, when we had our joint meetings, all the EPA people that I listed previously.

Q And Craig and the Army team, who was in the Army team?

A Craig is it, me. There's only two of us.

Q And so, essentially, it was back and forth between you and Craig about what your concerns were?

A Uh huh.

Q **And how would you characterize Craig's responses to your concerns?**

A **Unreceptive.**<sup>580</sup>

Smith also testified the Corps was largely left out of the outreach efforts. He stated:

Q Do you know whether the Army or Corps conducted outreach with all 50 States in the course of this rulemaking?

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

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

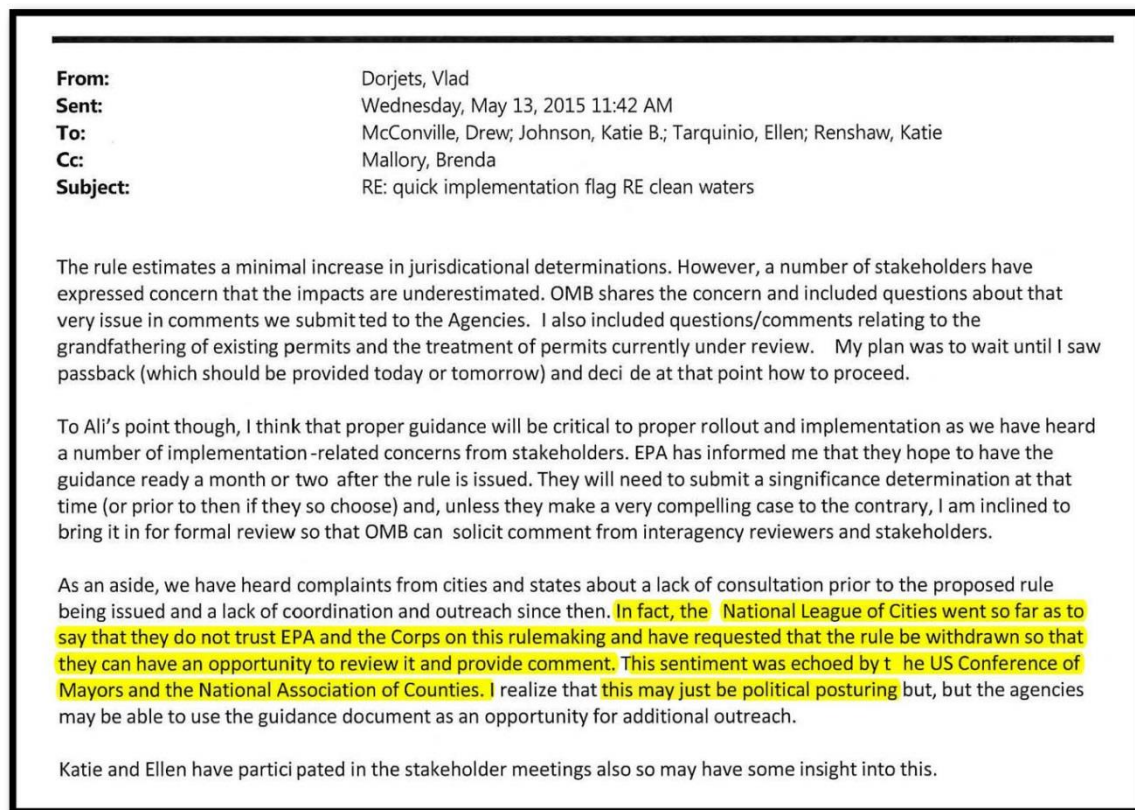
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<sup>580</sup> *Id.* at 137-38. (emphasis added)

A Post promulgation of the draft rule, outreach was conducted, but I don't recall how many States out of the 50 they reached.<sup>581</sup>

Indeed, OIRA, under its responsibility for reviewing draft regulations and rules from federal agencies, expressly acknowledged this concern. Vlad Dorjets told his supervisors in an email dated May 13, 2015, "we have heard complaints from cities and states about a lack of consultation prior to the proposed rule being issued and a lack of coordination and outreach since then."<sup>582</sup>

Dorjets also speculated that the concerns raised by cities and states "may just be political posturing."<sup>583</sup>



Despite the "clear and strong comments," as characterized by OIRA, of the National League of Cities, National Association of Counties, and United States Conference of Mayors, the EPA argued that they did not need to further consult with the states and local governments, because they received letters from a number of cities following the *Rapanos* decision. They argued to OIRA that "we've heard you and we've made changes responsive to your

