

CHALLENGES FACING OIRA IN ENSURING TRANSPARENCY AND EFFECTIVE RULEMAKING

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH CARE,
BENEFITS AND ADMINISTRATIVE RULES

AND THE

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

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CHALLENGES FACING OIRA IN ENSURING TRANSPARENCY AND EFFECTIVE RULE- MAKING

Tuesday, March 3, 2015,

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HEALTH CARE, BENEFITS AND
ADMINISTRATIVE RULES, JOINT WITH THE SUBCOMMITTEE
ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:35 a.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the Subcommittee on Government Operations] presiding.

Present from Subcommittee on Health Care, Benefits and Administrative Rules: Representatives Jordan, DesJarlais, Walker, Hice, Carter, Cartwright, DeSaulnier, and Lujan Grisham

Present from Subcommittee on Government Operations: Representatives Meadows, Jordan, Massie, Buck, Carter, Grothman, Connolly, Lynch, and Plaskett.

Mr. MEADOWS. The Subcommittee on Government Operations and the Subcommittee on Health Care, Benefits and Administrative Rules will come to order.

Without objection, the chair is authorized to declare a recess at any time.

We believe that the ranking member is on his way here, so I am going to go ahead and start with my opening statement.

Mr. Shelanski, thank you so much for coming today to testify. Obviously, as you know, Federal agencies draft proposed and final rules on a regular basis as part of their regulatory analysis that is supported by the underlying rule. That incorporates comments received from the public on those rules. Certainly, created by this committee under the Paperwork Reduction Act of 1980, the Office of Information and Regulatory Affairs, also known as OIRA, which is a mouthful, is charged with reviewing draft proposals and final regulations from the Federal agencies.

This regulatory review role is currently defined by an executive order, which is 12866, issued by President Clinton, and Executive Order 13563 issued by President Obama, which reaffirms that Clinton executive order. OIRA is the gatekeeper over poor regulatory analysis, so it is your agency's charge to certainly look at that; and you are responsible for making sure that those agencies, the regulatory analysis that gets done are sound and that the agencies respond to the public in the rulemaking.

Obviously, we have seen unprecedented rulemaking in the last few years, and certainly with that your workload, I would imagine, has increased. So we look forward to hearing from you on that today.

Additionally, as we start to look at this particular agency's role in looking at the analysis and how we go, what I want to hear from you today is truly how we can streamline the process, make sure that the American public has a voice and that they are heard. I have looked over your testimony, read much of the background information last night as we were looking at this, so I want to hear specifically from you, too, in terms of our 90-day time limit, because that has been consistently invaded through either procedural motions, is what I would call it, in asking for the agency for extensions. But this committee truly needs to make sure that we have an open and transparent regulatory rulemaking process.

This is the first hearing of this committee on this particular issue since 2011, so I know that as I am being joined with the ranking member here to my right, he and I both agree unanimously that transparency and making sure that the American people have their voice in it is certainly one of those things that we both hold very dear and will vigorously defend. So I would share all of that as we look forward to your testimony here in just a few minutes.

Before I go any further, I will say there has been a series of votes on the floor that we had not planned for. The chairman of the other subcommittee, Mr. Jordan, is actually on the floor. He will be joining us shortly. But in his stead as chairman, I would like to just take a moment to announce the newest member of the Subcommittee on Health Care, Benefits and Administrative Rules. I am pleased to welcome the gentlelady from New Mexico, Ms. Lujan Grisham.

I am confident that you not only will be an asset to this subcommittee, but I personally am looking forward to working with you, so welcome.

With that, I now recognize Mr. Connolly, the ranking member of the Subcommittee on Government Operations, for his opening statement.

Mr. CONNOLLY. I thank my friend, the chair. Sorry I am a little late. We were a little worried on the floor that there could be a motion to adjourn, so they asked some of us to stay behind just a little bit.

The Office of Information and Regulatory Affairs is the most important, influential, and consequential Federal agency most Americans have never heard of. No agency comes near OIRA with respect to the far-reaching authority this relatively small and anonymous office wields over vital Federal rules that have an impact on our Nation's economy, environment, and public health and safety.

OIRA plays a key role in shaping hundreds of important rules, such as those that enhance the safety of our drinking water, protect food supply, guaranty buildings are accessible to the disabled, and protect the homeland, to name just a few important topics. Yet, despite the powerful impact this agency has in the lives of all Americans, OIRA operates mostly in the shadows and, from a good government point of view, greater transparency is called for.

There is a documented lack of transparency with this small statutory office housed within OMB. Over the years, the U.S. GAO, Government Accountability Office, has repeatedly found that OIRA, under multiple administrations, failed to meet the laudable transparency requirements contained in the relevant executive orders that prescribe the principles and procedures that ought to be followed when conducting regulatory review.

Worse, despite GAO issuing a comprehensive set of recommendations in 2003 to address these deficiencies, to date, OIRA appears to have only implemented one of the nine recommendations made 12 years ago. Thus, when a Federal agency promulgates a rule, or fails to promulgate a rule, it is entirely possible that the public, the Congress, which wrote the underlying statute, will have no idea what entity or individual is ultimately responsible for the final regulation, if any at all.

To be fair, enhancing transparency has been a stated goal of the last few OIRA administrators. Indeed, our witness today, Administrator Shelanski, has made progress in this area. But I think he would agree more work needs to be done. There should be broad bipartisan consensus that the public has a right to know why OIRA classifies certain rules as major rules; that the public has a right to know why some rules sit under OIRA review for two years, when the review was supposed to take only 90 days. Finally, the public also has a right to know who is weighing in on these regulations and the nature of the deliberations with respect to them.

Often, the modifications and revisions that result from the machinations of a rapidly growing cottage industry, known as shadow lobbying, have as great an impact on an agency's action as the actual letter of the law we wrote.

In closing, I want to recognize that OIRA boasts an incredibly hard-working and dedicated corps of career staff. It is first-rate when it comes to conducting quantitative analysis that weighs complex economic costs against potential benefits, and that is a lot of bulwark. As the 2014 draft report to Congress on the benefits and costs of Federal regulations demonstrates, OIRA's reviews ensured that in 2014 the annual benefits of major rules dramatically outweighed the monetary costs. OIRA should be commended for conducting retroactive analyses of existing rules that may be outdated or unnecessarily burdensome and in need of more effective and innovative solutions.

I want to thank Administrator Shelanski for testifying, and I look forward to hearing how OIRA will continue promulgating cost-effective rules and examining what further steps Congress can take to ensure that regulatory review transparency is improved in the coming years.

With that, I yield back, Mr. Chairman.

Mr. MEADOWS. I thank the ranking member.

Just so I can advise the members on my side of the dais, I will be coming to you for questions before we go on any further. We probably are going to be interrupted for votes around 2:45, so we will take a slight recess at that particular time. We will try to keep it going with two different chairs and two different ranking members, where we can keep you with limited time there.

With that, I now recognize Mr. Cartwright, the ranking member of the Subcommittee on Health Care, Benefits and Administrative Rules, for his opening statement.

Mr. CARTWRIGHT. Thank you, Chairman Meadows, for calling today's hearing.

I also want to thank our witness, Administrator Shelanski, for testifying today.

OIRA plays a critical role in the Federal regulatory process, completing the review of about 500 agency draft rules at both the proposed and final stages of rulemaking every year. OIRA is also responsible for ensuring adequate interagency coordination of draft rules to reduce unnecessary burdens and costs, safeguarding against the issuance of redundant or inconsistent regulations.

OIRA's regulatory review functions aim to improve the daily lives of Americans across our Country in a multitude of ways. Its crucial oversight of agency rulemaking leads to the issuance of rules that aim strengthen worker safety standards, increase access to clean water, lower energy costs, reduce pollutants, and improve public health protections.

Despite OIRA's key role in helping to address our Nation's environmental, health, and public safety challenges, some of my colleagues on the other side of the aisle have referred to the Federal rulemaking process as a highly flawed system that punishes job creators and stifles economic growth, so we need to talk about that. But according to OMB's 2014 draft report to Congress on the benefits and costs of Federal regulations, the estimated annual benefits of major rules reviewed by OMB from October of 2003 to September 2013 ranged from \$217 billion to \$863 billion in savings, significantly exceeding estimated annual costs, which were between \$57 and \$84 billion.

That said, there has been longstanding criticism against OIRA for not being transparent enough in its review process, certainly, and concerns have also been raised by both Republicans and Democrats about OIRA holding regulations for long periods of time without offering any reasonable explanation for the delay.

I share my colleagues' concerns about these lengthy delays in OIRA's review of regulations and I would like to hear from you, Administrator Shelanski, today about steps OIRA is taking to eliminate its backlog and increase transparency, including whether a lack of adequate resources has contributed to this problem.

I am also interested in hearing about OIRA's efforts to engage the average citizen in its rulemaking process. OIRA enjoys enormous oversight over regulations that touch on nearly every aspect of our American lives, and I want to ensure that OIRA provides consumer and environmental protection groups the same amount of time as it does for lobbyists for industry that is being regulated.

In January 2011, the President issued Executive Order 13563. Now, this Executive Order directed agencies to give the public a meaningful opportunity to comment on proposed rules through the Internet to allow for a minimum 60 day comment period and to provide online access to the rulemaking docket in an easily searchable and downloadable format.

I think these are all positive actions by the current administration to improve transparency and public confidence in the openness of our regulatory system, but I also believe that more can be done.

I do thank the chairman again and look forward to hearing more from Administrator Shelanski about how we can make the existing regulatory process even more efficient and even more transparent. Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

Before we go further, I want to just thank the committee staff for their work on this particular issue. Obviously, it is something that is not a household acronym, so it has been very illuminating. So I want to thank those who have worked on it, as well as our personal staff.

I will hold open the record for five legislative days for any member who would like to submit a written statement.

We will now recognize our witness. I am pleased to welcome the Honorable Howard Shelanski, Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget. Welcome.

Pursuant to committee rules, all witnesses are sworn in to testify, so I would ask you if you would rise, please.

If you would raise your right. Do you solemnly swear or affirm that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witness responds in the affirmative.]

Mr. MEADOWS. Let the record reflect that the witness has answered in the affirmative.

Thank you. You may take your seat.

In order to allow time for the discussion, Mr. Shelanski, if you would please limit your testimony to five minutes. Your entire written statement will be made part of the record. You are now recognized.

STATEMENT OF THE HONORABLE HOWARD SHELANSKI

Mr. SHELANSKI. Thank you very much, Chairman Meadows, Chairman Jordan, Ranking Members Connolly and Cartwright, and members of the subcommittees. Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss the activities and priorities of the Office of Information and Regulatory Affairs, OIRA.

As the administrator of OIRA, it is my privilege to work with a great team, both within the Office of Management and Budget and across the Federal Government. We are all working to continue our Nation's economic recovery and employment growth while protecting the health, safety, and welfare of Americans now and into the future.

OIRA has a broad portfolio that ranges from coordination of government-wide information and statistical policy to review of executive branch regulations to international regulatory cooperation. The Office reviews collections of information by the Federal Government to ensure that they are not unnecessarily burdensome; develops and oversees the implementation of government-wide statistical standards and policies; and provides guidance on privacy and confidentiality policy to Federal agencies.

The largest area of OIRA's work is the review of regulations promulgated by executive branch departments and agencies. A set of executive orders provides the principles and procedures for OIRA's regulatory reviews. Executive Order 12866, implemented across several administrations of both parties, sets forth standards and analytic requirements for rulemaking by departments and agencies. To the extent permitted by law, it calls for agencies to regulate only when the benefits of a rule justify its costs.

My priorities as OIRA administrator are directly rooted in the relevant executive orders. One such priority has been to increase the predictability and transparency of the regulatory review process. In that regard, during my tenure, we have ensured timely publication of the Unified Agenda and Regulatory Plan for agency rule-making activity each spring and fall.

Of similar importance to clarity and certainty in our regulatory environment is that rules that come to OIRA receive an efficient, as well as thorough, review. OIRA must first and foremost uphold the standards of review that the executive orders establish. But we have also worked to minimize unnecessary delays in review. Such delays are harmful across the board: to those wishing to comment on proposed rules, to those who must make plans to comply with rules, and to those denied the benefits of regulation.

Another important OIRA objective is ensuring appropriate flexibility in and removing unnecessary burdens from Federal rules. For example, we have worked successfully with the Small Business Administration and agencies across the executive branch to minimize the particular burdens that new regulations might disproportionately impose on small and new businesses, especially in areas where emerging technologies have the potential to greatly enhance public welfare.

Existing rules, too, warrant scrutiny to ensure that they achieve their benefits and goals without imposing unnecessary costs. Retrospective review is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public.

The Administration's retrospective review efforts to date will yield savings of over \$20 billion over the next five years, but, as President Obama made clear in remarks at the Business Roundtable this past December, it is a critical part of this Administration's regulatory agenda to do an even better job of finding and reforming regulations that are unduly burdensome or missing their mark.

To that end, OMB has convened a series of meetings with various stakeholders, including State and local government officials, community groups, and representatives from numerous industries to better understand what approaches, themes, and particular areas of regulation could most usefully factor into agencies' retrospective review efforts.

Agencies filed their most recent retrospective review plans with OIRA last week. OIRA intends to complete its review of those plans within the next month, after which time they will be publicly released. OIRA will continue to work closely with agencies to make additional progress in the review plans the agencies will file this coming July and through the next two years.

Finally, OIRA has important responsibilities related to international regulatory cooperation. We have made progress in a number of areas with our international partners through our Regulatory Cooperation Councils with Canada and Mexico. OIRA has also furthered its international regulatory mission through coordination with the Department of State and through support of the U.S. Trade Representative's trade negotiations.

In conclusion, government activities can bring great benefits to Americans, but it is critical to ensure that regulations and paperwork do not impose undue burdens; that Federal agencies ensure privacy and base their decisions on high-quality evidence; and that beneficial regulation remains consistent with the overarching goals of job creation, economic growth, and public safety. These are the central objectives of this Administration and we look forward to continuing our efforts to meet these challenges.

Thank you for your time and attention, and I would be happy to answer any questions you may have.

[Prepared statement of Mr. Shelanski follows:]

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**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
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**TESTIMONY OF HOWARD SHELANSKI
ADMINISTRATOR FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON HEALTH CARE, BENEFITS AND ADMINISTRATIVE RULES AND
THE SUBCOMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES HOUSE OF REPRESENTATIVES**

March 3, 2015

Chairman Jordan, Ranking Member Cartwright, Chairman Meadows, Ranking Member
Connolly and members of the Subcommittees:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss the activities and priorities of the Office of Information and Regulatory Affairs (OIRA).

As the Administrator of OIRA, it is my privilege to work with the skilled and dedicated OIRA staff, the first-rate leadership team at the Office of Management and Budget, and our excellent colleagues throughout the Government. We are all working to continue our Nation's economic recovery and employment growth while protecting the health, safety, and welfare of Americans, now and into the future.

OIRA has a broad portfolio that ranges from coordination of Government-wide information and statistical policy to review of Executive Branch regulations to international regulatory cooperation. For example, under the Paperwork Reduction Act, OIRA is responsible for reviewing collections of information by the Federal Government to ensure that they are not unnecessarily burdensome. OIRA also develops and oversees the implementation of Government-wide statistical standards and policies, facilitates efficient and effective data sharing, and provides guidance on privacy and confidentiality policy to Federal agencies. We will continue to work with colleagues across the Government to ensure that Federal policy in each of these areas adapts to the ever-changing technological environment while remaining clear and consistent with applicable law.

The largest area of OIRA's work is the review of regulations promulgated by Executive Branch departments and agencies. A set of Executive Orders (E.O.s), most significantly E.O. 12866 and E.O. 13563, provide the principles and procedures for OIRA's regulatory reviews. Executive Order 12866 is long established, and has been implemented across several Administrations of both parties. Both E.O. 12866 and E.O. 13563 set forth standards and analytic requirements for rulemaking by departments and agencies, and call for agencies to regulate only when the benefits of a rule justify its costs, to the extent permitted by law.

My priorities as OIRA Administrator are directly rooted in the relevant Executive Orders. One such priority has been to increase the predictability of the regulatory review process by improving the timeliness and transparency of OIRA's key functions. In that regard, during my tenure we have ensured timely publication of the Unified Agenda and Regulatory Plan for agency rulemaking activity each spring and fall.

