

Joe Shirley, Jr.
Supervisor, District I

Tom M. White, Jr.
Chairman, District II

Barry Weller
Vice Chairman, District III

**NOTICE OF PUBLIC MEETING AND AGENDA OF
THE APACHE COUNTY BOARD OF SUPERVISORS**

November 4, 2014

**Board of Supervisors' Hearing Room, First Floor
75 West Cleveland Street
St. Johns, Arizona
8:30 a.m. MST**

Invocation by Invitation.
Pledge of Allegiance.


1. District III –Round Valley Road Yard: Notification of the retirement of Road Foreman Lester Slayton effective November 6, 2014 and request approval to payout his sick leave balance per Apache County Human Resources Policy 3.25.
2. Discussion and possible approval of **CONSENT ITEMS**: All items indicated by an asterisk (*) will be handled by a single vote as part of the consent agenda, unless a Board Member or the County Manager objects at the time the agenda item is called.

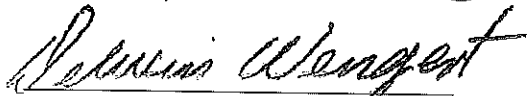
County Manager/Clerk of the Board:

- *A. Request approval of minutes dated October 21, 2014.
 - *B. Request approval of demands dated October 21, 2014 – November 4, 2014. Demands are payments made by the County. Specific details of the demands may be requested through the County public record request process.
 - *C. District II: Request approval to purchase holiday food items for three (3) Senior Centers located in District II at a not to exceed total cost of \$2,000, utilizing District II funds.
3. County Attorney's Office: Discussion and possible approval to hire Jared C. Robinson to fill the vacant Deputy Attorney I position, after being admitted to the Arizona Bar and being assigned a Bar number, at the same salary which the County Attorney's Office hired the two previous Deputy Attorney I's of \$56,874.

4. County Manager: Discussion and possible approval of commentaries regarding the redefinition of the waters of the United States by the Environmental Protection Agency (EPA) and the Corps of Engineers.
5. Call to the Public: Individuals may address the Board on any relevant issue for an amount of time determined by the Chairman. At the close of the call to the public, Board members may not respond to any comments but may respond to criticism, ask staff to review a matter, or ask that a matter be placed on a future agenda.

Pursuant to the Americans with Disabilities Act, the Apache County Board of Supervisors endeavors to ensure the accessibility of its meetings to all persons with disabilities. If you need an accommodation for a meeting, please contact the Clerk of the Board's office at (928)337-7503, TDD (928)-337-4402 at least 48 hours prior to the meeting (not including weekends or holidays) so that an accommodation can be arranged. One or more members of the Board of Supervisors may participate telephonically or through video communication.

Posted: 10/29/14 at 3:00 a.m. p.m. by 



Delwin Wengert, Clerk of the Board

Apache County Board of Supervisors
AGENDA ITEM REVIEW FORM

date/time stamp

Submitter's Name: (Individual, Organization, or County Department)

Engineering

Date/Signature:

10/23/14

Stamie Herrick

Describe in detail what you want to say to the Board and what action you want the Board to take:

Notification of retirement for Lester Slayton 11/6/14
and request approval to pay out sick leave
per Apache County Policy 3.25

BOS Meeting Date Requested

11/4/14

PRE-AGENDA ITEM REVIEW

Review Routing Legal / Finance / Purchasing / Human Resource / Other:

Legal Review:

Signature:

[Signature]

Finance Review:

Signature:

Human Resources Review:

Signature:

[Signature]

Other Review:

Signature:

Reviews completed, item approved for Agenda.

Supervisor/Board Clerk's Initials

October 23, 2014

To: J. Ferrin Crosby
From: Lester A. Slayton
Re: Letter of Retirement

Ferrin

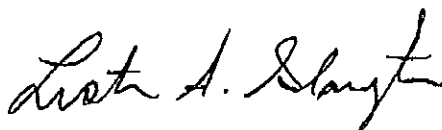
This is my notice of retirement with Apache County. The effective date will be November 6th at 4:30pm.

I want to thank you and everyone in District III for everything during the nearly 12 years I have been employed here.

With over 30 years in the A.S.R.S; it is time for me to move on to the next chapter and adventure in my life.

Thank you very much

Lester A. Slayton

A handwritten signature in cursive script that reads "Lester A. Slayton". The signature is written in black ink and is positioned below the typed name.

OFFICIAL PROCEEDINGS OF THE APACHE COUNTY
BOARD OF SUPERVISORS MEETING

October 21, 2014

St. Johns, Arizona

Present were: Vice Chairman Barry Weller and County Manager/Clerk of the Board, Delwin Wengert. Participating via the telephone was Chairman Tom M. White, Jr., Supervisor Joe Shirley, Jr. and County Attorney Michael Whiting.

Chairman White called to order the Board of Supervisors and Library District meetings at 8:32 a.m. in the Board of Supervisors chambers, County Annex Building, 75 West Cleveland Street, St. Johns, Arizona and welcomed all in attendance.

Lenora Fulton gave the Invocation.

Mark Patterson led the Pledge of Allegiance.

Chairman White called for the Library District items.

SuAnn Collins, on behalf of the Library, requested approval to accept State Grant-in-Aid in the amount of \$25,000, an ongoing grant from the Arizona State Library. **Mr. Shirley moved approval, seconded by Mr. Weller.** Vote was unanimous.

SuAnn Collins, on behalf of the Library, requested approval to amend Sierra Propane's propane delivery contract due to closure of Ft. Wingate, NM propane distribution center. **Mr. Shirley moved approval seconded by Mr. Weller.** Vote was unanimous.

Mr. Shirley moved to adjourn the Library District meeting, seconded by Mr. Weller. Vote was unanimous.

Chairman White called for the regular agenda items.

The Board sat as the Board of Equalization to hear the Petition of Review of Real Property Valuation for parcel 107-52-029 for owner, Diana Shobe which was tabled from the October 7, 2014 meeting. Petitioner Terry Shobe stated he had the tax returns for his ranch and he had just obtained the needed documents and brought them today. Mr. Weller asked if the Assessor had been given copy of the returns. Mr. Shobe stated no. (copies of Shobe's 2010 – 2013 tax returns were provided to the Assessor's representatives B.J. Greer and Mark Patterson). A discussion was held regarding the tax returns and the profit/loss related to the Shobe's Ranch. Mr. Greer stated at the that last Board meeting, Mr. Shobe had stated he had a viable cattle operation in Utah and he researched it and found no evidence of that; at one point the Shobes owned some property but was never granted any agriculture status and he also found a website of the Shobes called GB7.com for a cattle operation that stated it was primarily for custom grass fed beef but the website stated it went out of business. Mr. Greer stated that the tax return that were just provided to him shows a loss every year from 2010 through 2013 and that information will not be viable to the Assessor's Office in creating some type of income approach on the operation