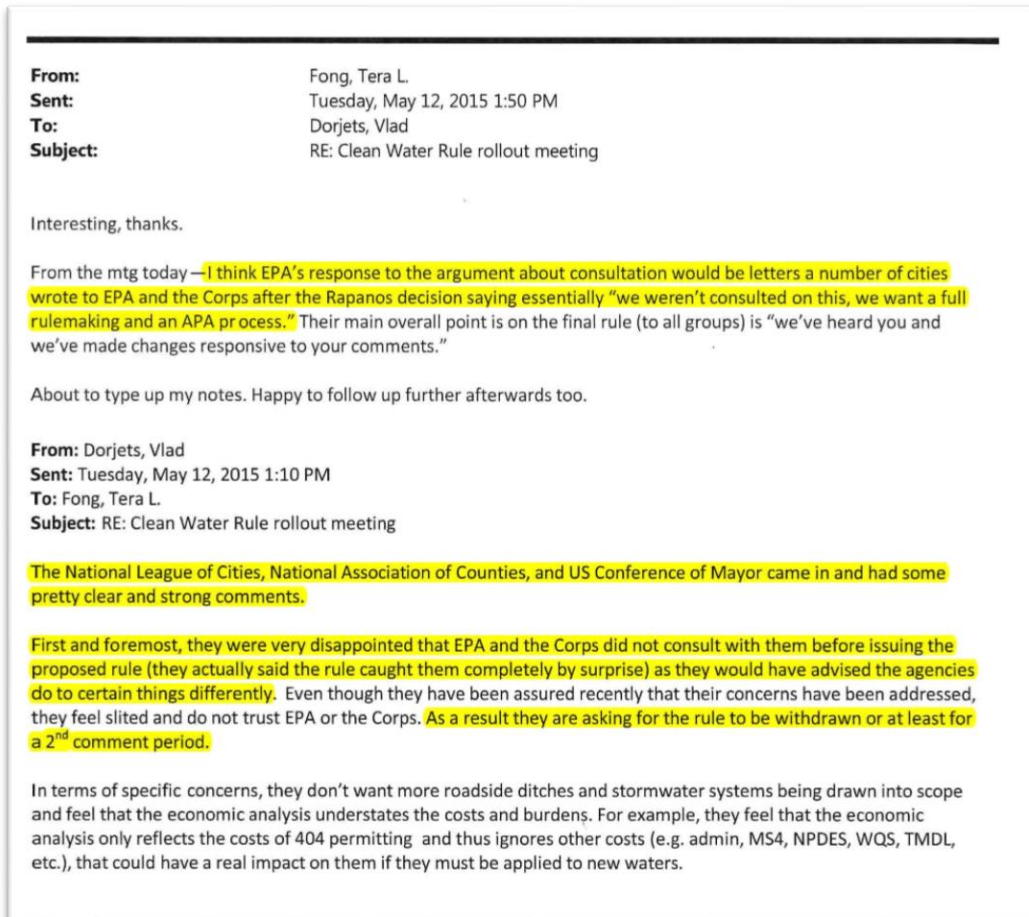
<sup>581</sup> *Id.* at 115.

<sup>582</sup> Email from Vlad Dorjets, OIRA, to Drew McConville, Council on Environmental Quality, *et al.* (May 13, 2015, 11:42 a.m.) (OMB-034317). (emphasis added)

<sup>583</sup> *Id.* (emphasis added)



comments.”<sup>584</sup> However, this goes directly against the requirements of the APA, which requires new comments to be received and considered only after proper notice is given.<sup>585</sup> Though the notice “need not identify every precise proposal which the agency may adopt,” the notice must nonetheless “apprise[ ] interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner.”<sup>586</sup> Even under this relaxed standard, the *Rapanos* decision—issued eight years prior to the issuance of the proposed rule—does not constitute sufficient notice, and, as a result, any comments received following *Rapanos* but prior to the official proposal would not constitute proper consultation.



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More than half of the States—in addition to numerous other stakeholders—felt so strongly that the agencies “declined to conduct a federalism analysis, despite numerous requests

<sup>584</sup> Email from Tera Fong, OMB, to Vlad Dorjets, OIRA (May 12, 2015, 1:50 p.m.) (OMB-039660).