Of similar importance to clarity and certainty in our regulatory environment is that rules that come to OIRA receive both a thorough and efficient review. As we have been throughout this Administration, we will work with agencies to continually improve the review process and the quality of government regulation. While OIRA must first and foremost uphold the standards of review that the Executive Orders establish, unnecessary delays in review are harmful across the board: to those wishing to comment on proposed rules, to those who must make plans to comply with rules, and to those denied the benefits of regulation. Another important objective of the Executive Orders under which OIRA operates is the introduction of flexibility into, and removal of unnecessary burdens from, Federal rules. Ensuring regulatory flexibility for small businesses and reducing regulatory burdens for everyone through the retrospective review process are high priorities for OIRA. We have worked successfully with the Small Business Administration and agencies across the Executive Branch to minimize the particular burdens that regulation might disproportionately impose on small and new businesses, especially in areas where emerging technologies have the potential to greatly enhance public welfare. This is an area that OIRA continues to emphasize as we review new regulations.

Existing rules, too, warrant scrutiny to ensure that they achieve their benefits and goals without imposing unnecessary costs. Retrospective review, which the President has advanced through E.O. 13563 and E.O. 13610, is a crucial way to ensure that our regulatory system is modern,

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streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary or excessively burdensome over time and with changing conditions. The Administration's retrospective review efforts to date will yield savings of over \$20 billion over the next five years. But as President Obama made clear in remarks at the Business Roundtable this past December, it is a critical part of this Administration's regulatory agenda moving forward that we do an even better job of finding and reforming regulations that are unduly burdensome or missing their mark.

To that end, OMB has convened a series of meetings with various stakeholders, including State and local government officials, community groups, and representatives from numerous industries, to better understand what approaches, cross-cutting themes, and particular areas of regulation could most usefully inform agencies' retrospective review efforts. Input from those meetings is being shared with agencies, which are concurrently engaging in their own stakeholder outreach efforts on retrospective review. E.O. 13610 directs agencies to submit biannual reports on the status of their retrospective review efforts to OIRA, and agencies filed their most recent retrospective review plans with OIRA last week. OIRA intends to complete its review of those plans within the next month, after which time they will be released. As agencies move forward, OIRA will continue to work closely with them to make additional progress in the plans the agencies will file this coming July, and throughout the next two years.

Finally, under E.O. 13609 OIRA has important responsibilities related to international regulatory cooperation. We have made progress in a number of areas with our international partners through the Canada-United States Regulatory Cooperation Council and the Mexico-United States High Level Regulatory Cooperation Council. OIRA has also furthered its international regulatory mission through work in coordination with the Department of State and through activities in support of the U.S. Trade Representative's trade negotiations. Regulatory cooperation benefits both businesses and consumers by promoting consistent standards and procedures across borders, and by preserving safety and welfare while promoting competitiveness here and abroad. While the international role of OIRA is modest compared to

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its key missions of regulatory review and implementing Federal information policy, it is nonetheless an increasingly important part of our agenda going forward.

In conclusion, Government activities can bring great benefits to Americans but can also carry costs. It is critical to ensure that paperwork and information collection do not impose undue burdens; that Federal agencies ensure privacy and base their decisions on high-quality evidence; and that beneficial regulation remains consistent with the overarching goals of job creation, economic growth, and public safety. These are central objectives of this Administration and the main tasks of OIRA. We look forward to continuing our efforts to meet these challenges.

Thank you for your time and attention. I would be happy to answer any questions you may have.

Mr. MEADOWS. I thank the gentleman for his testimony and his timeliness. You know, plus or minus two or three seconds, that is very good, Mr. Shelanski.

I am going to recognize the gentleman from Tennessee, Mr. DesJarlais.

Mr. DESJARLAIS. Appreciate that. Thank you, Mr. Chairman.

And thank you, Mr. Shelanski, for joining us today. I wanted to talk to you today about the issue of agencies taking steps in order to circumvent the rule review process. I recently sat down with a group of farmers and leadership from the Tennessee Farm Bureau in my office here a week or so ago and they were wanting to discuss the impact of EPA's proposed Waters of the United States rule.

Like many of my constituents, the farmers in my district are concerned about the burdensome requirements that this rule would impose on agriculture providers and businesses. This regulation would expand Federal authority beyond the limits approved by Congress. This sweeping new authority granted by this proposed rule has so far only created confusion and uncertainty among farmers, ranchers, landowners in my district, and also a lot of uncertainty, according to the Office of Advocacy and also the NFIB.

In fact, the NFIB, last year, sent a FOIA request to the EPA and the Army Corps regarding the Regulatory Flexibility Act, and wanted a better explanation, and the EPA's response to the NFIB was that they had no records related to RFA compliance.

Mr. Chairman, can I ask unanimous consent to introduce these documents into the record?

Mr. MEADOWS. Without objection, so ordered.

Mr. DESJARLAIS. So my question today would be can you explain how such a costly and sweeping rule has also been designated as non-significant?

Mr. SHELANSKI. Thank you very much, sir.

So the Waters of the U.S. rule, which is a proposed rule that was out for public comment and is now back at the agency for development into a final rule, was reviewed by OIRA. We review rules that are significant regulations, so it did receive a full OIRA review. It will similarly receive such review when the EPA submits the rule back to our office for final determination.

One of the reasons for the American system under the Administrative Procedure Act of having a proposed rule that goes out for public comment is that we learn a lot during that period, and I think one of the valuable things about the notice and comment period on the Waters of the United States rule is the very concerns that you articulated will have the chance to become part of the record and to be taken into account by EPA in their development of a final rule.

And part of what OIRA does when it reviews final rules it looks to see how the agency has reacted to and addressed important public commentary. So we look forward to doing so when that rule comes back to us for final review.

Mr. DESJARLAIS. I am glad that you are getting that feedback; that will be very helpful.

Can you provide this committee with documentation relating to OIRA's oversight of this rule, including the rule's designation as significant and certification under the Regulatory Flexibility Act?

Mr. SHELANSKI. So all of the documentation related to a rule is actually on our Web site and through the Web site RegInfo.gov. So when a rule comes in, it becomes public that it is with OIRA; its designation at that point similarly becomes public. So when the final rule comes in, that will be publicly visible, both the timing of the arrival and the designation that it receives.

Mr. DESJARLAIS. Okay. Can you explain how rules exceeding the \$100 million threshold end up designated as non-major and avoiding statutory mandated review by Congress?

Mr. SHELANSKI. Well, when an agency makes a determination that a rule is economically significant or not significant, we do typically review that determination if we think that it is close to the line. In cases where we are actually reviewing the regulation, as in Waters of the United States, it may be very unclear what the costs of a rule may be. We may review the rule anyway because we think it raises important or novel issues, even if it is not formally designated as economic significance.

So I would just note that we actually have several forms of significance at OIRA. Economic significance, but a rule, even one that may not reach the \$100 million threshold, we can deem significant and call in for review, and that is indeed what we did with the Waters of the United States rule.

Mr. DESJARLAIS. Okay. Well, we will certainly be interested in seeing your results as you get the feedback, because there is no question in my mind and certainly no question in the mind of our farmers and farm bureaus and small businesses that this should be designated as significant. So we look forward to seeing your review.

Mr. SHELANSKI. Yes, sir.

Mr. DESJARLAIS. And thank you for your time.

I yield back.

Mr. MEADOWS. Let me ask a clarifying point before I recognize the ranking member, because your testimony right now says that all those documents and all of that as it relates to your review of that is online. I don't believe that that is correct; and that is what the gentleman was asking. So maybe your answer didn't match his question.

Mr. SHELANSKI. No, what I meant to say is the fact that a rule is with us under review and the designation—

Mr. MEADOWS. So what about in the interim process? You have been involved in the interim process with the Waters of the U.S., have you not?

Mr. SHELANSKI. Right.

Mr. MEADOWS. So where is that documentation?

Mr. SHELANSKI. So what we do at the end of a review process is the agency, and the EPA does this, makes available both the rule as it came in and the rule as changed after it finished the review process.

Mr. MEADOWS. I will wait to my line of questioning. That doesn't answer the question, because when you have the initial rule and the final rule, there is a whole lot of the story that happens in be-

tween that we are not privy to your involvement there. Where is that documentation? Where is the transparency, I guess?

Mr. SHELANSKI. So there is a deliberative process that is undertaken, discussions not just between OIRA and the agency, but there is an interagency review process in which agencies are—

Mr. MEADOWS. Right. We are well aware of that. I guess what I am saying is his question was specifically with regards to the information, the audit trail, so to speak, of your involvement. Where are those documents?

Mr. SHELANSKI. There is not a set of documents.

Mr. MEADOWS. So you don't document it.

Mr. SHELANSKI. No, we do not.

Mr. MEADOWS. You just get involved and have verbal conversations?

Mr. SHELANSKI. There is a lot of verbal conversation, there is a lot of discussion, and then there is a written pass-back, back and forth that goes on between the agencies.

Mr. MEADOWS. All right, so let's say the emails. Where are those emails? Can you provide those specifically with regards to that particular, your analysis and your interrogatory with them? Can you provide that to the committee?

Mr. SHELANSKI. We do not make public—

Mr. MEADOWS. We are not public. You want to make that to us?

Mr. SHELANSKI. With all respect, sir, with respect to the rule-making process, we do not divulge parts of the deliberative process outside the office.

Mr. MEADOWS. But you are not part of the deliberative process; you are part of the analysis, according to the statute.

Mr. SHELANSKI. But what you are asking for is the deliberative process that we engage in.

Mr. MEADOWS. Well, we will come back. The ranking member has been very gracious, so I will be glad to recognize the ranking member, Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman.

There is a clear definition of economically significant rules, but classifying major rules that are significant for other reasons, health, safety, environment, are not as well defined. GAO, last September, released a report that discussed this very issue. The report found that for the majority of the 109 significant rules that it reviewed, 72 percent included no explanation of why the rule was designated as significant. What, if anything, are you doing to try to respond to that critique?

Mr. SHELANSKI. Typically, the reason that we would designate a rule as significant: it raises a novel issue or because another agency other than the agency that has promulgated the rule has asked us to convene an interagency rule.

Mr. CONNOLLY. Yes, but GAO found that 72 percent of the 109 it reviewed had no explanation. You are telling us now there may be lots of reasons, and I agree with you, but isn't the public entitled to know why you deemed it significant?

Mr. SHELANSKI. I mean, we really often, if an agency, for example, says we would like to comment on another agency's rules, I don't know what reason we would give other than interagency re-

view. But we could certainly look into ways to provide that explanation, but as a general matter we——

Mr. CONNOLLY. Well, maybe I am misreading you, Mr. Shelanski, but you are acting as if what I just read to you was news to you. Were you not aware of the GAO report last September?

Mr. SHELANSKI. Yes, I am aware of the——

Mr. CONNOLLY. And do you agree with its findings or do you disagree with it?

Mr. SHELANSKI. You know, we are in the process of discussing the GAO's report, and I don't have any further comment on that right now.

Mr. CONNOLLY. Okay. Well, our committee may have some comments about it.

There have been calls for more transparency and all of us have alluded to that, and I assume you agree, looking at your own agency's history, more transparency might be in order?

Mr. SHELANSKI. Well, so we have taken certain steps to try to make aspects of our process more transparent. Discussions between staff members in my office and agencies clarifying questions, trying to understand what the rule is, trying to understand why an analysis was done a certain way are part of a deliberative process that I think has to be able to occur with the staff not knowing that every email, every discussion is going to be under the glare of the microscope. On the other hand, we have done a number of things and we are going to continue to take steps to make our process more transparent.

You alluded in your opening remarks, sir, to knowing who is coming to OIRA to meet. Well, we do post every party that comes in to meet with our office on a rule that is under review. Under Executive Order 12866, we do not initiate such meetings, but we are required to take all-comers; it can be an individual, a corporation, an advocacy group, an environmental group; and, indeed——

Mr. CONNOLLY. Even members of Congress?

Mr. SHELANSKI. Even members of Congress.

Mr. CONNOLLY. Well, Lord almighty. Look at that.

Mr. SHELANSKI. You guys are some of my best customers.

[Laughter.]

Mr. SHELANSKI. So we are required to take all comers in this regard; and we post not only who has come to see us, but any paper that they submit to us. In fact, you mentioned the openness of this process to environmental groups, advocacy groups, in addition to industry and the lobbyists you referred to. We welcome absolutely everybody and the door is there to be knocked on; we turn down no meeting requests

Mr. CONNOLLY. Well, I guess the point is in my opening statement I referred to you are one of the most powerful agencies nobody has ever heard of. Assuming that characterization is fair, that puts maybe more burden on you to be a little bit more accountable and transparent than, historically, the agency has been. I am glad we are posting who asks to meet with you and who does meet with you. I do think, however, when something has been deemed significant, and 72 percent of those reviewed by GAO there is no explanation, I think we can do better in terms of responding to the public.

My time is running out, but let me ask one more question in this regard. There currently, if we are right, 34 regulatory actions that have been in OIRA review for more than 90 days. That is your goal, to do it within 90 days. You can go on the Web site and see the length of time the rule has been at OIRA, which is good, but there is no information about why that rule has been under review well beyond the deadline; there is no explanation for why the delay. Why not, and are you working on that?

Mr. SHELANSKI. So there are a number of things when a rule comes in to review for OIRA. So the one thing I would note is that there isn't a really one-size-fits-all review process, and 90 days is sometimes inadequate. But one of the things that happens very early in the review process is that the rule goes out for interagency comment. And we, unfortunately, do not have the authority to compel that commentary on as fast a timeline as we would often like, and when you have a lot of agencies commenting on a particular rule, it can take some time to get that feedback.

Moreover, once we incorporate that feedback and retransmit it to the agency, the rulemaking agency, we have no control over the amount of time that that agency takes to bring the rule back to us. So, to be perfectly frank, long periods of time can go by where the rule is not in fact at OIRA; it is under review, but it has been passed back for further work, consideration, analysis by the agency.

Mr. CONNOLLY. Mr. Shelanski, let me just end on this note. That is a perfectly rational explanation, so post it. And oh, by the way, by posting it, saying, you know, agency X is still reviewing it after our review, you put a little pressure on them to maybe accelerate their review, because they are now under scrutiny.

When I was chairman of my county, I started a multi-year transportation plan for spot improvements, and I put up every project we were going to fund; I put up how much it was going to cost; I put up when we were proposing to have it done; and if there was a delay, we posted why to make myself accountable. And you know what? You would be amazed at how quickly the bureaucracy moved knowing that there was that public accountability.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

Votes have been called, but we are going to try to go ahead and hit very quickly. I am going to go ahead and recognize the gentleman from North Carolina, Mr. Walker.

Mr. WALKER. Thank you, Mr. Chairman. We will try to do this efficiency as possible.

If I have time, I want to get to talk a little bit about the inability, it seems, of the department to return the deficient draft regulations. It seems to a vital part of that and there seems to be very long delays following that.

But I first want to hit an area that, in doing my reading, is concerning me. Evidence suggests that leading up to the 2012 election, Mr. Shelanski, the White House instructed OIRA not to complete reviews and finalize rules before the new year. My question would be how many times has your office delayed, reviewed, modified a rule, altered your review, or have taken any other action steps in response to directions from the White House?

Mr. SHELANSKI. So part of the interagency review process would incorporate other components within the executive office of the President; the policy councils, they get to weigh in. But in terms of instruction of that sort, I was not administrator in 2012, but my observation is that a lot of big rules happened right through the election cycle in 2012; the mercury standard, the CAFE standard for vehicles. So I am not aware of any slow-down and certainly have not been instructed myself to slow down rulemaking.

Mr. WALKER. Well, then let's talk about specifically, let's use your words, slow-down here. In 2012, OIRA review averaged about 80 days. But it has now jumped to an incredible 140 days. What do you account for that?

Mr. SHELANSKI. Actually, our average review time is quite a bit shorter than that. Rules submitted in the last six months were well down under our normative time. I would also note that the number of rules under extended review has dropped dramatically since the beginning of 2013, and during my tenure over the last 18 months has continued to drop substantially. There are many fewer rules that have been under review for 200 days and even over fewer over 90 days.