itself. Mr. Greer stated according to State Statute, in looking at agriculture status, they look primarily at the property being able to generate a viable profit for the owner. Mr. Greer asked Mr. Shobe if he had a ranching operation in Utah. Mr. Shone stated that property was sold. Mr. Greer and Mr. Shobe held a discussion as to whether the cattle operation was strictly grass fed or a controlled feed/supplementation operation. Mr. Weller stated there was no evidence of a profit, which is an issue relative to the statutes and asked Mr. Shobe if he had any evidence that shows profitability of the business. Mr. Shobe stated with depreciation and cost of goods, you can have a negative value and still have a profit with depreciation, but it is still an asset. Mr. Weller asked Mr. Greer what the statute required for showing a profit. Mr. Greer stated they use 3 out of the past 5 years and Mr. Shobe only provided his returns for the past 4 years. Mr. Weller asked if depreciation was used to value of a business. Mr. Greer stated it can be used but technically it is used for rental/income properties. Mr. Greer stated he had called other counties to see how they handle feed lots and there was a feed lot in Holbrook that is a much large feed lot and is also an cattle auction site. Mr. Shobe stated that his operation is not a feed lot; it is a controlled feed operation, as outlined in U.S.D.A. under federal standards. A discussion was held regarding the requirements needed for a designation of agriculture use. Mr. Weller stated he is trying to understand the small operations in the county as possible so he is trying to understand a method that would be appropriate for the classification that would suit Mr. Shobe but doesn't appear to meet statutory limitations right now. Mr. Weller stated from an income standpoint, the evidence does not seem strong. Mr. Shobe stated his property is designed to keep and feed animals in a confined area. Mr. Weller asked Mr. Greer if there were any other ways to designate this as agriculture status. Mr. Greer responded that profitability is the main point the State has them look at for the status to be designated and 40 acre parcels are not normally recognized for agriculture status unless used as part of larger grazing land, but going off the profit/loss statement, it provides nothing showing a profit to work with. Mr. Greer provided the method and formula used to value property which requires a positive income to start that process. Mr. Weller stated at the last meeting he had asked the Assessor's Office to provide some comparable values of what this would be rated at if it was agriculture status and how would it modify the taxes by. Mr. Greer stated that since they did not receive the tax information from the petitioner until today, they had nothing to go off of but looking at their tax return he just provided, in 2010 he spent 27,000 on feed and in 2011, 2012 and 2013 he spent no money on feed which makes him question if there was cattle on the property since it shows cattle were fed one year out of the four years that Mr. Shobe provided tax returns for. **Mr. Weller moved to deny the applicant's petition until further information can come through, with the understanding that the tax assessors are taxing on the profitability of the business, seconded by Mr. Shirley.** Vote was unanimous.

Milton Ollerton, Community Development Director, requested approval of a Final Plat for CK Cabins Condominium Subdivision located at 84 North Main Street, Greer, Arizona, Parcel 102-08-021A. Mr. Ollerton stated that the Planning and Zoning Commission voted 5-1 in favor on creating 5 condominium lots on the parcel. David Brown, attorney representing the owner, Doug Sandahl stated this project has been approved twice by the Planning and Zoning Commission, approved by the Board of Supervisors back in August in its preliminary fashion and no changes have been made since the preliminary and final, and meets all the requirements of the ordinances and statues. Mr. Brown stated there is access from main street, all utilities are constructed and the project has been approved by the County Attorney, Engineer, Planning

and Zoning, Building and Health Departments. **Mr. Shirley moved approval, seconded by Mr. White.** Motion passed 2-1 with Mr. Weller voted nay on the grounds it does not meet the intent of Article 6.

Mr. Wengert presented the Consent Items A, B & C. **Mr. Shirley moved approval.** Weller requested taking each item separately. Chairman White allowed Mr. Weller's request.

Mr. Wengert presented the request for approval of minutes dated October 7, 2014. Mr. Weller stated again, the minutes clearly state there was promised information to him from the County Attorney's Office relative to the special taxing district issues that were supposed to be a written confirmation from the Attorney General of the State of Arizona that the County has met all requirements associated with the special taxing districts and notifications. Mr. Weller stated we are now into October and he has still not received that promised written communication from then Attorney General. Mr. Weller stated the minutes also reflect his statement regarding the demands and read from the October 7th minutes: "the agenda item did not match any of the information sent for the demands to his department for approval." Mr. Weller stated the word "any" is not one he would have used unless it was accidental because some of the information on the agenda did match the information sent to him for review, but all of it was not there and was not accurate in its entirety so he would like the word "any" stricken or at least corrected by his statement here today. (The audio recording of the minutes from the October 7, 2014 meeting were reviewed and the word "any" was correctly reflected in the minutes). **Mr. Weller moved to approve the minutes as clarified, seconded by Mr. Shirley.** Vote was unanimous.

Mr. Wengert Request approval of demands dated October 7, 2014 – October 21, 2014. **Mr. Shirley moved approval, seconded by Mr. White.** Demands are payments made by the County. Specific details of the demands may be requested through the County public record request process Payee Amount APACHE COUNTY HAS 2,629.59 APACHE COUNTY MEDICAL 142,820.52 APACHE COUNTY TAX WITHHOLDING 130,028.67 AZ STATE RETIREMENT SYSTEM 87,241.16 COLONIAL LIFE AND ACCIDENT INS 1,431.81 CORRECTIONS OFFICER RET PLAN 8,820.85 CORRECTIONS OFFICER RETIREMENT PLAN 520 4,437.29 NATIONWIDE 1,605.00 PUBLIC SAFETY PERSONNEL 401 14,293.21 PUBLIC SAFETY SHERIFF RET 29,361.80 SECURITY BENEFIT GROUP 1,321.00 SUPPORT PAYMENT CLEARINGHOUSE 2,096.18 APACHE COUNTY SHERIFF'S POSSE 10,000.00 APPLIED CONCEPTS INC 3,043.89 ARIZONA STATE FORESTRY DIVISION 8,403.14 AZ COUNTIES INSURANCE POOL 1,500.00 AZ DEPT OF RISK MANAGEMENT 2,261.57 BANK OF THE WEST – 6432 2,196.08 BLUE HILLS ENVIRONMENTAL 4,142.34 BRADCO 47,261.20 CDW GOVERNMENT LLC 1,293.06 CREATIVE MULTIMEDIA INC (CMD) 23,272.50 CRESCENT ELECTRIC SUPPLY CO 1,086.50 CRISS CANDELARIA LAW OFFICE 2,381.50 CULLEY, JOANNE R 2,357.91 DAVID'S PROFESSIONAL FIRE SYSTEMS INC 1,550.00 EMPIRE MACHINERY 16,889.50 EVENFLO COMPANY INC 1,311.24 FRONTIER 1,740.51 GILA COUNTY 15,802.76 HILLYARD INC 2,562.20 HOV SERVICES 1,265.00 LAW OFFICE OF MARSHA GREGORY 8,500.00 LEXIPOL LLC 7,300.00 MERRILL, KYLER GRANT 1,935.00 NAVAJO TRIBAL UTILITY AUTHORITY 1,061.88 NAVOPACHE ELECTRIC COOPERATIVE 11,038.54 NORTHLAND PIONEER COLLEGE 39,748.35 OVERDRIVE INC 8,336.38 PLATT DDS, RANDOLPH 1,203.00 PROFORCE LAW ENFORCEMENT