<sup>585</sup> 5 U.S.C. § 553.

<sup>586</sup> *American Medical Association v. United States*, 887 F.2d 760, 767 (7th Cir. 1989).

<sup>587</sup> Email from Tera Fong, OMB, to Vlad Dorjets, OIRA (May 12, 2015, 1:50 P.M. EST) (OMB-039660) (emphasis added); email from Vlad Dorjets, OIRA, to Tera Fong, OMB (May 12, 2015, 1:10 p.m.) (OMB-039660). (emphasis added)



by states and others” that they immediately challenged the WOTUS rule in court.<sup>588</sup> The Attorney General of the State of North Dakota wrote a letter to EPA Administrator Gina McCarthy, stating: “[t]he agencies declined to conduct a federalism analysis, despite numerous requests by states and others, failing to give consideration to these issues before issuing the final rule.”<sup>589</sup>

Contrary to the history of partnership between states and the federal government and in disregard of the sovereign interests implicated and immediate harm to states caused by the rule, EPA and the ACOE assert that the final rule “*does not have federalism implications.*” 80 Fed. Reg. 37102 (emphasis added). The agencies declined to conduct a federalism analysis, despite numerous requests by states and others, failing to give consideration to these issues before issuing the final rule. The agencies were required to consult with the states during the development of the proposed and final rule pursuant to both the Clean Water Act and Executive Order, and we remain concerned that EPA and the ACOE fail to recognize the importance of cooperative federalism. The attached memorandum indicates that EPA and the ACOE continue to proceed without acknowledging the impact of the WOTUS Rule on state sovereignty.

### The EPA Failed to Sufficiently Consult with Indian Tribal Governments

The agencies also failed to perform meaningful consultation with tribal governments in the development of the rule. On November 6, 2000 then-President Clinton signed Executive Order 13175—Consultation with Indian Tribal Governments – to “ensure that all Executive departments and agencies consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities.”<sup>590</sup> The Executive Order ensures that in the course of rulemaking, agencies recognize “tribal sovereignty, self-determination, and self-government” and “respect the Native Americans’ rights to choose for themselves their own way of life on their own lands according to their time honored culture and traditions” as required by both the law and the agencies’ own policies.<sup>591</sup>

<sup>588</sup> Complaint, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. June 29, 2015), 2015 WL 3955508 (Filed by the States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and the New Mexico Environment Department and New Mexico State Engineer); Complaint for Declaratory and Injunctive Relief, *Oklahoma v. EPA*, No. 15-cv-0381 (N.D. Okla. July 8, 2015), 2015 WL 4462248; *Georgia v. McCarthy*, No. 2:15-cv-00079 (S.D. Ga. Aug. 27, 2015), 2015 WL 5092568 (Filed by the States of Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, South Carolina, Utah, West Virginia, Wisconsin, and the North Carolina Department of Environment and Natural Resources); Complaint, *Ohio v. EPA*, No. 2:15-cv-02467 (S.D. Ohio June 29, 2015), 2015 WL 9269459 (Filed by the States of Ohio, Michigan, and Tennessee); Complaint and Petition for Review, *Texas v. EPA*, No. 3:15-cv-00162 (S.D. Tex. June 29, 2015), 2015 WL 3952929 (Filed by the States of Texas, Louisiana, and Mississippi).

<sup>589</sup> Letter from Wayne Stenehjem, North Dakota Attorney General, et al to Gina McCarthy, Administrator, EPA, & Jo-Ellen Darcy, Assistant Secretary of the Army (July 28, 2015) (on file with North Dakota Attorney General’s office).

<sup>590</sup> Exec. Order No. 13175, 65 Fed. Reg. 67249.

<sup>591</sup> *Id.*

In furtherance of these principles, in “implementing policies that have tribal implications” the Executive Order requires agencies to “consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.”<sup>592</sup> E.O. 13175 further states, “no agency shall promulgate any regulation that has tribal implications” unless “the agency, prior to formal promulgation of the regulation, consulted with tribal officials early in the process of developing the proposed regulation.”<sup>593</sup>

According to the EPA’s *Final Summary of Tribal Consultation for the Clean Water Rule: Definition of “Waters of the United State” Under the Clean Water Act; Final Rule*, “the agencies consulted with tribal officials throughout the rulemaking process” and found that the WOTUS rule “does not have tribal implications as specified in E.O. 13175.”<sup>594</sup> According to the report, “EPA coordinated with Army, and Army jointly participated in aspects of the consultation process.”<sup>595</sup> Lead regulatory staff from both the Army and the Corps testified, however, that they were not aware of who drafted the report, and the Army and the Corps did not participate in such consultation under the Executive Order. Jennifer Moyer stated:

Q 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.