Mr. WALKER. Can you talk about the action steps that have led to what sounds like you are sharing has been successful? Can you tell me a little bit about that? What steps have you taken to cause the low amount of time?

Mr. SHELANSKI. Well, one thing that we have tried to do is to push agencies to work with us and to move quickly. We have devoted substantial resources to trying to move things along more quickly. It has been a priority on my part to focus on sort of first-order concerns with the rules. And I think also that we have just had very good cooperation from the Federal departments and agencies in the executive branch in working with us to move things forward.

Mr. WALKER. Okay, then answer this question for me, if that is the case. OIRA has only issued one letter of return, a return letter during the entire six-plus years of the Obama Administration. How do you account for that?

Mr. SHELANSKI. Well, I have issued no return letters. I can explain why I have not issued any return letters. First of all, a return letter is a fairly strong-arm tactic, and I would only do that if negotiation with the agency over the substance of the rule or an alternative to a return letter failed.

We have actually been very successful in getting agencies, on numerous occasions, to withdraw rules that simply were not workable. That has happened several times in the time that I have been in office. That is a negotiation over something that is not going well with a rule and the agency's determination that they want to take it back for further work on their own clock.

In addition, we have been able to break through a lot of differences and find lots of compromises amongst different agencies that were disagreeing on a rule, and I have not had a need to issue a return letter.

Mr. WALKER. So when was your start date?

Mr. SHELANSKI. My start date was July of 2013.

Mr. WALKER. And in that 19, 20 months, there is not a single time that you feel like that you have needed to issue a return letter?

Mr. SHELANSKI. There hasn't been one occasion where either the agency has decided not to take the rule back on its own or we haven't been successful in finding a solution.

Mr. WALKER. Okay. Thank you.

I yield back, Mr. Chairman.

Mr. MEADOWS. Mr. Shelanski, to follow up on Mr. Walker's question, how does that increase transparency if you are making these interagency deals in terms of you are basically going back and forth and getting them to withdraw a rule? Is that what you are saying?

Mr. SHELANSKI. So the way a rule—

Mr. MEADOWS. Yes or no? Is that what you are saying?

Mr. SHELANSKI. No.

Mr. MEADOWS. All right.

I will recognize Mr. Cartwright.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Well, Administrator Shelanski, we are talking about Federal rules and the making of Federal rules, and I don't think I go too far when I say most Americans are frustrated by that, because we are talking about rules that govern their conduct, rules that govern their places of employment, rules that apply to everybody and rules that have to be followed or else they are breaking the law, and rules that aren't made by the United States Congress, rules that are made by people whose votes don't appear in our local newspapers. So questions of transparency are important to people, and I want to ask you about that.

During its review process, OIRA meets with all kinds of stakeholders, allowing many opportunities for public participation, and you have made that clear; everybody is invited and your door is open to all the stakeholders. But I have some concerns, and I said this before in my opening, about industry domination of those meetings. You know, there is a sense in America that the fox is guarding the hen house in a lot of this rulemaking.

Administrator Shelanski, are you aware of a November 2011 white paper from the Center for Progressive Reform entitled, Behind Closed Doors at The White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment? Are you familiar with that white paper?

Mr. SHELANSKI. I have heard the criticism of the Center.

Mr. CARTWRIGHT. Well, the authors of the report examined the records of 1,080 meetings held at OIRA from October 16, 2001 all the way to June 1, 2011. These meetings consisted of 5,759 appearances by outside individuals. The report found that industry representatives outnumbered public health and safety advocates by almost four to one.

Among the 30 organizations they found that met with OIRA most frequently, 5 were national environmental groups, NRDC, Environmental Defense Fund, Sierra Club, Earth Justice, and Consumer Federation, 17 were well-run and well-funded industries and trade associations such as ExxonMobil, the American Petroleum Institute, and the National Association of Manufacturers; and another 8 of them were lobbying firms.

Administrator Shelanski, are these findings consistent with what you have seen during your tenure at OIRA?

Mr. SHELANSKI. Thank you, Mr. Cartwright, for your question. I think the Center for Progressive Reform has made the classic error of confusing correlation with some form of causation. We at OIRA do not have discretion to turn down meetings. Our door is open; anyone who knocks we let in. We cannot control the fact that more industry groups choose to come and meet with us than other kinds of organizations.

I will tell you that we have made every effort to encourage organizations, indeed, the Center for Progressive Reform itself and many others, to please come see us on any rule—

Mr. CARTWRIGHT. That is my next question. You have said the doors are open, but the doors are open is different from inviting people, being active and inviting people in. Here is the question: What, if anything, is being done during the current administration and in your tenure to promote a more balanced public engagement approach to OIRA's review process?

Mr. SHELANSKI. With respect, I think it would be inappropriate for OIRA to try to tip the scales in any direction for who comes to see us and who comes to weigh in on rules. What I have tried to do is to make clear to everybody that they are welcome and that we want to hear from them; and it is for that reason that I have met with and, indeed, addressed, groups like Public Citizen, Center for Progressive Reform, labor unions, to make clear that the door is just as open to them.

Indeed, when Director Donovan and I held our stakeholder meetings on retrospective review, we specifically invited such organizations to their own meeting so that we could hear their viewpoint. Not only is the door open, but, to the extent appropriate, we have encouraged and made clear that it is open.

Mr. CARTWRIGHT. Well, thank you for that.

With that, I yield back, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman from Pennsylvania.

We are going to recess for 10 minutes. So the committee stands in recess.

[Recess.]

Mr. MEADOWS. We are going to try to be sensitive to your time. I understand that we have one of the ranking members on their way over here huffing and puffing, so the committee will reconvene, and I thank the witness for his patience.

I am going to go ahead and recognize the gentleman from Georgia, Mr. Hice, for five minutes.

Mr. HICE. Thank you, Mr. Chairman.

And thank you for joining us today. I have a few questions. I know you have already commented somewhat on this, but relating to the Waters of the U.S. rule. I am just curious. My understanding is that this was supposed to be out by April of 2014. Is that correct? We have heard that.

Mr. SHELANSKI. So I don't recall what the exact agenda dates were for the Waters of the U.S. rule, sir.

Mr. HICE. Okay, well, it is my understanding and what we have been told is that that was supposed to come out last year, and, of course, it didn't, so that raises a lot of questions as to where all

of this stands; and, of course, the public comment period of time is over. So can you assure us that there will be a full review and that the issues that are of interest, the comments to the public, will be addressed in their entirety?

Mr. SHELANSKI. Yes, Mr. Hice, I can give you that assurance. The rule is with the Environmental Protection Agency for development right now into a final regulation. That rule will come to my office for review and the rule will receive full review under the executive orders.

Mr. HICE. It will have a full review?

Mr. SHELANSKI. Yes.

Mr. HICE. And you can assure us that the comments will be addressed?

Mr. SHELANSKI. One of the things that OIRA does when it is reviewing a final regulation that has been out for notice and comment is to look at how the agency has taken into account the public comment; and we will do that on the Waters rule as we do with every rule.

Mr. HICE. Okay, thank you. The President evidently has come out stating that as far as having a review of the guidance documents, he is in favor of that. The Center for Progressive Reform, on the other hand, opposes the review from the guidance documents. I am curious to know from you if you think the review of the guidance document is a worthwhile endeavor.

Mr. SHELANSKI. So we at OIRA are interested in reviewing anything that an agency does that has regulatory effect, and whether they call that vehicle a regulation, a guidance, a notice, if it creates new regulatory burden and effect on businesses or farmers or any stakeholders, we want to review it.

So we at OIRA do review guidance documents, sometimes at the request of agencies just because they want to have interagency review of the guidance document; other times because they submit it to us and we find that there is some regulatory impact that warrants our analysis and review. So I side with looking at guidance documents where they do create such obligations on stakeholders and the public.

Mr. HICE. Okay, so you would conclude, then, that it is a valuable use of your time and OIRA to review the guidance documents.

Mr. SHELANSKI. We don't review all guidance documents; there are many, many guidance documents that many different parts of government issue. Typically, when agencies are issuing a guidance document that is going to have an effect on industry or folks out there in the public, they will submit it to us and we will review it.

Mr. HICE. What is the guideline that you determine whether or not you look at guidance documents or not, is it the request of various committees or what have you, or how do you make that determination?

Mr. SHELANSKI. Usually it is the agency that will ask us to look at a guidance document. Other times we will know that an agency is planning to issue a guidance and we will say, you know, that relates to a regulation that we reviewed, we would like to have a look at it.

Mr. HICE. So there is no official policy determining whether or not you will look at guidance documents.

Mr. SHELANSKI. We have a significant standard for guidances, just as we do for rules. Every little administrative guidance document we may not even be aware of, but we certainly wouldn't have the time or resources or, frankly, would not be worth the time or resources, to review. But if we know of a significant document and it is one that the agency wants us to review, we will typically review it.

Mr. HICE. Is there a possibility that some significant, potentially significant guidance documents are not looked at and slip through the crack, so to speak?

Mr. SHELANSKI. Well, there are some guidances that it wouldn't be within our purview to review.

Mr. HICE. Such as?

Mr. SHELANSKI. You know, there are agencies whose guidances we don't review or guidances that are really for internal functioning of an agency or government entity. We very often don't review those because those aren't having impact on stakeholders and the public.

Mr. HICE. But the guidances that, in effect, impact the public in whatever different ways that in essence become laws, regulations, can you assure us that all of those are looked at?

Mr. SHELANSKI. We certainly try to look at guidances that are in themselves creating new regulatory effect. Many guidances articulate an intent to do future rulemakings, and we may not review them because we know we will review the rules.

Mr. HICE. Okay, sir. Thank you.

I yield back. Thank you.

Mr. MEADOWS. I thank the gentleman from Georgia.

Let me follow up, Mr. Shelanski. What agencies? You said there are some agencies you don't review their guidance. What are those agencies?

Mr. SHELANSKI. We don't typically review guidance, interpretive guidance documents, for example, of the Internal Revenue Service. We don't review, typically, guidance documents of independent agencies.

Mr. MEADOWS. So no independent agencies.

Mr. SHELANSKI. We do not review independent agencies.

Mr. MEADOWS. All right. So Department of Commerce?

Mr. SHELANSKI. Department of Commerce is an executive branch agency.

Mr. MEADOWS. So do you review any rulemaking that comes from them?

Mr. SHELANSKI. Yes, we do. We review many rulemakings that come out of the Department of Commerce.

Mr. MEADOWS. Guidance?

Mr. SHELANSKI. If there is a guidance document that we are aware of that has regulatory effect, we—

Mr. MEADOWS. I guess what I am trying to get at, without me guessing which ones, which agencies do you exclude from reviewing guidance other than the IRS?

Mr. SHELANSKI. Independent agencies.

Mr. MEADOWS. And no others?

Mr. SHELANSKI. No others that I can think of off the top of my head.

Mr. MEADOWS. All right, so part of your process is really to look at guidance with the EPA, for example.

Mr. SHELANSKI. The answer is yes, but not every guidance that the EPA might issue.

Mr. MEADOWS. So internal guidances you don't; external guidances you do. So if they are giving a guidance, because what is happening, as you well know, is that there are rules, there are guidances, but depending on who you are talking to, they treat the guidance as a rule. Would you agree with that, in practice?

Mr. SHELANSKI. What we try to do is—

Mr. MEADOWS. Yes or no, do you agree with that or not?

Mr. SHELANSKI. I agree that there are sometimes guidances that have regulatory—

Mr. MEADOWS. That get treated as rules.

Mr. SHELANSKI. Yes. And we try to review those.

Mr. MEADOWS. All right. How do you make sure that you review all of those if they are being used as a rule? Because what I found is with guidances, the agency many times will use it as a rule if it is to their advantage, and if it is not being implemented, then they say, oh, well, that is just guidance, it is not a rule. How do you deal with that?

Mr. SHELANSKI. Well, we deal with the situation where an agency is issuing a guidance that purports to interpret a rule, and we look to see whether it is extending the rule, whether it was adding burdens that had not been commented on, that were not part of the rulemaking process.

Mr. MEADOWS. All right. So tell me how you use the Unified Agenda to promote transparency, or does it?

Mr. SHELANSKI. Well, the objective of the Unified Agenda and Plan—there are two different documents.

Mr. MEADOWS. Right.

Mr. SHELANSKI. The Agenda is a broad document that will contain things that are a little more far-reaching into the future; the Plan is really the more focused document on what the agency intends to do over the next year. What we try to do is make sure that all rules and significant guidances are listed there so that the public—

Mr. MEADOWS. So when they will be coming up so the public will know about them.

Mr. SHELANSKI. Exactly.

Mr. MEADOWS. All right. So it is important that you make that as transparent as possible so that the general public can know about it.

Mr. SHELANSKI. That is why we have worked very hard over the past couple of years to get that on track for its publication both in the fall and the spring.

Mr. MEADOWS. Well, it is curious you say that.

If you will go ahead and put up the slide.

[Slide.]

Mr. MEADOWS. Because if that is truly the agenda and that is truly your responsibility, let me show you this particular chart. What we have gone back to is the spring of 2012, when it wasn't

even issued, the Unified Agenda wasn't. So you can say, well, that was not really your responsibility at that particular point. But let me tell you the concern that I have is each time that you publish it, it is the Friday before Christmas, the day before July 4th, the day before Thanksgiving, the Friday before Memorial Day, and the Friday before Thanksgiving.

And if you truly want transparency, why are you rolling this out at a time when people wouldn't really be focusing on it? That is what we call the Friday afternoon data dump. But it is really what you are doing with regards to the Unified Agenda. Why would you do that?

Mr. SHELANSKI. Well, with all respect, sir, the Agenda remains posted.

Mr. MEADOWS. I understand. But when it comes out, it is newsworthy. Maybe you can help me a little bit further, then, with all due respect. Why do we have question marks under the spring of 2014 and the fall of 2014 in terms of those other, the Plans, as you talked about? That is under your watch.

Mr. SHELANSKI. So I am sorry, both of those were issued. I don't understand. The Plan and Agenda were both issued in the fall and the spring. I don't see what you are referring to.

Mr. MEADOWS. Okay, from what I understand from counsel, that is a memo that is basically saying on how to respond, not that you put it out.

Mr. SHELANSKI. Oh, the memo to the agencies and the deadline for agency plans? Those were issued in each of those times, so I do not have any knowledge of why your slide has question marks.

Mr. MEADOWS. Okay, Mr. Shelanski, I guess the concern that I have is we have asked you for those, the committee has, and you haven't responded.

Mr. SHELANSKI. I am sorry, you have asked me for what, sir?

Mr. MEADOWS. For those documents. And you say you have published them. But we have asked for them and you haven't—

Mr. SHELANSKI. The memo to the agencies for the Plan and Agenda were duly issued. We received responses and we posted those Plans and Agenda. It may be that it happened before holiday weekends or near holidays, but they were in the fall, they were in the spring. Everyone knew they were coming; they were well covered and they remain posted.

Mr. MEADOWS. I guess my question, and I see the ranking member has come back, so we will go to another line of questioning here, you mentioned earlier with regards to the emails, and when I was asking all of that you said that we are not entitled to that. Under what statute or are you claiming executive privilege on why we would not have those?

Mr. SHELANSKI. Sir, let me clarify. I am not claiming executive privilege at all. We at OIRA are part of a review process prior to publication of a rule. Prior to the point where the proposed rule, where it goes out for public comment, we are part of a deliberative process where the integrity of this process, the honest discussion and deliberation between staff at OMB and OIRA, staff and the agencies has to be able to occur.

We do post, just to be clear. Everyone can know what the rule looked like when it came into OIRA. That is not hidden from view.

Everyone knows what the rule looks like when it goes out. There is docketing on everything that goes back and forth on Clean Air Act rules under the statute, so that is quite clear. And in terms of staff emails and things like that, we don't discuss those because they are part of a deliberative process and they encourage honesty and integrity in the discussions between staffs of agencies and OIRA.

Mr. MEADOWS. So your testimony here today is that keeping that information from the public encourages honesty and transparency. Is that your testimony today?