1,555.91 QUILL CORP 3,497.09 RDO EQUIPMENT CO 2,150.14 SANOFI PASTEUR INC
13,615.18 SHELL OIL 2,353.94 SHUMWAY, TRACY 1,117.00 SPRINGVILLE-EAGAR
CHAMBER OF COMMERCE 4,125.00 ST JOHNS CITY 4,458.51 STALEY LAW FIRM
PLLC 2,260.50 SUPERSTITION SPRINGS MID LLC 98,998.41 SYSTEM ID WAREHOUSE
2,454.85 THE AARONS COMPANY LLC 3,000.00 THE UNIVERSITY OF ARIZONA
6,250.00 THOMSON REUTERS WEST 1,073.56 TJP COMMUNICATIONS 2,019.82
TYLER TECHNOLOGIES INC 60,702.16 VALDIVIA, LINDA D 2,250.00 VERIZON
WIRELESS 2,482.11 WATCHGUARD VIDEO 15,371.31 WILLIAMS LAW GROUP PLLC
8,500.00 XEROX CORP 1,360.44 YAVAPAI COUNTY GOVERNMENT 7,750.00 YOUNG,
JOSEPH 7,320.00 ALLEGRA 2,243.38 AMERICAN SPORTSMAN HOLDINGS CO
16,334.00 AMIGO CHEVROLET 3,621.70 APPLIED CONCEPTS INC 2,455.84 AZ
COUNTIES WORKERS COMPENSATION PLAN 64,911.25 BAUMAN HOME AND AUTO
INC 1,890.82 BRADCO 7,947.45 CASTILLO, KODI LEE 1,056.24 DELL COMPUTER
CORPORATION 15,377.37 DESERT MOUNTAIN CORPORATION 11,496.40 DIAMOND
DRUGS INC 3,796.75 DINE TIRES AND ACCESSORIES INC 1,191.99 EBSCO
SUBSCRIPTION SERVICES 2,977.16 EPPS FORENSIC CONSULTING PLLC
1,815.00 FLEET PRIDE 1,763.45 GALLUP BLUEPRINT 2,868.29 HILLYARD INC 1,596.74
HUGHES SUPPLY INC (LAKESIDE) 1,422.88 INGRAM LIBRARY SERVICES 1,106.13
LOEHRS AND ASSOCIATES LLC 5,500.00 MOUNTAIN COMFORT HEATING AND
COOLING 6,388.23 MOUNTAIN PAINT CENTER 1,056.95 NAVOPACHE ELECTRIC
COOPERATIVE 1,838.36 NEW WORLD SYSTEMS CORPORATION 1,728.45 QUILL
CORP 2,756.26 SCHIFF, LAURENCE 2,000.00 SECURUS TECHNOLOGIES INC 1,300.48
SHELL OIL 2,975.19 SPECTRA TEK LAW ENFORCEMENT TECHNOLOGY LLC
16,420.00 ST JOHNS CITY 2,252.60 TOWN OF EAGAR 7,300.01 TP PUMP AND PIPE CO
INC 5,354.52 VERIZON WIRELESS 1,747.63 WAGNER EQUIPMENT CO 9,492.88
YOUNG, JOSEPH 7,250.00 AZ DEPT OF REVENUE 2,034.72 RESERVE ACCOUNT
10,000.00 Motion passed 2-1 with Mr. Weller voting nay stating it was based on the same
grounds as last meeting.

Mr. Wengert presented Item C of the Consent agenda, requesting approval of a Fireworks Permit for Concho Fire Department for a fireworks display to be held on November 11, 2014 located at Cinder Mountain in Concho, Arizona. **Mr. Weller moved approval, seconded by Mr. Shirley.** Vote was unanimous.

Chief Deputy Sheriff Brannon Eagar requested approval of the revised Arizona Mutual Aid Contract (AZMAC) Chief Eagar stated the AZMAC was revised to allow school districts to become signatories which resulted is a substantive enough change to require all signatories to re-sign, according to the opinion of the Arizona Attorney General. Chief Eagar stated this agreement is what they use during emergencies to obtain aid from other counties and municipalities participating within the agreement and then apply for reimbursement for those entities that assist. **Mr. Shirley moved approval, seconded by Mr. Weller.** Mr. Weller asked Chief Eagar if this agreement was different than the Mutual Aid Agreement the County has with the Navajo Nation. Chief Eagar stated yes. Vote was unanimous.

Chief Deputy Sheriff Brannon Eagar requested approval to sell a 2000 Chevrolet C2500 van to the St. Johns Emergency Service for use on their Explorer training Program and the price for this

sale would be \$1.00, pursuant to the Board's authority under A.R.S. 11-251. Chief Eagar stated the van is a former detention vehicle that is being retired from Sheriff's Office use. **Mr. Shirley moved approval seconded by Mr. Weller.** Mr. Weller asked if St. Johns Emergency Services was an ambulance district. Chief Eagar stated no it is part of the City of St. Johns and the Explorers are high school students who are part of the fire EMS program. Mr. Weller stated they are a district that is able to tax their citizen for funding. Chief Eagar stated no, it is part of the municipal government. Chief Eagar stated he does not believe it is a taxing district. Mr. Weller stated he was not supportive of giving vehicles to the Eagar Group which has the ability to pay some value, he is supportive of a reduced values to these organizations to help but to sell a \$3200 vehicle for \$1.00 does not seem appropriate for our taxpayers so to remain consistent he will be voting no. Motion passed 2-1 with Mr. Weller voting nay. Mr. Wengert stated according to a legal opinion from Attorney Joe Young, this action requires a unanimous vote by the Board in order to transfer a vehicle to a municipality so with it not being unanimous the action fails.

Sheriff Dedman requested approval to implement the 2009 Public Sector Salary Study for certified law enforcement officers working within the Sheriff's Office. Mr. Weller stated he supports getting the deputies to what the Sheriff is requesting; he has looked at the study and it was done well and is not an overly great impact to a larger budget, but is concerned it is not within the budget that has been approved. Mr. Weller stated the rates being requested appropriate but he would like to see how this impacts the budget but is such small amount he thinks it can be worked out. Mr. Weller stated what the sheriff's office does is an absolute priority for the County and he will do his best to figure out a way to be supportive to get this approved within a short period of time. Mr. White asked Mr. Wengert how much this would cost and where would the funds come from to implement the increases. Mr. Wengert stated the cost is about \$90,000 with vacancies and without vacancies it would cost about \$40,000 but the numbers are not exact since they are using a study that was done in 2009. Mr. Wengert stated the funds to implement the increases would come from the savings account. Mr. Shirley stated the County needs to look at guaranteeing we won't lose any more officers to other law enforcement agencies; that he is aware starting deputies make \$41,000 in Coconino and the County needs to do what it can to raise salaries so we don't continue losing deputies. A discussion was held regarding the salaries and options available. Mr. Wengert suggested the Board give him, Chief Eagar and Human Resources a chance to look into the issue and come back with more information. Mr. Shirley stated he would like to defer this for a couple weeks to give Mr. Wengert a chance to look into options for retention of the deputies. Mr. White agreed to revisit this issue in two weeks. Mr. Weller voiced his concerns with shooting for the highest rate available with the idea of guaranteeing the retention of the deputies; salary is one aspect of a job and this salary study was done exceptionally well in looking at the mean of competitive counties and asked the Human Resources Director be a part of the discussion to look at the turnover rate of other counties pay levels and the reasons for a turnover. Mr. Weller stated pay levels are only one aspect and he thinks that an adjustment is needed for the deputies but we have to know how it will impact the budget and there are also other departments that can come up with a study showing their employees are nowhere near the pay of other counties so we have to be careful how this impacts our entire budget but he is supportive of raises for the deputies. Sheriff Dedman stated that he has been using some RICO funds to purchase vehicles which helps offset county money so he has been helping out to utilize that money for equipment since that money can't be used for salaries, it has helped to contribute to the county by using RICO funds. Sheriff