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<sup>592</sup> *Id.*

<sup>593</sup> *Id.*

<sup>594</sup> Environmental Protection Agency, Department of the Army, *Final Summary of Tribal Consultation for the Clean Water Rule: Definition of “Waters of the United State” Under the Clean Water Act; Final Rule 3* (May 2015), available at [https://www.epa.gov/sites/production/files/2015-05/documents/clean\\_water\\_rule\\_tribal\\_summary.pdf](https://www.epa.gov/sites/production/files/2015-05/documents/clean_water_rule_tribal_summary.pdf).

<sup>595</sup> *Id.*

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.<sup>596</sup>

With respect to the report, Moyer testified:

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

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<sup>596</sup> Moyer Tr. at 101-103 (Dec. 17, 2015). (emphasis added)

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 Yes. That would be my expectation, yes.<sup>597</sup>

Chip Smith, who serves as the head policy analyst for tribal affairs, testified that he was the only Army staffer responsible for, and equipped to, engage in consultation with tribes on this rulemaking. He further testified that such consultation did not occur. He stated:

Q So why was it different for WOTUS that you would have been the only person who would have consulted with over 500 tribes?

A Because I would be the only one—this is a national rule that applies to all 404 actions.

Q This being WOTUS?

A WOTUS, I'm sorry, yes. And I was the only tribal person educated, on the rulemaking team, understood what the rule was, and who could have communicated it to tribal leaders. And the districts were not privy to early drafts. They were embargoed. So they couldn't consult.<sup>598</sup>

\* \* \*

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

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

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<sup>597</sup> *Id.* at 103-104. (emphasis added)

<sup>598</sup> Smith Tr. at 154-155 (Jan. 21, 2016).

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

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

A I am not aware of any they conducted.

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

A Yes, ma'am.

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

A That's correct.

Q The EPA and Army tribal summary states that, quote, "In the course of this consultation, EPA coordinated with Army and Army jointly participated in aspects of the consultation process," unquote. Do you know what aspects this document is referring to?

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

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

A I do not.

Q —on this?

A I do not.

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

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

Q Let me restate just to make sure I understand.

A Okay. Yeah.

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

A Civil Works.

Q —that engages in tribal affairs?

A Yes, ma'am.

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

A I was not.

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

A No, ma'am.<sup>599</sup>

According to witness testimony, tribes expressed directly to Assistant Secretary Darcy that the rule would adversely affect tribal sovereignty and resources and that they had not been consulted on the rulemaking. Smith testified:

Q Have you spoken with or heard from any tribes about this rulemaking since promulgation?

A Yes.

Q And what has been their input?

A Ms. Darcy and I traveled to the Navajo Nation 2 weeks ago. We spent 3 days there. We attended a council meeting. We prepared talking points for her generally on the Corps of Engineers and things we do for the Navajo Nation. It was a full council meeting. So it's kind of like one of your Senate rooms with all those chairs or House you know. So there were probably 50 tribal members there. And one council member stood up and said that the WOTUS rule adversely affected tribal sovereignty, it adversely affected tribal resources, that they had not been consulted with, and that the Navajo Nation viewed it as an abrogation of their sovereignty. And he spoke for about 15 minutes.

Q In our last interview and today, you've spoken a bit about your involvement in tribal affairs and experience and expertise with conducting tribal consultations for the Army and the Corps. You also stated that you agree that the agencies did not fulfill their tribal consultation obligations for WOTUS under Executive Order 13175. Is that correct?

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<sup>599</sup> *Id.* at 19-20. (emphasis added)



A      Correct.<sup>600</sup>

Documents show the Corps brought the agencies' failure to properly consult with federally-recognized tribes to the attention of OMB and EPA. In a February 14, 2014 markup of the draft WOTUS rule, after the final rule had been drafted, the Corps stated "the agencies did not properly consult with federally-recognized tribes or properly evaluated impacts to reservation lands, or treaty and trust resources."<sup>601</sup>

**Definition of "Waters of the United States" Under the Clean Water Act  
Draft Rule as of 20Feb14**

On February 18, 2014, OGC provided two documents for review (333 pages each), a markup of the draft rule by OMB and a markup of the draft rule by EPA. Neither OASD/CW staff nor USACE staff have not been given the opportunity to markup the rule and propose improvements, corrections, or clarifications.