Mr. SHELANSKI. It encourages staff to talk honestly with each other, to ask hard questions of each other, to discuss what might be problems or incompleteness in a rule. It is worth making clear again that we are OIRA are just part of the review process.

Mr. MEADOWS. All right, so let me close with this, then. Can you send us a list of either pre-proposed rules or other rules that are undergoing the informal review process? Can you send us a list of those rules?

Mr. SHELANSKI. I don't know what you are referring to when you talk about the informal review process.

Mr. MEADOWS. Just all of them. Can you send us a list of those that are in the informal rulemaking process or those that are about to be proposed that they are asking you to weigh in on? Because you get comment in that deliberative process.

Mr. SHELANSKI. No, those are rules that are formally under review, sir.

Mr. MEADOWS. So your testimony here today is that you never engage in dialogue back and forth on an informal rulemaking process?

Mr. SHELANSKI. Sir, we don't have an informal rulemaking process. Agencies make rules.

Mr. MEADOWS. Do you engage on informal rules-making? Yes or no?

Mr. SHELANSKI. Again, I don't know what you are referring to when you refer to informal rulemaking.

Mr. MEADOWS. So there is never an informal process in the deliberative process?

Mr. SHELANSKI. There are times when agencies will come to brief us on a rule that is under development.

Mr. MEADOWS. That is informal.

Mr. SHELANSKI. Well, the rule is being developed by the agency. I assume it is part of a formal rulemaking process, so that is why I am not quite sure what you mean by informal. They will, on occasion, come and brief us and say—

Mr. MEADOWS. Okay, what I am talking about is before the rule is proposed, do they have discussions with you, Mr. Shelanski? It is very clear. Yes or no?

Mr. SHELANSKI. Sir, before it is submitted to us for review or before the agency publishes it as a proposed rule?

Mr. MEADOWS. Before they publish it as a proposed rule. Do they have discussions with you?

Mr. SHELANSKI. Of course they do, because then it is a formal review process. It has been submitted to OIRA for review.

Mr. MEADOWS. So there is a formal review before they propose the rule.

Mr. SHELANSKI. Correct. Proposed rules, NPRMs, are reviewed formally by OIRA.

Mr. MEADOWS. So can we get those documents?

Mr. SHELANSKI. Excuse me?

Mr. MEADOWS. I said can we get those documents.

Mr. SHELANSKI. The documents you can have are the rule that they submitted to us and then the rule that they published so you can see what changed in that process. In terms of emails and interim discussions amongst staff, we do not disclose those.

Mr. MEADOWS. All right, thank you.

I will recognize the gentleman from Pennsylvania for a second round of questions.

Mr. CARTWRIGHT. Thank you, Chairman Meadows.

Again, Administrator Shelanski, thank you for being here. I want to talk about delays, and you have touched on it a little bit, but delays in OIRA's regulatory review process.

OIRA has been criticized by members of Congress on both sides of the aisle because certain rules have been under OIRA review for longer than 90 days. The 90-day deadline for OIRA to complete its review of final rules was set by executive order in 1993 and reaffirmed by President Obama in 2011.

In June of 2013, several Senate and House members, Democrats, wrote to the then director of OMB, Sylvia Burwell, expressing concern about a number of rules that had been under OIRA review for well beyond that 90-day limit, and, Administrator Shelanski, I too am concerned about lengthy delays in OIRA's regulatory review process.

You have touched on a little bit already, but I want you to elaborate on what the factors are that cause OIRA's review process to go beyond the 90-day period. Will you do that?

Mr. SHELANSKI. Yes. Thank you very much, Mr. Cartwright. So let me begin by just framing the issue.

I think that the reduction of extended review periods has been one of the success stories of OIRA over the past couple of years. We have very few rules, and especially compared to what the situation was when the letter was written to then Director Burwell, that are under extended review and, on average, we are meeting our normative time. In fact, we are getting a lot of rules reviewed, I think, very effectively. And it has been part of my objective to move rules as quickly as we can.

As to the factors that can lead that not to happen on some occasions, there are several. One of them is simply this: some rules, as you no doubt know, are extremely complex. This doesn't necessarily correlate with the length of a rule or the number of pages of a rule; but some rules, just the underlying analysis and what the rule is trying to do, and our ability to evaluate whether the rule is going to achieve its objectives in a cost-effective way, can be a very difficult process. So the 90-day time period is just simply not possible for some rules.

Mr. CARTWRIGHT. Because of complexity.

Mr. SHELANSKI. Because of complexity and the difficulty of working through the rules.

I would also note that the review process is really a very collaborative process. It is not a case where a rule necessarily comes in and then, in one whole big piece, gets sent back to the agency and then we wait for it to come back; there is ongoing discussion, there are pieces of the rules that are worked on. Sometimes the agency itself will discover that there are issues with the data or the analysis it has used. So that factor of just working out difficult problems is probably the one that most centrally contributes to longer rulemaking periods, but there can be other ones.

Agencies will often have their priorities jumbled by intervening events. They may decide to de-emphasize a rule as a priority for a period of time, so a rule may take a back seat at the agency for three or four months. Or the agency may say, hey, OIRA, can you wait on that rule that we already sent you and jump this other one in line? So we have the rule for that period of time. So there are a number of factors that really can figure in.

And then other times, as I think I alluded to before, there are rules that really affect multiple agencies, and sometimes it can be very hard to find exactly how the puzzle piece fits with different agencies' statutes and regulations, so that can add complexity and time to the rulemaking process.

There can be a trade issue under the WTO that requires significant analysis by counsel. That can take a long period of time.

What I can assure you is that the OIRA staff are really highly efficient and work as quickly as they can. We don't want rules on our desks for longer than the normative time, and we work very hard, and I think it shows in the success we have had over the past couple of years, success that started in the months prior to my arrival at OIRA and that I have been glad to be able to maintain and continue in getting the extended review periods down.

Mr. CARTWRIGHT. May I ask you to share some of your benchmarks with us? You may not have them with you today, but will you send us some of your benchmarks that you have been hitting, as far as measurable goals in reducing the number of rules under review past the 90-day period?

Mr. SHELANSKI. I would be happy to follow up with you, sir.

Mr. CARTWRIGHT. Finally, you talked about complexity as one of the factors. Administrator Shelanski, does OIRA have adequate resources to perform its regulatory reviews? In other words, where complexity is slowing you down, would additional resources help?

Mr. SHELANSKI. You know, when it is a question of complexity, it is really just working through hard issues. I don't think that that is a case where I would point to the need for additional resources. We have been able to do a pretty good job. We have a really hard-working staff. We have been able to retain really excellent people at OIRA.

I think, look, all of OMB, we are a small office overall, has been, I think, straining against resource constraints to do the jobs that it does, so we at OIRA I think are no different from other components within the Office of Management and Budget, but I think we have the tools we need and we have been able to do pretty good job. That is why we have been able to reduce the number of rules under extended reviews, just getting our processes working well and having people work very hard.

Mr. CARTWRIGHT. Well, thank you for that.

Mr. Chairman, I yield back.

Mr. MEADOWS. I thank the gentleman from Pennsylvania.

The chair recognizes the chairman of the Committee on Health Care and Government Relations Subcommittee, Mr. Jordan.

Mr. JORDAN. I thank the chairman.

Mr. Shelanski, Government should be as transparent as possible. Would you agree with that?

Mr. SHELANSKI. Yes, sir.

Mr. JORDAN. I mean, when we make laws, that is why we have debate; that is why we have a Congress; that is why we have elections. We want it to be as transparent as it possibly can be. And that is what OIRA is all about, right? The agencies have certain rules that they put together. You don't necessarily look at the rule itself so much; you look to make sure they did the process right, the transparency process, and they followed what they are supposed to do when they arrived at the rule they arrived at, is that right?

Mr. SHELANSKI. We look very closely at the substance.

Mr. JORDAN. You look closely at the substance as well. But mostly the process, right?

Mr. SHELANSKI. No.

Mr. JORDAN. Both of them? Even better.

Mr. SHELANSKI. Both of them—

Mr. JORDAN. Even better. All right. So the General Accounting Office just issued a report where they talked about the number of agencies who issue rules without public notice and without public comment. The report is entitled Agencies Often Publish Final Actions Without Proposed Rules, dated just last month, February 26, 2015. And in that report they say that the OIRA staff have regularly questioned agencies' use of the good cause exception.

So I just want to make sure I understand this completely. Transparency is the norm; that is what we want. When agencies make rules, they are supposed to have a public notice, public comment period, correct?

Mr. SHELANSKI. Correct.

Mr. JORDAN. All right. But there are exceptions to the Administrative Procedure Act where you don't have to necessarily do public notice and public comment. Is that all accurate?

Mr. SHELANSKI. There are some exceptions, correct.

Mr. JORDAN. Some exceptions. Right. And the GAO is saying we have too many of those, too many times that is happening. This is their report. But they said when it does, your staff has assured GAO, and I am quoting directly from their report, "OIRA staff have regularly questioned agencies when they use the good cause exception." Is that accurate?

Mr. SHELANSKI. So let me—the answer is yes, it is accurate.

Mr. JORDAN. Okay, so I just want to be clear. When agencies say we are not going to do the most transparent way, we are going to deviate around the normal process. There is an exception for not having public notice, public comment. But you look at that when they do those exceptions, correct?

Mr. SHELANSKI. So let me tell you what we do.

Mr. JORDAN. I want to know if that is a yes or no, though, if you could.

Mr. SHELANSKI. There are times when we have a basis for questioning that; there are times when we do not. There are statutes that authorize the use of what are called interim final rules or direct final rules—

Mr. JORDAN. The report says you regularly question agencies' use of good cause exception. So when they deviate from the process, you regularly ask them questions. What I want to know is, in those situations where you don't, is that just a handful of times, is it 10 percent of the time? What is the time?

Mr. SHELANSKI. So the times when agencies seek to get around public comment and not to issue a notice of proposed rulemaking, but to go directly to some kind of final rule, are very rare.

Mr. JORDAN. Okay, very rare.

Mr. SHELANSKI. All right, now, I want to get to the specific example that has just been in the news just this past month. The Bureau of Alcohol, Tobacco and Firearms has a recent proposal to ban certain type of ammunition. Are you familiar with this?

Mr. SHELANSKI. No, sir, I am not.

Mr. JORDAN. Okay. And they have said they are not going to follow the normal process, the most transparent process; they are going to deviate from that and they are not going to have public notice and public comment. And they are citing for good cause, that notice and public procedure are impractical, unnecessary or contrary to public interest. What I want to know is has OIRA given the ATF the thumbs up to follow the exception and not do the norm, the most transparent thing, and have public notice, public comment.

Mr. SHELANSKI. So the first thing I would notice is OIRA does not review all Federal rules, all executive branch rules. There are thousands of such rules. We review about 500 a year.

Mr. JORDAN. That is fine.

Mr. SHELANSKI. It is very possible—

Mr. JORDAN. But I am asking about one in particular. I am asking did you review this. Did you say to ATF, it is okay if you don't follow the normal public notice, public comment?

Mr. SHELANSKI. So it would not be our place to say that to ATF if that rule was even ever submitted to OIRA. I should make clear when an agency does submit a rule to us that it seeks to do by a means other than the standard APA process, that is when we have occasion to question that agency.

Mr. JORDAN. So you have had no influence, no say on ATF's decision not to follow public notice and public comment. Do you expect to have any say in their decision not to follow public notice, public comment?

Mr. SHELANSKI. As I say, I am not familiar with this particular regulation, so I cannot comment.

Mr. JORDAN. Well, lots of Americans are familiar with it, Mr. Shelanski.

Mr. SHELANSKI. But what I will tell you is that any such determination by an agency is judicially reviewable under the Administrative Procedure Act, and lots of Americans, as you put it, would have recourse to the course to challenge that determination.

Mr. JORDAN. That is after the fact. What you are supposed to be is on the front end. I know that; everybody knows after the fact we can take action, but that is costly, that takes more time. The whole idea is that on the front end we are supposed to get it right. That is why I am asking you. Do you plan to check out this rule?

Mr. SHELANSKI. It is not either the role or the scope of OIRA to go to every agency for every rule in the Federal Government and to second-guess their process.

Mr. JORDAN. If I could, Mr. Chairman, then I will stop.

But I am reading from the GAO report which says your staff regularly questions agencies' use of the good cause exception. Here is an agency using the good cause exception and you are telling me we have not questioned them and we never plan to question them, and oh, by the way, if you don't like it, Americans, take them to court.

Mr. SHELANSKI. What I told you was I would look at that very closely if the rule were submitted to OIRA. I don't know if this rule was ever submitted to OIRA. I can't question a rule that has not been submitted to my office.

Mr. JORDAN. We are running in circles here, Mr. Shelanski, and that is the problem.

Mr. SHELANSKI. There is no circle here, sir.

Mr. JORDAN. If the agency says we are not going to submit it to you, then you say, well, we don't have to review it even though they are not being transparent and not following public notice, public comment.

Mr. SHELANSKI. So as I think I made clear, we don't review all Federal rules. What the GAO report is referring to is when we question agencies that have submitted the rule for us to review or where it is a rule worthy of review.

Mr. JORDAN. Well, that is great. That is great. I would love not to have, so they don't even have to give it to the authority who is going to tell them what, and you said in your opening comments we are going to look at the procedure they use and the substance. I disagree with both what the ATF did here, both the procedure and the substantive change. This has been a rule that has been in place since 1986, and they suddenly are just going to change it and there is no review process.

Mr. SHELANSKI. There is a review process. First of all, the agency is responsible for that policy.

Mr. JORDAN. They have already told us what they are doing.

Mr. SHELANSKI. If it is an interim final rule, an interim final rule goes out for public comment after it is enacted, so there is a chance for public comment, and there is judicial review.

Mr. JORDAN. Mr. Chairman, I apologize. Thank you for your indulgence on the time, but we have been running circles around this and this is just not the way it is supposed to work for the American people.

Mr. MEADOWS. I thank the gentleman from Ohio.

We go to the gentlewoman from the Virgin Islands, Ms. Plaskett.

Ms. PLASKETT. Thank you very much, Mr. Chairman, Mr. Chairman, and both Mr. Ranking Members for this hearing.

Good afternoon, sir. I had a question and wanted to get some indication from you about international regulatory cooperation. If you

could just speak a little bit about that and its benefits and how that has worked thus far.

Mr. SHELANSKI. Sure. Thank you very much for your question. I appreciate that.

We have an executive order, Executive Order 13609, that the President issued which gives OIRA a role in international regulatory cooperation. We currently have what I would describe as both formal and informal roles in regulatory cooperation. We have two formal regulatory cooperation councils, one with Mexico and one with Canada, and the objective of that council is to get our agencies working directly with the agencies of our international partners, agency-to-agency, to try to make sure that there are not unnecessary regulatory impediments to trade, commerce, competitiveness, those kinds of things.

So we have a very productive set of working relationships with both of those.

Ms. PLASKETT. And can you cite examples where that has been productive to date?

Mr. SHELANSKI. Sure. With Mexico, for example, there were some very interesting questions about the regulation of nano materials in various kinds of products, including agricultural products, and there were very different approaches in both countries, and through the RRC we have been able to reach, I think, some productive results.

We are also working with Canada currently on a number of issues to ensure that regulations that are pending in agencies here don't get cross-wise with or create difficulties for entities doing business across our border with Canada.

Ms. PLASKETT. So I wanted to bring it a little closer to home, then, to my own waters in the Virgin Islands and wanted to know if the benefit of OIRA being involved in some issues that we have, and that is duplication of agencies in permitting processes. So we have a lot of projects that revolve around our waters, dredging projects, development projects that involve the Army Corps of Engineers, NOAA, EPA, subdivisions in each of those. That duplication and need for everyone to go through these processes costs us hundreds of thousands of dollars a year and the impact economically is enormous when we are not able to meet deadlines for dredging projects, which means that cruise ships can't come in, puts us at competitive disadvantage.

Even now we have a project where the Army Corps of Engineers were needing a permit so that we can move from fossil fuel to being one of the first areas in the Caribbean using LPG, liquid petroleum gas, in the area—I am sorry, propane gas. And the need of duplication between these agencies in coordination is having a horrendous effect on the economy.

Does OIRA become involved in that, and if not, why not, and how could you?