Dedman stated this is a good step forward and asked the board for a motion of support so he can take that positive feedback to the deputies and he looks forward to working on this issue. Chairman White directed Mr. Wengert to have Human Resources Director, Karen Houston be part of the meetings regarding the salary study. **Mr. Shirley stated in support of law enforcement, made the motion for the Board to do all it can to address the low salaries of law enforcement including any benefits such as housing and health insurance and the Board will look at the study to give a substantial increase to the law enforcement personnel. Mr. Weller seconded the motion.** Mr. Wengert suggested the issue be put on the second meeting in November because of the election on the next Board meeting date, November 4th and to include item with a possible executive session to discuss personnel issues. Mr. White agreed and stated the agenda needs to be short because both he and Mr. Shirley will be busy on that day. Vote was unanimous.

Recorder Lenora Fulton, requested approval to convert the currently vacant Projects Coordinator (range 35, full-time 40 hours) to an Administrative Assistant II (range 26, Part-time, benefits eligible) and an Administrative Assistant III (range 30, part-time benefits eligible) and fill the two vacancies. **Mr. Shirley moved approval, seconded by Mr. Weller.** Vote was unanimous.

Angela Romero, Election Director, requested approval of the polling places and appointment of precinct and tally board workers for the upcoming November 4, 2014 General Election. **Mr. Shirley moved approval, seconded by Mr. Weller.** Vote was unanimous.

Chairman White stated the update on Lyman Lake State Park by Mike Rollins, Lyman Lake State Park Ranger was to be rescheduled.

Vincent Cameron, a resident of the County stated that he is addressing the Board regarding his property taxes and stated in 2008 he applied for the disability and age exemption and he isn't getting that even though he has submitted it every year. Mr. Cameron stated he has health issue and asked the Board to help straighten out his tax issues as well as a problem with NACOG when they destroyed his heating system. Mr. Cameron asked if there was anything the Board might be able to do to assist him in obtaining the tax relief he should be getting, since he is now behind and is trying not to lose his property. Chairman White directed Mr. Wengert to do what can be done to help Mr. Cameron.

Mr. Shirley moved to adjourn, seconded by Mr. Weller. Vote was unanimous.

Approved this 4th day of November, 2014.

Tom M. White, Jr.
Chairman of the Board

Delwin Wengert
Clerk of the Court

Apache County Board of Supervisors
AGENDA ITEM REVIEW FORM

date/time stamp

Submitter's Name: (Individual, Organization, or County Department)

County Manger

Date/Signature:

Describe in detail what you want to say to the Board and what action you want the Board to take:

Demands

BOS Meeting Date Requested

PRE-AGENDA ITEM REVIEW

Review Routing / /Legal / /Finance / /Purchasing / /Human Resource / /Other:

Legal Review:

Signature:

Finance Review:

Signature:

Human Resources Review:

Signature:

Other Review:

Signature:

Reviews completed, item approved for Agenda.

Supervisor/Board Clerk's Initials

Apache County Board of Supervisors
AGENDA ITEM REVIEW FORM

date/time stamp

Submitter's Name: (Individual, Organization, or County Department)

Apache County District II

Date/Signature:

Describe in detail what you want to say to the Board and what action you want the Board to take:

Request approval to purchase holiday food for three (3) senior centers located in District II, not to exceed \$2,000 total utilizing District II Funds.

BOS Meeting Date Requested November 4, 2014

PRE-AGENDA ITEM REVIEW

Review Routing / /Legal / /Finance / /Purchasing / /Human Resource / /Other:

Legal Review:

Signature:

Finance Review:

Signature:

Human Resources Review:

Signature:

Other Review:

Signature:

Reviews completed, item approved for Agenda.

Supervisor/Board Clerk's Initials

BOARD OF SUPERVISOR'S AGENDA ITEM REVIEW FORM

date/time stamp

Submitter's Name: (Individual, Organization, or County Department)

Michael B. Whiting, Apache County Attorney

Date/Signature: _____

Describe in detail what you want to say to the Board and what action you want the Board to take:

County Attorney: Request authorization to hire Jared C. Robinson to fill the vacant Deputy Attorney I position after being admitted to the Arizona Bar and being assigned a Bar number, at the same salary which the ACAO hired the two previous Deputy Attorney I's of \$56,874.

BOS Meeting Date Requested November 4, 2014

PRE-AGENDA ITEM REVIEW

Review Routing / /Legal / /Finance / /Purchasing / /Human Resource / /Other: _____

Legal Review: _____

Signature: _____

10-27-14

Finance Review: _____

Signature: _____

Purchasing Review: _____

Signature: _____

Human Resources Review: _____

Signature: _____

Other Review: _____

Signature: _____

Reviews completed, item approved for Agenda.

Supervisor/Board Clerk's Initials _____

BOARD ACTION TAKEN

/ /Approved / /Disapproved / /Deleted / /Continued to: _____

Signature Clerk of Board _____

Apache County Board of Supervisors
AGENDA ITEM REVIEW FORM

date/time stamp

Submitter's Name: (Individual, Organization, or County Department)

Date/Signature: 10/29/14 Verbal - per TM Weller

Describe in detail what you want to say to the Board and what action you want the Board to take:
Disc. of possible action regarding Community
regarding redirection of the water of the U.S
by the EPA & Corp of engineers

BOS Meeting Date Requested 11/4/14

PRE-AGENDA ITEM REVIEW

Review Routing / /Legal / /Finance / /Purchasing / /Human Resource / /Other: _____

Legal Review: _____

Signature: _____

Finance Review: _____

Signature: _____

Human Resources Review: _____

Signature: _____

Other Review: _____

Signature: _____

Reviews completed, item approved for Agenda. Supervisor/Board Clerk's Initials _____

Oct 13, 2014

Water Docket, Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue NW.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2011-0880

Subject: Proposed rule defining the scope of waters protected under the Clean Water Act

These comments address the proposed rule published in the Federal Register / Vol. 79, No. 76 / Monday, April 21, 2014, pages 22188-22274. The Environmental Protection Agency and the Department of the Army, Corps of Engineers ("Agencies") have published specific requests for information they seek. Our comments address these questions as well as additional concerns we have as elected officials. We appreciate the opportunity to submit comments and information for the proposed rule for a new definition of the "Waters of the United States" (WOUS) as it pertains to the Clean Water Act (CWA).