To conduct a rapid review, we flagged every page with edits by OMB, then compared those pages to the markup produced by EPA. Where OMB and EPA markups were identical we used only the OMB draft. Where markups were different we clipped the appropriate pages together for further review and made observation in the "Comments" column below.

The results by page are:

- Concur with OMB edits = 45 pages
- Concur with OMB edits with modification = 2 pages
- Discuss for understanding and agreement = 18 pages
- Discuss as a potential critical issue = 4 pages
- Discuss to receive OMB guidance = 2 pages

Recommend coordinating the results of my rapid review with the Corps, discussing results to find vertical alignment, then requesting a meeting with OMB and EPA to work through the edits where we note issues or the need for better understanding.

Page(s)	USACE/Army Staff Determination RE OMB Edits	Comments

<sup>600</sup> Smith Tr. at 27-28 (Feb. 19, 2016) (emphasis added) .

<sup>601</sup> Memorandum from Army Corps of Engineers to the Office of Management and Budget & Environmental Protection Agency, *Summary of Corps Comments on OMB Comments on WOTUS Proposed Rule*, at 1, 7 (Feb. 18, 2014) (OMB-046642-9).

127-128	Request guidance from OMB	The agencies have not done proper consultation with federally-recognized tribes or properly evaluated impacts to reservation lands, or treaty and trust resources. Some phone coordination occurred several years ago for a version of the draft guidance. No coordination or consultation has occurred for the proposed rule, and there has been no analysis of impacts, beneficial or adverse. If the intent is to proceed without consultation at this time we may want to add a robust
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## CONCLUSION

The WOTUS rule represents one of the most far-reaching and significant environmental regulations in modern history. It creates new restrictions on the rights of citizens, state and local governments, and tribes to use streams, lakes, rivers, and other water bodies on their properties and within their jurisdictions. It greatly expands the right of the federal government to monitor, control, and even penalize citizens for what they do on their own property, including how they operate their farms, ranches, and businesses.

The documents and testimony obtained by the Committee show serious flaws in the rulemaking process that affected the final WOTUS rule. The documents and testimony create the appearance that the rule was promulgated based on political considerations, with the involvement of outside special interest groups, and at the expense of adhering to rulemaking best practices and laws. The EPA repeatedly cut corners, disregarded statutes and executive orders, and ignored serious concerns voiced by experts, the states, and American citizens, in a deliberative effort to rush promulgation of the rule to meet the demands of the Obama Administration. Specifically, the documents and testimony show:

- Although WOTUS was a joint-rulemaking between the EPA and the Corps, the EPA routinely and intentionally ignored the Corps during the rule's development to accelerate the process;
- The EPA ignored important recommendations and concerns about WOTUS from multiple federal agencies, including the Corps, the Small Business Administration, and OIRA to avoid conducting a thorough, but lengthier, analysis of the rule;
- The compressed timeline made several agencies, such as NASA, DOT, and USDA unable to properly review the rule and provide regulatory feedback;
- The EPA ignored public comments submitted by citizens, and by the states, that probed key aspects of the rule;
- Officials underqualified and inexperienced in rulemaking and wetlands issues relative to their peers, like Craig Schmauder and Gib Owen, assumed major roles in the WOTUS process because they aided in expediting promulgation of the rule;
- The EPA routinely failed to follow the law, including the NEPA, the APA, the RFA and SBREFA, and the Anti-Lobbying Act;
- The EPA used science and data to formulate the WOTUS rule that was inconsistent, flawed and misapplied, and chose not to address these issues;
- The EPA failed to alter its analysis of the WOTUS rule after significant changes were made that rendered previous analysis wholly inconsistent with the new rule for the purpose of saving time;

- To keep the rulemaking on schedule, the EPA submitted the rule to OIRA for final review before important analyses were completed, preventing full review; and
- The EPA pursued an unprecedented effort to expand its CWA jurisdiction despite these shortfalls and in the face of opposition within its own administration.

In an effort to get one of its top policy priorities into effect quickly, the Obama Administration sacrificed numerous quality control steps, thus leaving itself vulnerable to criticism and perhaps undermining the very goal of protecting America's water.