Mr. SHELANSKI. Thank you for that question because you have raised a critical issue and I think an issue that is a very high priority for President Obama's Administration. Permitting reform is a very active process that the Office of Management and Budget is deeply engaged in, and OMB, particularly my colleagues on the

management side, are running a significant interagency process to streamline and reform permitting.

OIRA is available to work on that; it is not really central to the work we do, but we are involved with and certainly encourage that general reform effort. What OIRA does do is when we review regulations that have permitting requirements in them, we look to see whether or not those are unnecessarily burdensome or duplicative. So in the context of reviewing rules, we most certainly do take into account exactly the kind of duplication that you look at and, indeed, part of the retrospective review efforts that we are engaged in with every Federal, every executive branch agency right now are designed to identify and eliminate exactly the kinds of problems that you look at.

But certainly permitting reform is very high on the Administration's and OMB's agenda, and I think real progress is being made.

Ms. PLASKETT. Thank you. When you talked about the retrospective analysis, has there been a notable one that you could give us as an example of retrospective analysis of outdated or inefficient regulations?

Mr. SHELANSKI. Yes. We have a number of such rules. Just to give you an example of a very recent one, the Department of Transportation used to require every truck driver, after every trip, to file an incident report even if there had been no incident. This was costly in terms of systems, paperwork, driver time, and they went back and determined that there was no safety benefit that came from those reports and repealed the report for savings of about \$1.7 billion to the trucking industry. And I think if you stay tuned over the next several months you will see numerous additional things.

Ms. PLASKETT. Thank you very much.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank you.

The chair recognizes the ranking member, Mr. Connolly, for a few more questions.

Mr. CONNOLLY. I thank the chair.

Actually, we may submit some questions for the record, Mr. Shelanski, but one area that bothered me about what you said on how your door is always open and you have to take all-comers, right?

Mr. SHELANSKI. Correct.

Mr. CONNOLLY. Are you open on weekends?

Mr. SHELANSKI. I am working most weekends, but the Federal Government is not open on weekends.

Mr. CONNOLLY. So the hourly wage earner who might have a concern about a pending regulation or a lack thereof, or a view about cost and benefit, he or she has to take time off to avail himself or herself of your door being open. Lawyers get paid for going through your door, but sort of a working man or working woman who might be affected by actions of your office actually kind of don't have the same access, do they?

Mr. SHELANSKI. You know, we have actually had some very interesting meetings where exactly the kinds of people you have described have come in to see us and to tell us their stories. In terms of the access we provide, it may not be as easy to take advantage of for people who live far away or for people who don't have the

means. People can call us; we take telephone meetings. We receive letters. But in terms of our door being freely open to those people, and, in fact, some such folks exactly as you have described have taken advantage of it, I would maintain that we do represent as equal access as it is in our power to provide.

Mr. CONNOLLY. Okay.

Mr. Chairman, rather than continue, given the lateness of the hour, if you don't mind, we would submit some additional questions for the record.

Mr. MEADOWS. I look forward to those.

Mr. CONNOLLY. I thank the chair.

Mr. MEADOWS. I thank the ranking member for his insightful questions.

Let me just close out by following up. The gentleman from Kentucky is here and he actually serves on the House Transportation and Infrastructure Committee. We have had a number of hearings in that committee on the Waters of the USA, on the proposed rule, and I believe it is your testimony here today that they have not officially submitted that to you, is that correct?

Mr. SHELANSKI. That is correct.

Mr. MEADOWS. So you have had no dialogue with them.

Mr. SHELANSKI. I have had no dialogue with the EPA—

Mr. MEADOWS. Informal or formal.

Mr. SHELANSKI. I have had no dialogue whatsoever with the EPA on Waters of the U.S.

Mr. MEADOWS. Okay. How about deliberations?

Mr. SHELANSKI. No deliberations, no discussion.

Mr. MEADOWS. So if we were to ask for all of your records, we would find zero records, emails, nothing with the EPA with regards to that rulemaking or proposed rule.

Mr. SHELANSKI. We concluded review on the proposed rule. The EPA took it from there. The next I will hear about it is when they submit the final rule for review.

Mr. MEADOWS. All right. So let me go back. It gets back to documents. What documents do you actually keep? Because I think we were using the same terminology, but just in different ways.

Mr. SHELANSKI. Okay.

Mr. MEADOWS. We were talking about informal rulemaking, and then I have heard you say that three or four times, but, yet, when I asked the question, you act like you didn't know what it was. So let me be specific, all right?

The GAO has come in and they have found issues with the practice of you reviewing preliminary drafts and doing analysis for agencies before they actually submit it to you, before the time clicks in the for 90 days. Does that sound familiar?

Mr. SHELANSKI. No. What you describe—

Mr. MEADOWS. So you have never done that?

Mr. SHELANSKI. Let me explain.

Mr. MEADOWS. Because I will get the GAO in here to sit right beside you, because they believe that you have.

Mr. SHELANSKI. Look, I can testify to what has happened since I have been administrator of the office, and I can tell you what does happen and what I haven't seen happen. What does happen is there are times that agencies will come to us in advance of sub-

mitting their rulemaking package and say do we have the right components of a regulatory impact analysis? Can you look at the cost-benefit analysis that we are doing and tell us if we are going to need to do more?

Mr. MEADOWS. But that is before they have actually proposed the rule, so the answer would be exactly oppose of what you just answered. The answer would be yes to that question.

Mr. SHELANSKI. But that is not a review of the rule and a whole package, and sort of a preliminary—

Mr. MEADOWS. Well, let me just say your students at school, at Georgetown, if they answered your exam the way that you are answering my questions, I would venture to say you would give them an F.

Mr. SHELANSKI. No, I would give them an A for being precise. I am trying to explain to you what it is we do and what we don't do.

Mr. MEADOWS. All right. So is your testimony here today that there are no documents, no communication that has taken place between the EPA, either informal or formal, in that rulemaking process? That is your testimony?

Mr. SHELANSKI. My testimony, sir, is that since we concluded review on the notice of proposed rulemaking, I have had no communication with the EPA on their final—

Mr. MEADOWS. All right, so let me make it clear, then. Will you send us the documents with any aspect that you have been involved with the EPA on that particular rule? Will you send those documents to the committee for their review, yes or no?

Mr. SHELANSKI. I will not send to the committee documents that were part of the deliberative process where the proposed rule was under review.

Mr. MEADOWS. All right. Are you aware that, by statute, you are required to do that?

Mr. SHELANSKI. No, sir, I am not aware that by statute I am required—

Mr. MEADOWS. OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

Mr. SHELANSKI. So that is not a statute, sir, that is the executive order.

Mr. MEADOWS. Executive order. So you are only going to comply with part of the executive order.

Mr. SHELANSKI. That executive order has been interpreted across all administrations, Republican and Democrat, to embody the deliberative process exception of staff level communications, and we do not disclose those to the public.

Mr. MEADOWS. All right.

Mr. SHELANSKI. It is to protect the integrity of the process, the—

Mr. MEADOWS. I don't see how it does that. I mean, with all due respect, I don't see how. Your particular function is to protect the American people. So how, with you being secretive, does that protect the American people?

Mr. SHELANSKI. It protects staff and their ability to do their jobs.

Mr. MEADOWS. Is that your primary responsibility? When you were put into place, is that your primary responsibility?

Mr. SHELANSKI. My primary responsibility is to ensure good analysis, and, frankly, we wind up with less good analysis and less good work if staff feel that every communication that they have back and forth with an agency is going to be put under the microscope, pulled out of context.

Policy level official communications, policy level communications between me and the head of an agency, those are disclosable. But staff level deliberative process we do not disclose. And I would just emphasize this is across Republican and Democratic administrations that the executive order has been so interpreted.

Mr. MEADOWS. All right, we will make one final request, and it is this. Those agencies who have come to you to ask for your input on a proposed rule that they may be in the process of working, in this pre-that the GAO talked about, we would like a list of all of those.

Mr. SHELANSKI. I am not sure I have a list, sir, because we only do this when the agency asks to come brief us; and I don't know that I maintain any such list.

Mr. MEADOWS. All right. So, then, with the example that Mr. Jordan gave with the ATF—

Mr. SHELANSKI. As I told Mr. Jordan—

Mr. MEADOWS. So should we have the ATF come back here and testify at how they are taking the good, I guess good common sense exception, should we have them come back to testify, since obviously they have bypassed you?

Mr. SHELANSKI. As I thought I made clear to Mr. Jordan, I am not familiar with the rule that he was referring to. We don't see all 3500 rules that the Federal Government passes, so I have no comment or knowledge about what the ATF did—

Mr. MEADOWS. So how do you decide which rules to review?

Mr. SHELANSKI. Well, when the rules are submitted to us, we make a determination—

Mr. MEADOWS. So every agency, they can decide on their own whether to submit them to you?

Mr. SHELANSKI. No. If a rule is not significant, then it is up to the agency to do what they want.

Mr. MEADOWS. But I will remind you, as you know, the individual and employer mandate, both of those rules were seen as insignificant. Is that your testimony, that you would concur that they are insignificant?

Mr. SHELANSKI. Which rules are you referring to?

Mr. MEADOWS. The rules that are still outstanding with regards to the employer and individual mandate.

Mr. SHELANSKI. Are you talking about the IRS regulation?

Mr. MEADOWS. With the Affordable Care Act.

Mr. SHELANSKI. Well, if you are referring to the IRS regulations,—

Mr. MEADOWS. Yes.

Mr. SHELANSKI.—by longstanding practice, we do not review IRS interpretive regulations.

Mr. MEADOWS. So why don't you just say you are not reviewing it, instead of saying it is insignificant?

Mr. SHELANSKI. I am not saying that it is insignificant; I am saying we don't review it.

Mr. MEADOWS. I thank the gentleman, both ranking members, and each of the committee members who have come today, and, with this, this hearing is adjourned.

[Whereupon, at 4:11 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Questions for the Record
Subcommittee on Health Care, Benefits and Administrative Rules
Subcommittee on Government Operations

Hearing: "Challenges Facing OIRA in Ensuring Transparency and Effective Rulemaking"

CHAIRMAN JIM JORDAN

In your testimony, you justified OIRA's failure to issue a single "return letter" to send deficient rules back to agencies under this Administration because you have been "very successful in getting agencies ... to withdraw rules that simply were not workable."

- 1. Can you explain why, after receiving the U.S. Small Business Administration Office of Advocacy's October 1, 2014 comment letter and industry requests such as the National Federation of Independent Business, September 24, 2013 request to withdraw the "Waters of the United States" rule- detailing significant problems with the rule and its development- you did not issue a return letter for its reconsideration and it was not withdrawn?**
 - a. How, with regard to this rule, do you justify OIRA's failure to respond to these comments and requests?**
 - b. Did OIRA make any suggestions to the EPA or Army Corps for the rule's revision or withdrawal to respond to concerns detailed in these communications, or other concerns expressed to OIRA about the rule?**

The letters referenced in your question are concerned with compliance with the Regulatory Flexibility Act ("RFA") by EPA and the US Army Corps of Engineers (Corps). The SBA Advocacy letter was addressed to EPA and the Corps — not the Office of Information and Regulatory Affairs (OIRA). Moreover, the letter was sent after OIRA had concluded its review of the proposed rule and after the proposed rule had been published in the Federal Register. Any questions regarding the agencies' response to that letter should be directed to EPA and the Corps.

Regarding the National Federation of Independent Business ("NFIB") letter, NFIB raised several concerns regarding the rule's potential impact on small businesses and asked that OIRA return the rule to EPA so that the agency could fulfill its obligations under the RFA, including the obligation to convene an SBAR Panel.

Under the RFA, EPA is required to prepare an initial regulatory flexibility analysis and convene an SBAR Panel unless it can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. EPA did provide such a certification, and thus did not prepare an analysis under the RFA; however, due to the substantial interest this rule has received, EPA and the Corps sought early and wide input from representatives of small entities. Such voluntary outreach is consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This outreach process enabled the agencies to hear directly from small entity representatives, at a very preliminary stage, about how they

should approach the rule and ideas for minimizing the impacts of the rule on small entities. The agencies prepared a report summarizing their small entity outreach, the results of this outreach, and how these results informed the development of the proposed rule, and placed it in the rule docket.

2. **Do you think it is appropriate to return rules to agencies for political purposes, such as OIRA's September 2, 2011 return of the EPA Ozone proposal because the President did not support finalizing such a costly and controversial rule during an election year?**

OIRA strives to ensure a rigorous and efficient review of rules consistent with Executive Orders 12866 and 13563. EO 12866 outlines a longstanding process for returning a rule, and OIRA's actions are consistent with that process when returning rules. As it has done throughout my time as Administrator, OIRA will continue to ensure that rules undergo a comprehensive and efficient review consistent with EO 12866's directives.

In your testimony regarding OIRA's review of agency justifications for using the "good cause exception" under the Administrative Procedure Act (APA), you stated that "the times when agencies seek to get around public comment and not to issue a notice of proposed rulemaking, but to go directly to some kind of final rule, are very rare." However, in a 2012 study, GAO found that agencies did not publish notice of the proposed making for about 35 percent of major rules and 44 percent of non-major rules, citing the "good cause" exception for a majority of those rules.

1. **Can you elaborate on the meaning of "very rare" in your comments to the Committee? Do you consider 35 to 44 percent of all rules to be "very rare?"**

In my experience, because the good cause exemption under the APA is judicially reviewable, it is rare for agencies to not proceed with notice and comment rulemaking in the absence of a clear justification for doing so. In many cases, that justification has been established by Congress; for example, statutes such as the Farm Bill explicitly authorize or even direct agencies to pursue policy changes through interim final rules.

2. **In its review, the GAO also found that agencies do not always justify their use of exceptions to issue direct final rules under the APA. Does OIRA review agency justifications for all significant rules that are issued under such exceptions? Does OIRA ever review such justifications if the rule is not submitted to OIRA by the rulemaking agency?**

OIRA reviews rules consistent with Executive Orders 12866 and 13563. For those rules that are significant, and thus subject to review, OIRA reviews all relevant aspects of the rule, including justifications for invoking good cause. OIRA does not review rules that are not submitted for its review.

Recent reports indicate behavior by the Administration to hamper transparency in the rulemaking process and use OIRA to aggressively advance its political agenda. While touting itself as "the most transparent Administration in history," the Obama

Administration has gone out of its way to avoid protections afforded by law intended to prevent overreaching and burdensome federal regulation.

An October 7, 2013 report entitled "Length of Rule Reviews by the Office of Information and

Regulatory Affairs" authored by Curtis Copeland catalogues reports by senior agency officials of political influence as a reason for rule review delays, specifically citing White House concerns about issuing costly or controversial rules during an election year. Leading up to the 2012 Presidential election, evidence shows that the White House instructed OIRA not to complete reviews and finalize rules before the New Year: in 2012, OIRA review averaged 80 days, but jumped to an incredible 140 days in the first half of 2013- almost three times the average from 1994 to 2011. As of January 2013, an impressive 83 rules had been sitting at OIRA for at least six months. In contrast, between 1994 and 2011 the average length of OIRA review was only 50 days, with 62 being the highest average in any year. The spike in 2013 highlights the large number of rules OIRA held onto to avoid publishing before the 2012 election.

- 1. How many times has the White House or any component within the Executive Office of the President (EOP) communicated with OIRA regarding the level or nature of OIRA's review with regard to specific rules, including changes to otherwise routine review procedures?**
- 2. What direction does OIRA take from the White House or EOP with regard to when OIRA review may be completed?**
- 3. How are communications between the White House or EOP and OIRA regarding specific rules or OIRA's review documented? If they are not documented, why not?**
- 4. Can you commit that OIRA will not delay or alter its review of any rule because of political influence by the White House or EOP?**

OIRA strives to ensure a rigorous and efficient review of rules consistent with EO 12866's directives. During my time as Administrator, no EOP component—including the White House office—has co-opted OIRA's central role under those orders. Through the interagency review process, agencies across the Executive Branch, including EOP components, have the opportunity to review and comment on significant rules, including plans about the release of rules, consistent with EO 12866 and 13563. OIRA's process helps to ensure that reviews are completed in time, such as to meet a court or consent-decree deadline or to address an urgent situation in a timely fashion. Effective regulatory planning like this is a normal and responsible part of the regulatory process.