County and municipal officials are elected to manage on-the-ground daily governmental activities that involve the health, safety and welfare of local citizens. Resource conservation district officials are elected to provide for the ongoing stability and health of soil, water and other resources, with a special mission to coordinate between private property owners and federal and state governments. Local government responsibilities include protecting our citizens from adverse impacts of federal actions. Local governments are the foundation upon which higher levels of government depend to ensure the peaceful and orderly existence of the American way of life - our customs and cultures. Local government responsibilities most definitely include developing, managing and sustaining a supply of clean water for the citizens of their communities as well as downstream users of water.

While individuals and non-governmental organizations are always encouraged to take advantage of the opportunity to review proposed federal rules and to assess the potential beneficial and adverse impacts of these proposed rules, local governments have the additional responsibility for ensuring that the proposed rules are in compliance with the enabling legislation as it pertains to protecting the health, safety and welfare of their local citizens. As elected officials, we recognize and accept the responsibility to address the proposed changes to the definition of the WOUS that affect local citizens in a thorough and serious manner.

We submit these comments because it is important for the Agencies to recognize, honestly represent and openly disclose the adverse impacts (not just the benefits) that will result from the Agencies' actions pursuant to changing the definition of the WOUS. While the CWA directs the Environmental Protection Agency, the Army Corps of Engineers and other federal agencies to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, other federal laws require federal agencies to disclose information related to the effects of their actions on the American public.

We feel that the Agencies do not meet this requirement with the proposed rule and further, that the Agencies have engaged themselves in an effort to sway the public into supporting a new definition of the WOUS that the Agencies have determined is necessary but is independent of what is intended or presented in the CWA. This effort to gain support for an unnecessary new definition of the WOUS is carried out despite a recent Supreme Court decision that clearly defines the WOUS.

We, the undersigned, appreciate your attention to and serious consideration of our comments and recommendations on the proposed rule.

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COMMENTS

Issue 1: Conflicting intent and incorrect purpose given for the proposed rule

Reference: FR title: *Definition of "Waters of the United States" Under the Clean Water Act*

FR page 22188 column 1: [The Agencies] *are publishing for public comment a proposed rule defining the scope of waters protected under the Clean Water Act (CWA),*

FR page 22190, column 3: *The purposes of the proposed rule are to ensure protection of our nation's aquatic resources and make the process of identifying "waters of the United States" less complicated and more efficient.*

Discussion: The title of the proposed rule clearly states that the subject matter is the definition of a term, "Waters of the United States". The purpose of such a definition is declared to be to define the scope of waters that are protected under the CWA. However, the most significant and the most looming gorilla in the room associated with the Agencies' proposed regulatory definition is that there is no valid or justifiable need or purpose in redefining "waters of the United States", and that the actual purpose of the proposed rule is not to create a definition but to mask a tremendous expansion of the scope of CWA protected waters.

The task of establishing the parameters of the scope of responsibility for the Agencies that will enable them to carry out their missions¹ cannot be accomplished by proposing to redefine a term that already has a well-understood meaning in the English language. The Agencies, in couching the proposed rule as a request for unnecessary and inappropriate redefinitions of that and multiple additional terms, beg the question of actual intent for doing so.

The Agencies have stated in the Federal Registry that there is a need for adopting a formal statement of the meaning or significance of the phrase "waters of the United States". The Agencies stated that the need for this proposed rule was because the scope of CWA protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006.

¹ The EPA mission is to protect human health and the environment. <http://www2.epa.gov/aboutepa>

The mission of ACE is to "Deliver vital public and military engineering services; partnering in peace and war to strengthen our Nation's security, energize the economy and reduce risks from disasters."
<http://www.usace.army.mil/About/MissionandVision.aspx>

Summary of the Clean Water Act 33 U.S.C. §1251 et seq. (1972) The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. <http://www2.epa.gov/laws-regulations/summary-clean-water-act>

A regulatory definition, ideally, would be consistently and systematically used by the Agencies when interpreting and implementing the Clean Water Act (CWA). The Agencies' proposal that the definition of "waters of the United States" be defined masks the fact that no such new definition is needed or even wanted by the Agencies. In fact, the Agencies would be delighted for the public to accept "waters of the United States" at face value.

This approach is a "bait and switch" process based on confusion caused by self-referential internal definitions within the proposed rule, making any real definition of any term nearly impossible. The proposed rule is presented with an ultimate objective of substantially increasing the scope of waters protected by the CWA (the switch) as a consequence of getting the public to agree to using the term "waters of the United States" at face value meaning.

The bait is the pretense that a real rule change is being proposed to meet legal requirements for public notice and mandated public hearings (the bait), while bypassing not only the objective of public notice and public discussion on the actual rules, but avoiding the scrutiny of the legislative and judicial eyes (enabling the switch).

Any ordinary speaker of the English language understands "waters of the United States" to mean, in plain writing and common use, "all waters located within the territorial boundaries of the United States". None of the words are hard to comprehend, and the use of this type of phraseology is common to native speakers of the English language (e.g., "riders of the purple sage", "ranchers of the western states", "farmers of the Midwest", "speakers of the English language"). It is a non-specific term that does not exclude any specific kinds of water to be found within the United States (or, e.g., riders to be found riding the purple sage, etc).

No matter what definition could come about from the proposed rule, "waters of the United States" means *all* waters, including waters over which the Agencies have not previously had jurisdictional authority, e.g. waters of the States and private lands. This is not the intent of the CWA, although it apparently is the intent of the Agencies.

In the English language when a word or term must be qualified with a modifier it is an indicator that the word or term is too general for the intended meaning. Thus the reason for the many modifiers for "waters of the United States" in the CWA, is because the CWA was not intended to apply to every drop of water located within the territorial boundaries of the United States. Modifying words have been used to provide parameters for implementation of protection of water quality since the Water Pollution Control Act of 1948.

Thus when the CWA uses the term "navigable waters" to modify "waters of the United States", there should be no question that the Agencies should address waters that can be sailed on, i.e. that are passable by a vessel that floats on water. Using this clear and commonly understood meaning further leads to understanding that connected waterways and significant nexus waters will be waters that can be used for sailing on or that directly feed such waters. Limiting the Agencies' jurisdiction to the actual meaning of "navigable waters" yields to a simple test: *Can you float your boat on the water?*

It is not the business of the Agencies to reinvent language, nor is it right or proper for the Agencies to use confusing language and incorrectly stated purpose to attempt to expand a federal Agency's jurisdictional authority.

Recommendation: Withdraw the proposed rule. If the Agencies are confused about their scope of jurisdiction, they should seek Congressional and judicial guidance.