Consistent with EO 12866, OIRA maintains publicly available logs that contain information pertinent to rules under review, including information about written and oral communications between OIRA personnel and any individual not employed by the Executive branch of the Federal Government. In April 2014, for example, we updated, simplified and made searchable our log of meetings with outside parties and the written information provided at those meetings,

which can be found at www.reginfo.gov. In addition, OIRA makes available relevant documents exchanged between OIRA and the issuing agency during review.

As it has done throughout my time as Administrator, OIRA will continue to ensure that rules undergo a comprehensive and efficient review consistent with EO 12866's directives.

This same report provided that informal reviews of rules- agencies sharing drafts of rules with, and seeking input from, OIRA before proposal and submission for review- have become more common under the Obama Administration, with senior agency employees indicating that "all or most of their recent rules were reviewed informally before being formally submitted" and for some rules, even "the bulk of the OIRA review process appears to occur before formal submission."

1. **Does OIRA record or document the communications or drafts shared between agencies and OIRA at this stage of rule's development?**
2. **Under what authority does OIRA review rules or involve itself at this stage of the rulemaking process?**
3. **Can you produce a list of all rules currently under such "informal review" at OIRA? If OIRA does not maintain a list of all rules that have been sent by federal agencies, why not?**

As I mentioned in my testimony, and as discussed in this report, as part of the normal interagency review process OIRA often receives briefings from agencies that include details of a rulemaking before the rule is submitted for review under EO 12866 and 13563. Such briefings do not constitute review, and we do not track or keep a list of rules for which we have received such a briefing. Any rule subject to EO 12866 and 13563 undergoes OIRA review consistent with the requirements of the EOs, regardless of whether a briefing on that rule was previously provided to OIRA.

OMB, through OIRA, is required to publish an annual cost and benefit report in conjunction with the release of the President's Annual Budget under the "Regulatory Right-to-Know Act." The President released his Fiscal Year (FY) 2016 Budget on February 2, 2015, yet OIRA has yet to publish its report for FY 2014.

1. **When can we expect this report?**
2. **How do you justify providing estimates of benefits and costs for only *seven* regulations in your FY 2013 Report as a representation of the entire regulatory system's impact on the U.S. economy?**
3. **The American Action Forum conducted an analysis of final rules that monetized costs in FY 2013, and while the benefits met OIRA's reported estimates, costs were roughly three times higher than those reported by OIRA. How do you explain such a large discrepancy in costs reported by your office, but not benefits?**

4. **The Competitive Enterprise Institute reported that in comparison to OIRA's reported \$128.7 billion in costs during FY 2013, the annual cost of federal regulation is actually closer to \$1.882 trillion when taking into account compliance and indirect costs shouldered by the taxpayer. According to a study commissioned by the National Association of Manufacturers, the total cost of federal regulations in 2012 was as high as \$2.028 trillion. How do you explain this sizeable discrepancy? Do you believe OIRA's report accurately depicts the real cost of regulation felt by taxpayers if it does not consider compliance and indirect costs?**

OIRA is working on this report and I expect it to be released soon. The report provides agency estimates of the costs and benefits of Major and Economically Significant regulations issued within the last 10 fiscal years, with an emphasis on the last fiscal year preceding the report.

I have not studied the other reports cited in this question in detail; however, a short review of them suggests significant methodological issues that lead to questions about their accuracy. For example, some reports of the American Action Forum seem to have added the impact of both proposed and final rules together when reporting overall totals, which could lead to double counting.

In your testimony, you reference President Obama's Executive Order 13563, which directs agencies to implement plans to retrospectively review their regulations, with a focus on rules that were "outmoded, ineffective, insufficient, or excessively burdensome." The left-leaning Progressive Policy Institute recently testified in front of the Senate Homeland Security and Government Affairs Committee that the President's attempts at promoting retrospective review have fallen short of expectations. Specifically, of all major rules issued by agencies in 2014, none of the rules included a plan for future retrospective review and only two were identified as products of retrospective review under the President's Executive Order. Additionally, the President's plan does not work because agencies have a vested interest in justifying their original decisions, and even if costs and benefits of individual regulations are justified, "the total accumulation of regulation can create a heavy burden on innovation." Further, it is well-known that some agencies simply incorporate their current rulemaking activities into their retrospective review plans, defeating the purpose of ferreting out old and inefficient regulations.

1. **How does OIRA ensure that agencies are not limiting their retrospective review to new regulatory actions, and instead focus on "outmoded, ineffective, insufficient, or excessively burdensome" rules, per the President's Orders?**

Agencies prioritize their reviews of existing regulations based on their respective agency goals and priorities. Executive Order 13610 states that "agencies shall give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment." It further states that "agencies shall give consideration to the cumulative effects of their own regulations, including cumulative burdens."

Furthermore, Executive Order 13610 states that "agencies shall invite, on a regular basis (to be determined by the agency head in consultation with the Office of Information and Regulatory

Affairs (OIRA), public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations.” Agencies regularly report on the status of their retrospective review efforts to OIRA, including any reform efforts that the public suggested. Twice a year agencies submit their retrospective review reports to OIRA for review and the all of the most recent reports are publically available here:

<https://www.whitehouse.gov/omb/oira/regulation-reform>.

Agency reports prior to Spring 2015 are available on agency open government websites.

In a January 2015 briefing, the GAO informed this Committee that they are concerned over the growing list of unfulfilled recommendations made to OIRA and OMB. To date, OIRA has implemented only one out of 12 GAO recommendations ranging the past two decades to improve transparency in OIRA's review processes.

- 1. Can you explain why OIRA and OMB have not made progress on GAO recommendations to improve transparency in OIRA's review processes?**
- 2. Can you provide this Committee with a list of the status of their implementation?**

OIRA has adopted many of the GAO recommendations to further improve transparency it its review process. My office has ongoing discussions with GAO on these issues and would be happy to continue to work with them to assess the status of our implementation of their recommendations where appropriate.

CHAIRMAN MARK MEADOWS

On November 20, 2014, I partnered with other Members of the U.S. House of Representatives, including Chairman Chaffetz, in sending a letter to Office of Management and Budget Director Shaun Donovan. This letter raised concerns regarding Director Donovan's public statements in support of the Environmental Protection Agency's (EPA) proposed Clean Power Plan (CPP) regulation.

- 1. As of the date of the hearing regarding the Office of Information and Regulatory Affairs (OIRA), OMB has failed to provide a response to the questions raised in this letter. Is it standard for OMB to take over 113 days to respond to Members of Congress? If not, why is there a delay in this case?**
- 2. If the questions from this letter are not clearly addressed or provide the details necessary to put Members' concerns at ease, can we have your firm commitment to come before the Committee to provide the necessary clarity?**
- 3. Can the OMB ensure the Congress will receive more timely responses going forward?**

I would refer you to the response letter OMB provided on April 8th, 2015.

- 4. According to the EPA, the proposed CPP regulation will cost up to an additional \$8.8 billion, while estimates from the U.S. Chamber estimate the proposed rule will cost the U.S. economy over \$50 billion annually. The EPA also confirmed that its proposed CPP rule will have a "negligible" effect on global temperatures. Do you believe such public endorsements of the proposed EPA rule are consistent with EO 12866 directive to ensure each regulation is tailored to "impose the least burden on society," which must take "the costs of cumulative regulations" into account?**

As I stated in my hearing, I do not think there is any impediment to OIRA's ability to review EPA's Clean Power Plan draft final rule under EO 12866 and 13563, once EPA submits that final rule for interagency review.

- 5. In addition to the requests in the Nov. 20th letter, could you please provide all documents and directives since Director Donovan's confirmation detailing how OIRA should evaluate regulations, their total costs, and the costs of the benefits? These should include, but are not limited to, those documents and directives used in the development of proposed or final regulations issued by the EPA.**

The guidance OIRA has issued to agencies regarding cost-benefit analysis predates Director Donovan's time at OMB. Such guidance is available at

https://www.whitehouse.gov/omb/inforeg_regmatters.

RANKING MEMBER MATT CARTWRIGHT

- 1. A November 2011, White Paper from the Center for Progressive Reform entitled "Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety and the Environment" found that while the EPA rules made up only 11 percent of all reviews by OIRA, 41 percent of all OIRA meetings targeted EPA rules. EPA rules were changed at a significantly higher rate-84 percent-than those of other agencies-65 percent-over the whole ten-year period. Can you explain this discrepancy?**

EPA rules are often large and complex, and OIRA therefore receives many meeting requests from stakeholders with a range of perspectives on those rules. Changes to rules during the interagency review process can occur for a variety of reasons, including as a result of interagency comments that bring to bear expertise from various parts of the Government. OIRA receives significant interagency comments on these large, complex rules from other Federal agencies whose work and policies may be affected by a particular EPA rule. It is thus not surprising that EPA rules may change as a result of the OIRA review process.

RANKING MEMBER GERALD E. CONNOLLY

1. In September 2014, in a report on agencies' compliance with broadly applicable directives and guidance related to significant Federal rulemaking, the U.S. Government Accountability Office (GAO) made recommendations for executive action to improve transparency in the rulemaking process by providing agencies and the public with information on why regulations are considered to be significant regulatory actions, and promoting consistency in the designation of rules as significant regulatory actions (GAO-14-714). GAO recommended that the Director of the Office of Management and Budget (OMB) work with agencies to clearly communicate the reasons for designating a regulation as a significant regulatory action. Specifically, GAO recommended that OMB should:
- Explain OMB's reason for any changes to an agency's initial assessment of a regulation as non-significant; and
 - Encourage agencies to clearly state in the preamble of final significant regulations the section of Executive Order 12866's definition of a significant regulatory action that applies to the regulation.

Please describe in detail what progress OMB made in implementing these recommendations and provide an estimate of the date by which OMB anticipates the recommendations will be fully implemented.

OIRA is still looking at the recommendations of this report and considering whether further action is needed. I would clarify, however, that under current policies agencies may provide detailed information on significance determinations in their rulemaking preambles. In addition, agencies should clearly identify whether a rulemaking is "economically significant" under Section 3(f)(1) of Executive Order 12866, which triggers more robust analytical requirements described in detail in OMB Circular A-4.

2. In April 2014, GAO issued three recommendations to OMB that would help improve agencies' retrospective regulatory review processes and reporting and strengthen linkages between retrospective reviews and agency performance management (GAO-14-268). Specifically, GAO recommended that the Administrator for the Office of Information and Regulatory Affairs (OIRA) work with regulatory agencies to implement existing guidance, and update guidance where needed, to improve the reporting of outcomes in their retrospective regulatory review plans by taking actions such as:
- Publishing a link to updated plans, which lists recent results and anticipated outcomes, on the White House website;
 - Submitting evidence that agencies listed updates of their plans on their "Open Government" web pages;
 - Providing more comprehensive information on completed reviews in agencies' most recent plans and progress reports by ensuring the most recent published

plan contains a complete accounting of all completed reviews rather than expecting readers to review multiple plans, and including the supporting analysis and data for results by listing a link or citation to the related documentation;

- **Ensure that the contributions made by regulations toward the achievement of agency priority goals (APG) are properly considered and improve how retrospective regulatory reviews can be used to help inform assessments of progress toward these APGs by directing in guidance that agencies take such actions as:**
 - **Identifying whether a regulation contributes to an APG expected to be reviewed by management as one of the criteria for prioritizing retrospective analyses and for the timing of these analyses;**
 - **Once an agency prioritizes a retrospective analysis based, in part, on its support of an APG, improving the usefulness of that analysis by examining regulations that collectively contribute to the goal in the scope of the review as appropriate; and**
 - **Ensure that OIRA, as part of its oversight role, monitor the extent to which agencies have implemented the guidance on retrospective regulatory review requirements outlined in the related executive orders and confirm that agencies have identified how they will assess the performance of regulations in the future.**

Please describe in detail the progress OMB has made implementing these recommendations aimed at strengthening linkages between retrospective reviews and agency performance management, and include an estimate of the date by which OMB expects the recommendations will be fully implemented.

OIRA has worked expeditiously to be responsive to the GAO concerns about the progress made on retrospective review. The Spring 2015 reports are all centrally available on OIRA's website (<https://www.whitehouse.gov/omb/oira/regulation-reform>) in addition to being published on agency Open Government websites. Furthermore, OIRA has made efforts to streamline agency reporting on retrospective review so that reports are consistent across agencies and completed retrospective review initiatives are noted in the reports.

Thus far, agency retrospective review efforts have provided significant savings for the American people. Since 2011, the efforts have resulted in finalized initiatives expected to achieve \$20 billion in savings over five years. OIRA anticipates making significantly more progress in this effort over the next 18 months of the Administration and will have further progress updates in July when the next round of reports are received from agencies.

- 3. Executive Order 13609, issued in May 2012, tasked the Regulatory Working Group (RWG), chaired by OMB's Administrator of OIRA, with enhancing coordination and issuing guidance to agencies on international regulatory cooperation. In August 2013, GAO reported that, according to OMB officials, the RWG was developing guidance to implement the executive order (GAO-13-588). To ensure that U.S. agencies have the necessary tools and guidance for effectively implementing international regulatory cooperation, GAO recommended that the RWG, as part of the forthcoming guidance on implementing Executive Order 13 609, should establish one or more mechanisms, such as a forum or working group, to facilitate staff level collaboration on international regulatory cooperation issues and include independent regulatory agencies.**

What is the status of the RWG's guidance to agencies on implementing Executive Order 13609 and the implementation of GAO's recommendation?

Executive Order 13609 calls on the Regulatory Working Group to issue guidelines on the applicability and implementation of the Executive Order. Through an extensive interagency process involving members of the Regulatory Working Group—which, for purposes of this Executive Order, operates by consensus—we have made significant progress in developing guidelines that will address a number of responsibilities that the Executive Order gives to the Regulatory Working Group and to agencies. These responsibilities include coordinating (1) international regulatory cooperation activities that are reasonably anticipated to lead to significant regulatory actions; (2) significant and cross-cutting international regulatory cooperation activities, and (3) the promotion of good regulatory practices. We anticipate that the guidelines will be finalized this spring.

In addition, OIRA has been hosting monthly, staff-level meetings of an International Regulatory Cooperation Committee, which serves as a key coordinating mechanism for activities of the Regulatory Working Group covered by the Executive Order. These meetings have facilitated interagency coordination on a number of international regulatory cooperation activities, including the work underway in the U.S.-Canada Regulatory Cooperation Council and U.S.-Mexico High Level Regulatory Cooperation Council.

- 4. In December 2012, GAO reported that agencies did not publish a notice of proposed rulemaking (NPRM), enabling the public to comment on a proposed rule, for about 35 percent of major rules published from 2003 through 2010. GAO found that agencies often requested comments on those major final rules issued without a NPRM, but the agencies did not always respond to the comments received.**

To better balance the benefits of expedited rulemaking procedures with the benefits of public comments that are typically part of regular notice-and-comment rulemakings) and to improve the quality and transparency of rulemaking records, GAO recommended that the Director of OMB, in consultation with the Chairman of the Administrative Conference of the United States (ACUS), issue guidance to encourage agencies to respond to comments on final major rules, for which the

agency has discretion, that are issued without a prior notice of proposed rulemaking. In comments on the draft report, OMB stated that it did not believe it was necessary to issue guidance on this topic at that time.

What is the current status of implementation of this recommendation?

If OMB has not taken any action, please provide a detailed justification as to why OMB appears to believe that agencies should not be encouraged to respond to comments received on final major rules that are issued without prior notice and opportunity for comment.

In general, OMB encourages agencies to conduct notice and comment rulemaking, and that includes finalizing rules for which agencies issued interim final rules. OIRA is still looking at the recommendations of the GAO report and determining whether further action is warranted, including whether any formal guidance to the agencies is necessary, the development of which can be resource intensive. Furthermore, OMB stated in its response to this report that the rulemaking stage an agency wants to pursue (e.g., NPRM, final, IFR, etc.) is a legitimate subject of interagency review.