Issue 2: Failure to provide legal justification for the proposed rule

Reference: FR page 22188, column 3: *The SWANCC and Rapanos decisions resulted in the agencies evaluating the jurisdiction of waters on a case-specific basis far more frequently than is best for clear and efficient implementation of the CWA. This approach results in confusion and uncertainty to the regulated public and results in significant resources being allocated to these determinations by Federal and State regulators.*

Discussion: We find this statement to be self-serving and misleading. There is no doubt that with the plurality decision in the *SWANCC* and *Rapanos* cases the Supreme Court has already provided a clear definition of "waters of the United States". (See summary of the Supreme Court's decision in the attached "Syllabus of *RAPANOS ET UX. ET AL v. UNITED STATES*"²)

Interpreting the law and providing a clear meaning to the intent of laws when there is doubt or a dispute is the primary role of the Supreme Court. The Supreme Court has done its job concerning the definition of "waters of the United States" and "jurisdictional waters" under the CWA. We find that the Agencies have been and are continuing to struggle with "mission creep", i.e. self-determined expansion of their mission beyond their statutory authority, as demonstrated by their unwillingness to accept the (*Rapanos*) Supreme Court decision and instead formulating this proposed rule. Unwilling to accept the Supreme Court definitions, the Agencies are attempting to implement their own definition of the "waters of the United States", which has led to much confusion and uncertainty for the American public.

There can only be one reason for the Agencies' concern with having to evaluate jurisdiction of waters on a case-specific basis: The Agencies' desire to expand their scope of jurisdiction over the nation's waters. The perceived need to control land use activities across most of the nation, which has swept through the upper administrative levels of the Agencies, is not a need for states or the American public, nor is it a valid or acceptable justification for the proposed rule.

The Agencies' bid to expand their scope of jurisdiction over the nation's waters and the need to control land use activities across most of the nation is clearly evident in the fact that the EPA has taken it upon themselves to commission the development of a "Water Body Connectivity Report" and to further go to the trouble of setting up their own EPA Science Advisory Board (SAB) review of the report. It is hard to believe the outcome of this self-serving process would lead to anything but a finding that all waters are connected in one way or another, and to

² <http://www.law.cornell.edu/supct/html/04-1034.ZS.html> Accessed 06/24/14

conclude that the Agencies must be granted jurisdiction for permitting just about every land use activity in the nation.

Unfortunately for the Agencies, the Constitution does not grant power to any federal agency to establish their own authorities or jurisdictional boundaries independent of Congress and the Supreme Court.

Recommendation: Withdraw the proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law. Furthermore, they must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority.

Issue 3: Failure to provide justification for expansion of authority and jurisdiction

Reference: FR page 22189, column 1: *The agencies emphasize that the categorical finding of jurisdiction for tributaries and adjacent waters was not based on the mere connection of a water body to downstream waters, but rather a determination that the nexus, alone or waters in the region, is significant based on data, science, the CWA, and case law.*

In addition, the agencies propose that “other waters” (those not fitting in any of the above categories) could be determined to be “waters of the United States” through a case-specific showing that, either alone or in combination with similarly situated “other waters” in the region, they have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas. The rule would also offer a definition of significant nexus and explain how similarly situated “other waters” in the region should be identified.

Discussion: The above statements not examples of agencies adding clarity to existing laws. Instead, these statements are additional examples of “mission creep”, i.e. self-determined expansion of their mission beyond statutory authority. These statements serve to usurp the authority and jurisdiction of state and local governments. Although the powers of the federal government are vested by the U.S. Constitution, it is state government that tends to have a greater influence over most Americans' daily lives.

The Tenth Amendment to the United States Constitution prohibits the federal government from exercising any power not delegated to it by the states in the U.S. Constitution; thus the states, through local governments (county, municipal governments and the elected officials of soil and water conservation districts), handle the majority of issues most relevant to individuals within their respective jurisdictions.

Federal agencies are established by governments to provide specific services. The personnel of federal agencies are not elected officials, but rather civil servants. Agencies implement the actions required by laws (statutes) enacted by Congress, and may not take action that goes beyond their statutory authority or that violates the Constitution.

By virtue of the Acts of 1866, 1870, and 1877 the federal government divested itself of its authority over all non-navigable waters in the West, ceding that authority to the states. This action of Congress has only been changed in the past by the exemption of water from appropriation under state law. Thus, non-navigable waters of the West are still outside of the jurisdictional authority of the Agencies.

The proposed expansion of authority and jurisdiction over lands that may be or are covered with water for short periods of time cannot be justified. These are non-navigable waters. Clearly this expanded role is not the role the EPA and Corps were created to accomplish.

What is even more troubling with the proposed rule is the idea that because intertwined “water connectivity” and nebulous “significant nexus” to navigable waters might exist, somehow that connectivity and nexus should give the Agencies jurisdictional authority to fit their perceived needs. This is especially troublesome given the fact that what is being proposed has already resulted in multiple court cases that have gone as far as the Supreme Court of the United States, and has already resulted in the Supreme Court rendering multiple decisions that define “waters of the United States”.

We find it is very disheartening to have to deal with a proposed rule that is counter to the latest Supreme Court decision (*Rapanos ET UX. Et Al v. United States*), which has clearly addressed this matter. By issuing the current proposed rule the Agencies appear to be attempting to override the *Rapanos* Supreme Court decision, which for the most part dismissed the notion that intertwined “water connectivity” and the presence of some kind of nebulous “significant nexus” to navigable waters give the Agencies jurisdiction for permitting a much expanded jurisdictional authority, including authority over a broader suite of land use activities.

In the *Rapanos ET UX. Et Al v. United States* decision, Justice Scalia’s plurality opinion, section VII, clearly addresses and shows the errors with the Agencies notion that “water connectivity” and the presence of a “significant nexus” somehow come from and are part of the CWA. In this opinion, it is stated in the first paragraph of page 37:

“One would think, after reading JUSTICE KENNEDY’s exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of “significant nexus” between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from SWANCC’s cryptic characterization of the holding of Riverside Bayview.”

This statement alone should have been a red flag to the Agencies that the occurrence of “water connectivity” and the presence of a “significant nexus” was somehow a mandate for them to take it upon themselves to redefine what constitutes “waters of the United States” for CWA purposes.

We find it alarming that the Agencies feel free to ignore the intent of Congress through bypassing the CWA and ignoring the findings of the Supreme Court. It is even more troubling that the Agencies would attempt to convince the public that they are somehow empowered to greatly expand their jurisdictional authorities, which would open the door for them to substantially increase their influence in land use activities across the entire nation.

Recommendation: Withdraw the current proposed rule. If the Agencies feel the need to expand their jurisdictional authority and the scope of waters protected by the CWA, they must work within the bounds of already established federal and case law, specifically incorporating the “waters of the United States” definition presented by the plurality Supreme Court opinion in the *RAPANOS ET UX. Et AL v. UNITED STATES* decision. Furthermore, the Agencies must work within established constitutional process, as well as with state and local elected officials and a broad cross section of the American public in developing changes to their mission and scope of authority.

Issue 4: Misrepresentation of Agencies’ authority in the proposed rule

Reference: Page 22189, column 3: *This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use of land and water resources, and to consult with the Administrator with respect to the exercise of the Administrator’s authority under the CWA. CWA section 101(b).*

This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State to allocate quantities of water within its jurisdiction and neither does it affect the policy of Congress that nothing in the CWA shall be construed to supersede or abrogate rights to quantities of water which have been established by any state. CWA section 101(g).