September 24, 2013

Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: EPA's Definition of "Waters of the United States" Under the Clean Water Act Rule

The National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center submit this letter to voice serious concerns regarding the U.S. Environmental Protection Agency's (EPA) adherence to certain procedural requirements on its rule, "Definition of "Waters of the United States" Under the Clean Water Act (CWA). This proposed rule was submitted to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management Budget (OMB) for review on September 17.

We believe the EPA has failed to meet its statutory obligations under the Regulatory Flexibility Act (RFA) and its amending law, the Small Business Regulatory Enforcement Fairness Act (SBREFA). Accordingly, we request that OIRA immediately return the proposed rule to the agency so that these critical obligations can be met.

NFIB is the nation's leading small-business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent-business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Small Business Legal Center also works to educate small business owners on their rights and of significant developments in the law, while monitoring regulatory developments that concern the small business community.

EPA's Statutory Obligations

In enacting the RFA in 1980 and SBREFA in 1996, Congress sought to address the disproportionate burden faced by small businesses complying with federal regulations. Under the RFA and SBREFA, if a rule will have a "significant economic impact on a substantial number of small entities" EPA is required to perform an initial regulatory flexibility analysis (IRFA) at the proposed rule stage and, prior to submitting the proposed rule to OIRA for review, must convene a Small Business Advocacy Review (SBAR) panel. These panels involve representatives of EPA, the U.S. Small Business Administration's Office of Advocacy (Advocacy), OIRA, and small entities. The purpose of the

panel process is to collect information and feedback from the small entity representatives on different regulatory approaches being considered by the agency so that the agency can find less onerous ways to regulate small entities while still achieving the goal of its regulation.

In this instance, EPA has submitted a rule to OMB that will have clear significant economic impact on a substantial number of small entities — virtually all small businesses — without conducting an IRFA or convening an SBAR panel. The only way EPA can perform this action is to certify the rule will not have such an effect, and it must provide a factual basis for doing so. Though we expect EPA to make this argument when the proposed rule is published for public comment in the *Federal Register*, as this letter will explain there is no justifiable way EPA can claim this rule will not have a significant economic impact on a substantial number of small entities.

For this reason, the proposed rule should be returned to EPA immediately so it can conduct the required IRFA and SBAR panel.

The Proposed Rule's Clear Significant Impact on Many Small Businesses

NFIB believes the proposed rule EPA sent to OIRA is substantially similar to its controversial guidance document that languished at OIRA for more than 18 months before being withdrawn the same day the proposed rule began review. On November 16, 2012, NFIB sent a letter to OIRA detailing at length our concerns that the guidance would have serious negative impacts on the small business community (attached). For brevity's sake, we will only summarize those concerns below. However, the concerns in that letter make clear that EPA should not have submitted the rule for OIRA review without first conducting an IRFA and SBAR panel. EPA plainly has not met its obligations to understand how this rule will affect small businesses.

The EPA is pursuing a significant expansion of federal jurisdiction that will necessarily exert more government control over private landowners, which includes small business owners. As a result, it will have severe practical and financial implications for many. If a portion of a property is deemed a jurisdictional wetland, the owner cannot make use of that segment of his or her property. Indeed, the owner will face devastating fines of up to \$37,500 per day if he or she begins to develop that section of the property.

Consequently, most landowners — especially small businesses — will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. As of 2002, the average CWA permit cost over \$270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and they can neither afford necessary permits nor legal representation to challenge improper jurisdictional assertions.

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their

properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years; however, the regulated community is greatly concerned that EPA aims for a dramatic shift toward an even more aggressive jurisdictional reach. As a result, landowners are understandably concerned about the potential for EPA to use the proposed rule to justify jurisdictional assertions.

NFIB already receives questions and concerns from small business owners who are worried about whether EPA has jurisdiction over their properties. And we expect to hear from many more concerned individuals if the proposed rule is eventually promulgated and grants EPA vast new authority. Indeed, if any amount of water rests or flows over a property — at any point during the year — the owner may have cause for concern that the agency might assert CWA jurisdiction.

Unfortunately the proposed rule will likely do nothing to make CWA jurisdiction more clear for these property owners, but will instead only raise new concerns for them. If they want real counsel as to whether it is advisable to develop or make use of these sections of their property, they will have to pay for expert advice, which can be expensive and cost prohibitive. But, the only way to have definitive clarity is to seek a formal jurisdictional determination from the EPA and the Army Corps, which costs more money and further delays development plans.

In the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. And that is a risk most reasonable individuals would be unwilling to take. Indeed, they face ruinous fines of up to \$37,500 per day if they are mistaken. And for this reason any property that might be viewed as containing a jurisdictional wetland will be greatly devalued.

OIRA Should Return the Proposed Rule to EPA Immediately

For these reasons, we ask that OIRA return the rule to EPA so that the agency can perform the required actions. Under SBREFA, an agency's failure to meet its obligations under the RFA is judicially reviewable. Therefore, EPA is jeopardizing this entire rulemaking by falsely certifying that this rule will have no significant economic impact on a substantial number of small entities.

NFIB is not asking EPA to abandon this rulemaking. We simply request that the agency study this proposed rule's impact on small businesses as required by law.

NFIB appreciates OIRA's time and consideration of this letter. For further information please contact Daniel Bosch, NFIB's manager of regulatory policy at 202-314-2052 or dan_bosch@nfib.org, or Karen Harned, executive director of the NFIB Small Business Legal Center at 202-314-2061 or karen_harned@nfib.org.

Sincerely,



Susan Eckerly
Senior Vice President
Public Policy



November 16, 2012

Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Guidance on Identifying Waters Protected by the Clean Water Act

The National Federation of Independent Business (NFIB) submits this letter to voice concerns, over the proposed guidance from the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers on identifying waters protected by the Clean Water Act ("guidance"). The guidance is currently pending final approval at the Office of Information and Regulatory Affairs (OIRA) at the Office of Management Budget (OMB). We write here to strongly caution against approving the guidance in its current form because it will adversely impact the small business community.

NFIB is the nation's leading small-business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent-business owners who are located throughout the United States.

The guidance purports to expand federal jurisdiction under the Clean Water Act (CWA). This should raise serious concerns for OIRA for three reasons: (1) the guidance will require the EPA and the Army Corps to assert CWA jurisdiction over many thousands of properties, which will therein impose heavy economic costs on property owners seeking to develop their properties, or will entirely discourage economic development; (2) the guidance—in expanding CWA jurisdiction—will place a cloud upon the title of countless other properties, therein chilling economic development and greatly devaluing properties as the regulated community struggles to determine whether federal agencies will allow development; and (3) federal implementation of the guidance will result in tremendous new liabilities for the federal government and the national budget.

The Guidance Expands Federal Jurisdiction

Though we fully recognize the importance of the CWA's goal of eliminating pollutant discharges into the waters of the United States, we have serious objections to the proposed guidance because it will expand CWA jurisdiction—beyond the constitutional limits recognized in *Rapanos v. United States*, 547 U.S. 715 (2006). Under the new guidance the EPA and the Army Corps will assert newly expanded jurisdiction over properties all across the country. As we will explain in further detail, the economic impact from this will be severe. And landowners of modest means—especially small business owners and ordinary individuals—will be hardest hit because they lack the financial resources to challenge jurisdictional assessments and or to seek necessary permits.

As Justice Alito recently noted in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), the "reach of the Clean Water Act is notoriously unclear." This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. See *United States v. Riverside Homes, Inc.*, 474 U.S.

121 (1985); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715. But the exact reach of the CWA remains a murky question—so much so that some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland. See Jonathan Adler, Wetlands, Property Rights, and the Due Process Deficit, *Cato Supreme Court Review*, 141 (2012). Yet we contend here that the guidance does nothing to offer predictability in jurisdictional assessments and—more fundamentally—contravenes Supreme Court precedent.

CWA Jurisdiction Under Rapanos

The CWA prohibits the discharge of pollutants into “navigable waters” and defines those waters as the “waters of the United States.” But, the Supreme Court has repeatedly rebuffed overly expansive interpretations of “waters of the United States.” Most recently in *Rapanos*, the Supreme Court made clear that jurisdictional wetlands must have some connection or nexus to “traditional navigable waters.”

Unfortunately, the Court offered two distinct tests for determining whether there is a sufficient connection or nexus to satisfy the constitutional requirement that CWA regulation bear some connection to interstate commerce. Under the plurality’s test, CWA jurisdiction may only be established where there is a continuous surface connection from traditional navigable waters, such that it is difficult to determine where the water body ends and the wetland begins. *Rapanos*, 547 U.S. at 742. By contrast, Justice Kennedy’s test would instead extend CWA jurisdiction to any wetland with a significant nexus to navigable waters. According to Justice Kennedy:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.”

Id. at 780.

To date the federal appellate courts are split as to which test is controlling. The Seventh, Ninth and Eleventh Circuits hold that Justice Kennedy’s “significant nexus” test controls. *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robinson*, 521 F.3d 1319 (11th Cir. 2008). Whereas the First and Eighth Circuit hold that jurisdiction may be established under either test. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Baily*, 571 F.3d 791 (8th Cir. 2009). And at least one district court has held that the plurality’s “continuous surface connection” test is controlling. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

The Federal Response to Rapanos

In the wake of *Rapanos*, the regulated community, and regulators alike, struggled to make sense of the fact intensive “essential nexus” and “continuous surface connection” tests. To assist regulators in making jurisdictional assessments, the EPA and the Army Corps released a guidance document in December of 2008. Now, the EPA and the Army Corps seek approval of a new guidance—less than five years later.

By comparison, the 2008 guidance was much more conservative than the newly proposed 2012 guidance. Whereas the 2008 guidance was mostly faithful in defining the contours of CWA jurisdiction in accordance with the *Rapanos* tests, the new 2012 guidance liberally mischaracterizes the *Rapanos* tests in order to justify more expansive jurisdictional assertions. Accordingly NFIB opposes the 2012 guidance because it exceeds federal authority.

The 2012 Guidance Exceeds Federal Authority

For the foregoing reasons NFIB contends that the guidance exceeds federal authority by encouraging expansive assertions of CWA jurisdiction. The following is a non-exclusive list of our legal objections to the proposed guidance:

(1) The guidance misrepresents the standard for “traditional navigable waters”

The guidance defines “traditional navigable waters” as any waters that are used for commerce or that could be used for commerce in the future. But the guidance would effectively expand CWA jurisdiction by lowering the threshold for demonstrating the potential for navigable use in commerce. Specifically, the guidance provides that the potential for commercial navigation “can be demonstrated by current boating or canoe trips for recreation or other purposes.”

Yet, the courts have made clear that the test for “traditional navigable waters” must consider both the “physical characteristics” of the water body and “experimentation” with watercraft or other demonstrated “uses to which the [waters] have been put.” *FLP Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (citing *United States v. Utah*, 283 U.S. 64, 83 (1931)). Most fundamentally, the guidance fails to make clear that “traditional navigable waters” must be conducive to interstate or foreign commerce. This omission—in conjunction with the guidance’s liberal suggestion that navigability may be established without regard to the physical characteristics of the water body—suggests that the guidance will lead to expansive jurisdictional assessments, without regard to the question of whether *in fact* the water body is susceptible to interstate or foreign commerce.

(2) The guidance inappropriately treats all interstate waters as “traditional navigable waters”

The guidance expands CWA jurisdiction by inappropriately instructing agencies to treat interstate waters as “traditional navigable waters.” But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven *in fact*. *Rapanos*, 547 U.S. at 739.

(3) The guidance misstates, misconstrues and changes the “significant nexus test”

As stated by Justice Kennedy in *Rapanos*, waters have the “requisite significant nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical **and** biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780 (emphasis added). But, the guidance expands CWA jurisdiction by distorting Justice Kennedy’s “significant nexus test,” such that it will liberally justify jurisdictional assertions beyond what the test would allow for if properly applied. The result will be an expansion of CWA jurisdiction.

First, the guidance misstates the significant nexus test, by replacing the conjunctive word “and” with the disjunctive word “or,” when listing the different factors to be considered in determining whether the subject wetland has a sufficient nexus to traditional navigable waters. This misstatement is significant because it effectively lowers the standard for establishing jurisdiction. Under the guidance, agencies will assert jurisdiction if they can demonstrate *either* that the subject wetland—and similarly situated lands in the region—significantly affect the chemical and physical integrity of other jurisdictional waters *or* that they affect the biological integrity of those waters. But, Justice Kennedy’s jurisdictional test was not an either or proposition. To satisfy the

“significant nexus test,” one must demonstrate all three factors: The subject wetland, and similarly situated lands, must have a significant affect on the (1) chemical, (2) physical and (3) biological integrity of other jurisdictional waters.

Second, the guidance misconstrues the significant nexus test by stating that the test will be satisfied if it can be demonstrated that the chemical, physical or biological effect on jurisdictional waters is more than “speculative or insubstantial.” This enables the agencies to assert CWA jurisdiction without proving that the subject wetlands are in fact having a *significant impact* on other jurisdictional waters. This incorrectly shifts the burden of proof from the agency asserting jurisdiction to the property owner.¹ Under the guidance, the agencies will now presume jurisdiction unless proven otherwise. But, Justice Kennedy made clear that the agency must bear the burden of demonstrating substantial effects on other jurisdictional waters. *Rapanos*, 547 U.S. at 784 (Kennedy, J., concurring).

Third, the guidance changes the significant nexus test by expanding the definition of “region.” This is significant because Justice Kennedy provided that the test should consider the affect that the wetland—“either alone or in combination with similarly situated lands in the **region**”—has on other jurisdictional waters. *Id.* at 780 (emphasis added). Logically, a narrow understanding of the relevant “region” will cabin relevant considerations, whereas a broad understanding of the relevant “region” will allow the agencies to more readily assert jurisdiction. And the new guidance stretches the term far beyond the localized concerns that Justice Kennedy had in mind and far beyond the definition provided in the 2008 guidance document. In fact, this is probably the most radical aspect of the new guidance because it defines the relevant region as the entire “watershed,” which would entail more than a million square miles—or 41% of the lower 48 states—in the Mississippi watershed alone.²

(4) The guidance inappropriately asserts jurisdiction over almost any ditch

The guidance provides that any “natural, man-altered, or man-made water body” with an ordinary high water market will be considered a tributary, and encourages agencies to assert jurisdiction over practically any land over which water occasionally flows by applying either the “continuous surface connection” or “nexus” tests. But, both *Rapanos* tests reject such an expansive interpretation of CWA jurisdiction. *Id.* at 731-732. Justice Kennedy’s “significant nexus test” was not intended to apply beyond wetlands to tributaries. And the plurality’s “continuous surface connection” test was intended to strictly limit CWA jurisdiction over tributaries, and would not justify assertions of jurisdiction over “ditches, channels and conduits.” *Rapanos*, 547 U.S. at 737-39.

(5) The guidance erroneously bootstraps the CWA’s regulatory reach over adjacent wetlands

Under the *Rapanos* plurality opinion, the EPA and the Army Corps may be able to assert jurisdiction over wetlands that are adjacent to a traditional navigable waters.³ But in order to do

¹ In placing attempting to shift the burden from the agency asserting jurisdiction to the landowner contesting jurisdiction, the Guidance will place further economic strain on landowners who seek to defend their property rights in court.

² See Army Corps of Engineers, The Mississippi River and Tributaries Project, <http://www.mvn.usace.army.mil/pao/bro/misstrib.htm>.

³ The *Rapanos* plurality defined a “traditional navigable water” as a “relatively permanent, standing or continuously flowing bod[y] of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’” *Rapanos*, 547 U.S. at 739-39.

so, they must demonstrate that there is a continuous surface connection between such “traditional navigable waters” and the wetland, such that it is difficult to discern where the water ends and the wetland begins. *Rapanos*, 547 U.S. at 742. Yet the guidance erroneously restates the plurality’s test to assert jurisdiction over wetlands that are adjacent to relatively permanent, non-navigable tributaries that are connected downstream to “traditional navigable water.”

The Guidance Will Impose Heavy Economic Costs on Development for Newly Regulated Properties All Across the Nation

As explained more fully in the previous section, the proposed guidance should be rejected because it improperly encourages expansive jurisdictional assessments, which contravene Supreme Court precedent. But, our concern is over the real-world impacts that the guidance will have on countless landowners across the country. Because the guidance so greatly expands CWA jurisdiction, it will have severe practical and financial implications for many affected landowners.