Discussion: The above two statements are misleading because they are presented in the proposed rule in a way that tends to create the impression the Agencies are dealing with solely Congressional policy and not requirements of the CWA. The above two statements are in fact a clearly stated objective of the CWA.

The lead-in paragraph for Section 101 of the CWA states: *The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act --- (b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to ... and (g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act...*

When the above statements are presented in the context that they are found in the CWA it becomes much more evident that Congress did intend for Federal actions conducted under authority of the CWA to not interfere with state rights and authorities, and state responsibilities

to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.

We also have a concern with the statements: *“This proposal does not affect Congressional policy to preserve the primary responsibilities and rights of states ...”* and *“This proposal also does not affect Congressional policy not to supersede, abrogate or otherwise impair the authority of each State...”* When considering all of the concerns and problems that have occurred with the current implementation of the CWA it is difficult to believe that the actions called for under the proposed rule would not add an additional burden on the states as they work to carry out their rights and responsibilities to manage the water and land resources within their jurisdiction.

Having a federal agency permitting land and water management activities from distant and often out-of-state offices with no knowledge of local conditions and no connection with local citizens can only lead to further complicate matters. It is clear that Congress, when it originally enacted and then amended the CWA never intended for the Agencies to act as the primary permitting and enforcement agency for land and water use activities across the nation. Contrary to what is being presented in the proposed rule it is obvious that the Agencies are attempting to set themselves up as the distant and often out-of-state permitting authority that will have the ability to greatly influence the land and water uses in all States and across the entire nation.

For over one hundred years the nation’s state and local governments have dealt with the planning, development and use of land and water resources, including water pollution within their jurisdictions. These tasks have been carried out faithfully at the local level without having to take extremely punitive measures, which seems to be the norm when federal agencies have intervened in the recent past. This heavy-handed approach to gain compliance is now a common practice in the way the Agencies conducts their permitting activities. This constant fear of harsh fines and threats of being imprisoned by federal agencies has greatly affected the states’ responsibilities and rights when dealing with local efforts to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources. We can only foresee this situation becoming much worse if the proposed rule is implemented.

Congress has over the years been very careful to encourage state and local government responsibility for and involvement in the planning, permitting and proper implementation of land and water use activities. Only in the last twenty or thirty years has the role of the states and local governments been usurped by the mission creep of federal agencies. This proposed rule is another example of a mission creep that is being fueled and driven by a few select elite environmental organizations that will stop at nothing to impose their will on the American public.

Recommendation: Withdraw the current proposed rule.

Additionally, the Agencies must:

- End actions that allow mission creep within the federal governmental agencies.
- Discontinue unconstitutional self-serving efforts to increase the Agencies’ boundaries of jurisdiction over land use activities across the nation.

- Work diligently to divest themselves of all permitting authority and rather put their efforts towards helping the states and local governments coordinate and jointly plan for permitting and implementing sound land and water use practices across the entire United States, which is the clear intent of the CWA.
- Connect with the American public and not give in to the desires of a select elite group of environmental organizations that hope to gain control of the nation's land and water resources through the manipulation of the Federal land and resource management agencies.

Issue 5: Failure to comply with Executive Orders 12866 (1993) and 13563 (2011)

References: FR page 22188, column 1. *This proposal would enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.*

FR page 22189, column 1. *...the agencies request comment on alternate approaches to determining whether "other waters" are similarly situated and have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas.*

FR page 22189, column 1. *In particular, the agencies are interested in comments, scientific and technical data, caselaw, and other information that would further clarify which "other waters" should be considered similarly situated for purposes of a case-specific significant nexus determination.*

FR page 22189, column 2. *The agencies also solicit comment on whether the legal, technical and scientific record would support determining limited specific subcategories of waters are similarly situated, or as having a significant nexus sufficient to establish jurisdiction.*

FR page 22189, column 2. *...the agencies also request comment on determining which waters should be determined non-jurisdictional.*

FR page 22189, column 2. *The agencies seek comment on how inconclusiveness of the science relates to the use of case specific determinations. As the science develops, the agencies could determine that additional categories of "other waters" are similarly situated and have a significant nexus and are jurisdictional by rule, or that as a class they do not have such a significant nexus and might not be jurisdictional.*

FR page 22189, column 2. *The agencies pose the questions because of the strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and are not subject to CWA jurisdiction. These comments on alternate approaches will inform the agencies in addition to the comments on the case-specific determination proposed in the rule.*

FR page 22190, column 1. *This notice also solicits information and data from the general public, the scientific community, and tribal, state and local resource agencies on the aquatic resource,*

implementation, and economic implications of a definition of "waters of the United States" as described in the proposal. The goal of the agencies is to ensure the regulatory definition is consistent with the CWA, as interpreted by the Supreme Court, and as supported by science, and to provide maximum clarity to the public, as the agencies work to fulfill the CWA's objectives and policy to protect water quality, public health, and the environment

Discussion: Executive Orders 12866 Regulatory Planning and Review (1993) and 13563 Improving Regulation and Regulatory Review (2011) require that the federal regulatory system ensure, among other things, regulations that are consistent, written in plain language, and easy to understand. The proposed rule fails on all counts.

The stated purpose of this proposed rule, as evidenced by its title, is to define the "Waters of the United States" under the Clean Water Act, and as stated elsewhere (see above references), to increase clarity as to the scope of "waters of the United States". As has already been addressed, above, that term does not need to be defined. The CWA and the Supreme Court have already very adequately provided a definition. However, the proposed rule goes on to request comments that address so many other issues, and in such a self-referential and circular manner, that the proposed rule becomes nearly impossible to understand.

The Agencies have not published a proposed rule, but rather a request for the public to do the Agencies' own work. Rather than publish a proposed rule that presents definitions of terms and alternatives to those definitions in a consistent and easy to understand manner for the public to analyze and evaluate, the Agencies have created a rule that goes back and forth between confusing definitions scattered throughout the document and soliciting additional comments about definitions of terms that are not found anywhere near the request for comments. (*See Issue 1 above, "bait and switch" discussion*).

In the midst of all the confusion, it is difficult to understand precisely how the alleged purpose of clarification of scope actually would be achieved by complying with the proposed rules requests for comments. In fact, these many requests (only some of which are cited, above) are actually extremely loaded questions based on undisclosed presumptions meant to limit direct replies to only those that serve the Agencies' agenda.

Nowhere in the proposed document is it stated, in plain and direct language, that the result of defining the terms for the various waters would be that all waters so defined would automatically fall within the scope of jurisdictional authority of the Agencies. As has been mentioned in several comments prior to this one, this amounts to "mission creep", which is enabled by not complying with the Executive Orders directives on regulatory planning.

Recommendation: Withdraw the proposed rule. It is inappropriate and in violation of Executive Orders on regulatory planning.

Issue 6: Failure to list all supporting documents.

Reference: FR page 22188, column 2. All documents in the docket are listed in the <http://www.regulations.gov> index.

Discussion: FR page 22188, column 1 states that the proposed rule is published “in light of” court cases. Column 3 of the same page refers to the SWANCC and Rapanos court cases.

The SWANCC and Rapanos decisions are crucially important to understanding the whole reason the Agencies contend that the proposed rule is necessary, yet the Agencies have not made them available in the docket under “Supporting & Related Material. This is not only unfair to the public, but it is also a false statement made in the proposed rule.

Recommendation: Provide links to the SWANCC and Rapanos court cases as well as any other caselaw “in light of” their important connection to the proposed rule.

Issue 7: Violation of Fifth Amendment “regulatory taking”

Discussion: The extraordinary expansion of the Agencies’ jurisdictional authority that would come about through this proposed rule, and the resulting vastly increased restrictions imposed on private waters through permitting would result in regulatory taking, a violation of the Fifth Amendment. The increased permitting available to the Agencies would result in citizens being required to obtain permits and pay the government for ordinary activities on private property. This amounts to a seizure of that property without compensation, i.e. a regulatory taking. Although the Supreme Court does not require government compensation where regulations substantially advance legitimate governmental interests, this is not true when the regulations prevent a property owner from making “economically viable use of his land.” *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

In other words, the government should pay the market value of seized property rather than the property owner paying the government via a permit for the privilege of improving that property.

This type of violation of the Fifth Amendment would not come about except that the Agencies propose to include non-navigable waters in their definition of the scope of their jurisdictional authority. The mission of the Agencies, in particular the EPA, is to protect and sustain water quality, not own the water or manage its use.

Recommendations: Withdraw the proposed rule.

Issue 8: Improper dismissal of negative impact (small business)

Reference: FR page 22220, columns 1-2: *The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of 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. Small entities include small businesses, small organizations, and small governmental jurisdictions....*

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

Discussion: The above statement in the rule is patently self-contradictory. Expansion of the scope of the Agencies' jurisdictional authority to include practically any and all surface waters of the territorial United States will obviously impact many more small businesses than are already impacted, not fewer. The impact of regulatory overreach of the Agencies on small businesses cannot simply be dismissed by pretending that more is less through twisting language and doublespeak.

Apparently the Agencies expect the public (particularly farmers, ranchers and the no doubt millions of other small business owners that would be impacted by this propose rule) to believe that increasing the scope of jurisdiction, i.e. defining all waters as "waters of the United States", somehow means that fewer individual waters would be involved. This would be like saying that a bushel of apples is a smaller amount of apples than the 125 apples in the bushel basket, just because a bushel is one unit whereas the second description includes many units.

The Agencies' bid for increased jurisdictional authority would have exponentially expanding impacts on small businesses, and these impacts will have significant adverse economic impacts on the general public, including but not limited to reduced land value and, increased costs of doing business due to regulatory burdens (e.g. having to hire consultants to prepare permits, cost of permits, project delays, restrictions on land use and the cost of complying with permitting requirements, including mitigation and failure of projects to make a profit).

Property owners, particularly farmers and ranchers and citizens in rural areas, count their land as their principal asset. Land is often used as collateral for loans and other capital purchases needed for business operations or capital improvements.

The tremendous direct and indirect adverse impacts and cumulative impacts of this proposed rule on small businesses cannot simply be dismissed as the Agencies have decided to do.

Recommendation: Withdraw the proposed rule. Should the Agencies put forth another proposed rule, the true impacts of expansion of waters under the CWA on small businesses must be fully disclosed for the public to analyze and evaluate.

Issue 9: Failure to address economic impact

Reference: FR page 22220, column 1: [The Agencies] *prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in "Economic Analysis of Proposed Revised Definition of Waters of the United States."*

Discussion:

The Agencies' estimate of the costs and benefits associated with the regulatory redefinition of "waters of the United States" has not been adequately addressed in the proposed rule or in the associated document cited above. The inclusion of categories of non-navigable waters that were previously never regulated by the Agencies under CWA, such as waters in floodplains, riparian areas, and certain ditches, will broaden the jurisdictional authority of the Agencies and will significantly increase the costs associated with each program; however the above cited document severely underestimates the impact of the definitional changes, excludes important costs, and uses a flawed benefits transfer methodology to estimate the benefits of expanding jurisdiction.

According to a May 15, 2014 report by David Sunding, Ph.D. of the Waters Advocacy Coalition³, the numerous errors, omissions, and lack of transparency render the analysis virtually meaningless. Estimates of economic impacts to other programs rely on an incremental jurisdiction determination that is deeply flawed. The systematic exclusion of various costs and benefits ignores important impacts to permit applicants and permitting agencies. The analysis suffers from a lack of transparency. Explanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided; the entire report is based on records from the Corps' internal ORM2 database, which is unavailable to the public, and thus the validity of the underlying data cannot be determined due to lack of requisite transparency.

Recommendation: Withdraw the proposed rule. Withdraw the economic analysis. If the Agencies wish to resubmit a proposed rule, it must be based on an adequate economic analysis.

CONCLUSION

Many more examples of the misguided direction and misleading information found in the proposed rule could be cited and addressed in these comments, but doing so would be a waste of time and resources since the comments presented have brought forward key and fatal flaws of the current proposed rule. While the entire proposed rule is lacking integrity and is obviously loaded with bias toward the federal takeover of land and water use activities across the nation, we can only hope that the actions of the Agencies to expand their jurisdictional boundaries and increase their authority over land and water use activities will be recognized for what they are: gross incompetence and blatant mission creep.

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The mission of the Agencies is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters for the continuing benefit of the American people. This mission will work much better when done with the support of and interaction with state and local governments, and the citizens of the United States. The proposed rule would impose tremendous burdens on the taxpaying public and on small businesses, making it more difficult to farm and ranch, build homes, develop energy resources, engage in conservation activities and otherwise use the land. In fact, the Agencies have obscured rather than promoted their own missions and the purpose of the Clean Water Act.

Thank you for your attention to our comments and we hope our harsh criticism will lead to actions that restore the faith of the American public in the ability of the Agencies to honestly and transparently work with States and local governments in caring for and managing the WOUS.

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Garfield County Commission
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Luke Shipp
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X-Diamond Ranch
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**Apache County Board of Supervisors
AGENDA ITEM REVIEW FORM**

date/time stamp

Submitter's Name: (Individual, Organization, or County Department)

Board of Supervisors _____

Date/Signature: _____

Describe in detail what you want to say to the Board and what action you want the Board to take:

Call to the Public: Individuals may address the Board on any relevant issue for an amount of time determined by the Chairman. At the close of the call to the public, Board members may not respond to any comments but may respond to criticism, ask staff to review a matter, or ask that a matter be placed on a future agenda.

BOS Meeting Date Requested ongoing

PRE-AGENDA ITEM REVIEW

Review Routing / /Legal / /Finance / /Purchasing / /Human Resource / /Other: _____

Legal Review: _____

Signature: _____

Finance Review: _____

Signature: _____

Human Resources Review: _____

Signature: _____

Other Review: _____

Signature: _____

Reviews completed, item approved for Agenda.

Supervisor/Board Clerk's Initials _____