If a portion of a property is deemed a jurisdictional wetland, the owner cannot make use of that segment of his or her property. Indeed, the owner will face devastating fines of up to \$37,500 per day if he or she begins to develop that section of the property. *See Sackett v. EPA*, 132 S.Ct. 1367, 1370 (2012). As a result, most landowners—especially individuals of modest means and average small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property.

In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. As of 2002, the average CWA permit cost over \$270,000. *See Rapanos*, 547 U.S. at 720 (plurality opinion) (citing Sunding & Zilberman, *The Economics of Environmental Regulation and Licensing: An Assessment of Recent Changes to Wetland Permitting Process*, 42 Nat. Res. J. 59, 74-76 (2002)).

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses and individuals of modest means are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses and individuals suffer greatly because they have usually tied up much of their assets into their real estate investments and they can neither afford necessary permits or legal representation to challenge improper jurisdictional assertions.

The Guidance Will Chill Development and Devalue Countless Other Properties

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the guidance is approved. Landowners are already aware that the EPA and the Army Corps have taken an aggressive posture in making jurisdictional assertions in recent years; however, the regulated community is greatly concerned that the guidance—if approved—signals a dramatic shift toward an even more aggressive jurisdictional reach. As a result, landowners are understandably concerned about the potential for EPA to use the guidance to justify jurisdictional assertions.

The NFIB already receives questions and concerns from small business owners who are worried about whether the EPA and the Army Corps have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the guidance is approved in its current form. Indeed, if any amount of water rests or flows over a property—at any point during the year—the owner may have cause for concern that the agencies might assert CWA jurisdiction.

Unfortunately the new guidance will do nothing to make CWA jurisdiction more clear for these property owners, but will instead only raise new concerns for them. If they want real counsel as to whether it is advisable to develop or make use of these sections of their property, they will have to pay for expert advice, which can be expensive and cost prohibitive. But, the only way to have definitive clarity is to seek a formal jurisdictional determination from the EPA and the Army Corps, which costs more money and further delays development plans.

In the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. And that is a risk most reasonable individuals would be unwilling to take. Indeed, they face ruinous fines of up to \$37,500 per day if they are mistaken. And for this reason any property that might be viewed as containing a jurisdictional wetland will be greatly devalued.

Implementation of the Guidance Will Result in New Federal Liabilities

Finally, as we near the "fiscal cliff" dilemma, we must stress the importance of avoiding unnecessary liabilities. We submit that the budgetary needs of the United States would be better served if EPA and Army Corps continued to rely on the 2008 wetlands guidance. While the current debate in Congress centers upon the propriety of different proposals to cut spending and or to raise taxes, it should be abundantly clear that the federal government cannot afford to exacerbate its budgetary problems by adopting a new guidance document that will predictably result in incalculable litigation costs and inverse condemnation liabilities.

Not only will the guidance result in lost economic opportunities, for the reasons explained in the previous section, but it will result in a tremendous amount of litigation. Since the guidance encourages the agencies to make expansive assertions of jurisdiction, litigants will predictably challenge the EPA and Army Corps in their determinations. Moreover, these expansive jurisdictional assessments will take away the right of many landowners to make any economically beneficial use of their properties. And the federal government will therein incur takings liability under the Fifth Amendment for these properties.

For all of these reasons, we encourage the OIRA to reject the proposed guidance. We appreciate OIRA's time and consideration of this letter.

Sincerely,



Susan Eckerly
Senior Vice President
Public Policy



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

DEC 30 2014

OFFICE OF WATER

Ms. Karen R. Harned
Executive Director
NFIB Small Business Legal Center
1201 F Street, NW
Suite 200
Washington, DC 20004

RE: Freedom of Information Act Request: EPA-HQ-2014-007811

Dear Ms. Harned:

This responds to your June 16, 2014, Freedom of Information Act (FOIA) request for "certain agency records relating to the forthcoming Waters of the US Rule and Regulatory Flexibility Act." Your request had five categories of documents. On July 10, 2014, you agreed to narrow your response to only documents responsive to categories one and two of your original request. Category one pertained to U.S. Environmental Protection Agency (EPA) documents, and specifically requested "(a)ny documents prepared pursuant to EPA policies on RFA compliance produced in the course of promulgating the CWA Regulation. Specifically, we seek any documents prepared pursuant to EPA's Guidance on RFA compliance, including - but not limited to - any internal documents produced in the course of the required "screening analysis" or summarizing its conclusions." Category two pertained to Corps of Engineers documents which would be addressed by your similar FOIA request to the Corps of Engineers. On September 15, 2014, you withdrew your request but requested that EPA provide an index of any documents that would have been withheld.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis for any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As part of their "Waters of the U.S." rulemaking, the EPA and the Corps certified that their proposed rule will not have a significant economic impact on a substantial number of small entities.

Under the RFA, the impacts of concern are significant, disproportionate adverse economic impacts on small entities subject to the rule, 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 rule on small entities." 5 U.S.C. 603. The scope of regulatory jurisdiction in this proposed rule is narrower than that under the agencies' existing regulations. Because fewer waters will be subject to the CWA under the proposed 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. The agencies' proposed rule is

not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of the "waters of the United States," consistent with Supreme Court precedent. As a consequence, this action if promulgated will not have a significant adverse economic impact on a substantial number of small entities as a matter of law, and therefore no regulatory flexibility analysis is required. This analysis was laid out in the preamble to the proposed rule at 79 Federal Register, page 22220. Thus, the EPA did not perform a "screening analysis" and there are no records responsive to your request.

The EPA is only required to provide certain information about withheld documents (i.e. responsive documents that the Agency is asserting an exemption for). Pursuant to 40 C.F.R. 2.104(h), initial denials need not provide a detailed privilege log but must provide:

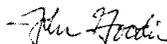
- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reason(s) for the denial, including an identification of records being withheld (individual, or if a large number of similar records are being denied, by described category), and any FOIA exemption applied by the office in denying the request;
- (3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and
- (4) A statement that the denial may be appealed under, and a description of the requirements of, paragraph (j) of this section.

In this instance, the EPA located no records that were responsive to the description in your request, and therefore is not withholding anything under an exemption. Thus, the above information is not required to be provided for the documents which were reviewed and determined to be non-responsive as part of our effort to locate responsive records. We have consulted with the Office of General Counsel in preparing this reply.

You may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the RIN listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Please contact Russell Kaiser of the Wetlands Division at kaiser.russell@epa.gov if you have any questions regarding this response.

Sincerely,



John Goodin, Acting Director
Wetlands Division



*Protecting the Rights of
America's Small Business Owners*

May 28, 2014

VIA CERTIFIED MAIL

Larry Gottesman
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Michelle Bartlett
National Freedom of Information Officer
Department of the Army Freedom of Information and Privacy Office
Army Corps of Engineers
7701 Telegraph Road, Suite 144
Alexandria, VA 22315-3905

RE: Freedom of Information Act Request

Dear Mr. Gottesman:

The National Federation of Independent Business Small Business Legal Center ("Small Business Legal Center"), a non-profit 501(c)(3) writes in the public interest, pursuant to the Freedom of Information Act, 5 U.S.C. 5 552, et seq., to request documents pertaining to the forthcoming rule that the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("ACE") (collectively "Agencies") have jointly proposed to define "waters of the United States" for purposes of the Clean Water Act ("CWA"). The proposed rule was published in the *Federal Register* on Monday, April 21, 2014 ("CWA Regulation").

We seek this information for the purpose of drawing public attention to suspected oversights, errors, and omissions on the part of the Agencies with regard to their statutory duties to seriously consider the impact that the CWA Regulation will have on small businesses throughout the country. Since small businesses are the backbone of the American economy, the Regulatory Flexibility Act ("RFA") requires that the Agencies must seriously consider whether newly proposed regulations will significantly, and adversely, impact a substantial number of small

businesses. In this case the Agencies certified that there would be no significant adverse impact on the small business community, and therein opted against considering less burdensome alternative interpretations of the pertinent statutory provisions of the CWA. But, this certification was—in our view—both conclusionary and contradicted by the administrative record.

EPA and ACE are quite familiar with the National Environmental Policy Act (“NEPA”), which requires that federal agencies must give a hard look to potential environmental impacts of a proposed federal project before certifying that there will be no adverse impacts. In the absence of such certification, NEPA requires agencies to consider less burdensome alternatives that will mitigate environmental harms. Though agencies are entitled to some degree of deference in NEPA certifications, the courts are clear in holding that NEPA requires *serious consideration* of potential environmental impacts. NEPA is not toothless, and neither is the RFA.

The Small Business Legal Center maintains that the RFA—like NEPA—requires serious consideration of the potential impacts of a proposed regulation. Accordingly, we intend to make public any omission, error, or oversight in the Agencies’ RFA certification. This is too important of an issue for the Agencies to make a certification without seriously considering small business impacts.

Accordingly, the Small Business Legal Center requests any and all responsive documents—including memoranda, reports, studies, communications, e-mails and other electronic records, and/or any other written material within the Agencies’ possession or control. We request the following:

- (1) Any documents prepared pursuant to EPA policies on RFA compliance produced in the course of promulgating the CWA Regulation. Specifically, we seek any documents prepared pursuant to EPA’s Guidance on RFA compliance, including—but not limited to—any internal documents produced in the course of the required “screening analysis” or summarizing its conclusions.

EPA’s Guidance on RFA compliance requires EPA to complete a “screening analysis” on every proposed rule to evaluate the potential businesses that may be affected by a new rule and specific economic burdens that the rule will impose on those businesses. Pursuant to these guidelines, there should be a “screening analysis” record. Regardless of what EPA called this record, there should be internal documents discussing and analyzing potential small business impacts, and summarizing EPA’s conclusions. We request all such documents.

- (2) Any documents prepared pursuant to ACE policies on RFA compliance produced in the course of promulgating the CWA Regulation. Specifically, we seek any documents prepared pursuant to ACE’s statutory duty to consider the impact that the CWA Regulation will have on small business. ACE should have produced documents discussing and analyzing potential small business impacts, and summarizing the ACE’s conclusions. We request all such documents.

- (3) Any inter-agency communications—including communications between the Agencies, any specially created taskforce, the Office of Management and Budget, and or the White House—concerning the impacts the CWA Regulation will have on small businesses.
- (4) Any documents identifying—and correspondence with—those small business representatives whom the Agencies contacted in the process of considering potential small business impacts. The Agencies assert that they have in fact consulted with representatives of the small business community and that this aided the Agencies in concluding that the Proposed Regulation will not adversely impact small business. We seek all such correspondence.
- (5) Any internal documents discussing or estimating the number of acres, or square miles, of land that will be impacted by the proposed CWA Regulation. For the purpose of this specific request, we seek any documents discussing, analyzing or otherwise quantifying any increase in jurisdictional reach resulting from the new CWA Regulation. And further, we seek any discussion or conclusions concerning estimates of potential liabilities that the federal government may incur upon expansion of the CWA's jurisdictional reach with finalization of the CWA Regulation.

We request that these records—to the extent possible—be furnished to the Small Business Legal Center in an electronic format. If the records and documents sought are stored electronically, please provide the information on a CD-ROM disc, readable by an IBM-compatible personal computer, and identify the program used or send it as an e-mail attachment to Karen.Harned@nfib.org. If the information sought is not stored electronically, please provide hard copies. Copies can be mailed to the NFIB Small Business Legal Center at 1201 F St., NW, Suite 200, Washington DC 20004.

If you determine that you cannot disclose any of the requested information in its entirety, I request that you release any and all reasonably redacted or segregated material that may be separated and released. For any documents, or portions thereof, that you determine to be exempt from disclosure, I request that you exercise your discretion to disclose the materials, absent a finding that a reasonable basis exists to invoke an exemption. I call your attention to President Obama's January 21, 2009 Memorandum concerning FOIA, which states in relevant part:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving FOIA.¹

Should you withhold disclosure of documents within the scope of this request, I ask that you provide an index that (1) identifies each and every document that is withheld; (2) states with specificity that statutory exemption claimed for each document; and (3) explains how disclosure of a particular document would damage the interest protected by a particular exemption.

¹ PRESIDENT BARACK OBAMA, Memorandum for the heads of Executive Departments and Agencies, *Subject Freedom of Information Act*, Jan. 21, 2009, available at <http://oversight.house.gov/hearings/foia-in-the-21st-century-using-technology-to-improve-transparency-in-government/>.

The Small Business Legal Center Is Entitled to a Complete Waiver of Fees

All information sought by this request is in the public interest. Accordingly, the Small Business Legal Center requests a waiver of all search, review, printing, and postage fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Fee Waiver Provision"). The Fee Waiver Provision requires that federal agencies must furnish FOIA requests without charge, or at reduced charge, if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester."

The Small Business Legal Center is a 501(c)(3), nonprofit public interest organization. As such, it has no commercial interest in this information beyond advancing the interests of the small business community, and the health of the American economy more generally. The Small Business Legal Center is entitled to a fee waiver because it will disseminate this information to the public by posting acquired information online, and or posting review and analysis of our findings. The results of this FOIA request will be especially relevant in fostering a free and open public discussion over the proposed CWA Regulation and the economic impact of environmental regulation more generally.

A. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

The Small Business Legal Center intends to thoroughly review all documents and correspondence obtained through this FOIA for the purpose of raising public attention to the impact that regulation has on small business and for the purpose of drawing public attention to any insufficiencies in the Agencies' RFA certification. Given that the requested information is not publically available at this time, the FOIA request will help the public understand the factual basis for the Agencies' conclusions that the proposed CWA Regulation will not adversely impact small business. To further that purpose all documents will be made available to the public online, or in the alternative the Small Business Legal Center will offer analysis and conclusions upon reviewing all such documents.

This is important for the purpose of open government since it will shed light on potential shortcomings in the Agencies' RFA analysis. Thus, the purpose of this request is to benefit the regulated community throughout the country, not only for the benefit of small businesses, but for the benefit of anyone who may be impacted by the CWA Regulation. The primary purpose of this request is to foster free and open discourse on an important issue affecting many Americans, including many small businesses.

B. Disclosure of the requested information is not in the commercial interest of the Small Business Legal Center.

The Small Business Legal Center has no financial interest in the requested information. The Legal Center is a 501(c)(3) public interest organization. Our mission is to advance small business

interests in the nation's courts, to monitor regulatory actions that may impact small business, and to educate small businesses on issues that may impact their interests. As such, we seek this information for the purpose of bringing light to the Agencies' internal review and analysis of the potential impacts the proposed CWA Regulation will have on small business. This is important for raising public awareness of the impact that regulation has on small business, and ordinary individuals, throughout the country.

Importantly, the Small Business Legal Center is a separate legal entity from the National Federation of Independent Business ("NFIB(c)(4) Entity"), which is a 501(c)(4) lobbying organization. Unlike the NFIB(c)(4) Entity, the Small Business Legal Center does not specifically represent the interests of NFIB members. Instead, the Small Business Legal Center represents the interests of the greater small business community and provides its resources indiscriminatingly to further the interests of all small businesses. When the Small Business Legal Center files amicus briefs in court, we speak on behalf of all small business owners for the purpose of serving the interests of the entire population that depends upon a vibrant small-business community.

C. The Small Business Legal Center will disseminate the requested information to the public.

The Small Business Legal Center has the capacity to communicate our findings to the small business community—and to the broader public—through a variety of media, including the Small Business Legal Center's website, electronic newsletters, quarterly printed newsletters, social media and other such channels. Additionally, the Small Business Legal Center has the capacity to distribute our findings and analysis to traditional news sources, which can be expected to broadcast these results to the broader public. Moreover, the Small Business Legal Center specifically intends to disseminate the information obtained to the public by making the information available online to the extent possible. Additionally, the Small Business Legal Center will make information obtained available to the House Committee on Small Business, which is currently evaluating the impact that the proposed CWA Regulation will have on our nation's job creators.

If you have any questions concerning this request, please contact me immediately at (202) 314-2061 or Karen.Harned@nfib.org. Thank you for your prompt attention in this matter.

Sincerely,

Karen R. Harned, Esq.
Executive Director
NFIB Small Business Legal Center