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**DEPARTMENT OF ENVIRONMENT AND CONSERVATION**  
NASHVILLE, TENNESSEE 37243-0435

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**Via E-rulemaking Portal, Electronic Mail and First Class Mail**

Water Docket, Environmental Protection Agency

Mail Code 2822T

1200 Pennsylvania Avenue, NW

Washington, D.C. 20460

ATTENTION: Docket ID No. EPA-HQ-OW-2011-0880

RE: Comments regarding the Environmental Protection Agency and the U.S. Army Corps of Engineers proposed rule defining the scope of water protected under the Clean Water Act, ***Docket ID No. EPA-HQ-OW-2011-0880***

Dear Administrator McCarthy:

On April 21, 2014, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") issued a proposed rule defining the scope of waters protected under the Clean Water Act ("CWA") in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")* and *Rapanos v. United States*. EPA and the Corps assert the proposal will "enhance the protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increased clarity as to the scope of 'waters of the United States' protected under the Act."<sup>1</sup> The Tennessee Department of Environment and Conservation ("TDEC"), as the state environmental regulatory agency, and the Tennessee Department of Agriculture ("TDA"), as the state agricultural agency (hereinafter referred to individually or collectively as the "state agencies"), submit the enclosed comments for your consideration.

We appreciate the comment period extensions EPA and the Corps granted as the rule proposal is controversial and its potential application is extensive across multiple programs under the CWA that are implemented by two federal agencies (EPA and the Corps) and the states. We also appreciate the opportunity to consult with EPA during the comment period. We believe the information sharing and coverage of some of the most concerning aspects of the proposed rule was beneficial and much needed, although many questions remain. We were disappointed the Corps was noticeably absent from the consultation, despite being asked to participate, and

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<sup>1</sup> 79 Fed. Reg. 22188 (April 21, 2014).

believe the lack of participation is indicative of more serious issues occurring within the implementation of Section 404 of the CWA. While we appreciate the time and effort spent by EPA on calls and outreach following the proposal, the overall effort by all co-regulators in the CWA context does not rise to the level of consultation that should occur between the states and federal agencies in developing a comprehensive regulation with far reaching impact such as the proposal. It was certainly lacking prior to the publication of the proposed rule. We encourage EPA to continue its consultation with the states beyond the comment period close and to engage the Corps to do the same. All sections of the CWA, but particularly sections 404 and 401, require the collective participation and interaction of EPA, the Corps and the states. EPA and the Corps acknowledge that the most significant impacts of the rule proposal are likely to occur within the 404 program; therefore, it is imperative that both federal agencies and the states engage with one another in the spirit of cooperative federalism that Congress intended when enacting the CWA.

### **Executive Summary**

TDEC implements programs under the CWA in addition to responsibilities under the Tennessee Water Quality Control Act of 1977. TDEC specifically implements programs and/or duties under sections 303, 401 and 402 of the CWA as related to this proposed rulemaking. The Tennessee Water Quality Control Act broadly defines waters of the state and requires, with limited exception, permits to authorize various activities, including but not limited to, the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. TDEC establishes and implements water quality standards by designating use classifications for surface waters within area and river basins and establishing water quality criteria for the various uses, with the most stringent or protective criteria being applicable to all state waters classified for more than one use. TDEC implements the National Pollutant Discharge Elimination System program as delegated by EPA and works as a co-regulator with the Corps in implementing the Section 404 program. TDEC also works with the Tennessee Valley Authority in the implementation of its regulatory responsibilities under the TVA Act within the Tennessee River Valley.

The state agencies are committed to the protection and appropriate management of water resources within the state. Tennessee is a water abundant state with almost unparalleled diversity of landscapes, stream types, groundwater resources, wetlands, cave systems, karst topography and fish and aquatic life. The state agencies have a long history of understanding how its water resources exist and behave across all regions within the State. As the trustee for water resources held in public trust for the people of Tennessee, the State acts through various departments and programs to ensure those resources are protected and that the goals of both the CWA and state law are given meaning. TDEC works diligently with state legislators and stakeholders to ensure that regulatory programs are protective of state resources and are structured and implemented in such a manner that regulated parties are able to understand what is required for compliance. All of the programs mentioned are likely to be impacted by the proposed rule; therefore, the state agencies are keenly interested in ensuring action taken by EPA and the Corps is fully supported by the law and the science.

Congress enacted the CWA with a broad objective to be accomplished through sweeping goals, such as eliminating the discharge of pollutants into navigable waters and the development of national policy calling for the control of nonpoint sources of pollution to be developed and implemented in an expeditious manner. Notwithstanding its broad objectives, goals and policies, the CWA clearly articulates Congress's intent to preserve and protect the rights of the states with regard to water resources within their borders. Additionally, Congress deliberately chose to use the term "navigable" when referring to the nation's waters into which discharges would be regulated under the CWA. ***Although the state agencies recognize that federal jurisdiction exists with regard to the vast majority of waters within Tennessee, the proposed rule is not appropriately limited and subverts Congress's clear intent to retain some meaning to the term "navigable" and to preserve to states the primary responsibility to prevent and manage pollution as well as plan for the development and use of land and water resources.***

The CWA embodies environmental regulatory programs that occur under a cooperative federalism scheme. Cooperative federalism occurs when federal and state governments share regulatory authority. Tennessee, like many states, spends significant time and money in understanding the water resources held in trust for Tennesseans and developing processes and procedures for delineating streams and other water features within the state. The structure and substance of these processes and procedures were not created in a vacuum—they were developed through an extensive process that involved environmental regulatory personnel, environmental professionals, legal professionals and various other stakeholders. They have a secure foundation in both science and law and are codified in statute as well as regulation. These processes and procedures exist today, are well understood and are being used by environmental professionals throughout the state to advise homeowners, farmers, municipalities, and businesses on the extent and limit of federal jurisdiction as well as what are considered state waters.

EPA and the Corps should apply categorical federal jurisdiction by rule to categories of waters with great caution. Notwithstanding the specific concerns discussed with the approach used in the proposed rule, Tennessee is currently experiencing a change in the scope of federal jurisdiction over some waters and features through the Corps' implementation of the Section 404 program that highlights the underlying skepticism so many stakeholders have with regard to the proposed rule, particularly the way tributaries and adjacent waters are handled. The state agencies believe this context is important because a critical piece of any regulatory program is implementation in the field that both respects the bounds of the program and is consistent in application. ***The state agencies are seriously concerned with the broad application of categorical jurisdiction for tributaries and adjacent waters, as defined in the proposal, when there is currently inconsistent and moving federal jurisdictional assertions for some waters and/or features within these categories that just over a year ago TDEC and federal government agreed were not federal waters.***

In the proposed rule, EPA and the Corps assert jurisdiction, by rule, over tributaries utilizing essentially the same language as currently exists in regulation. However, the proposed rule includes, for the first time a regulatory definition for the term "tributary" that is expansive and would encompass any and all water features, including ephemeral waters, that the agencies identify to have a bed, bank and ordinary high water mark regardless of how far they are from a

traditionally navigable water or to what extent any water flows through them. The agencies conclude all waters within the definition of tributary are jurisdictional based on the fact there is a significant nexus between the waters and the downstream waters to which they flow. In order to draw this legal conclusion, the agencies rely on the language provided by Justice Kennedy in the 2006 Supreme Court case *Rapanos v. United States*—that [waters] may be jurisdictional when a significant nexus is present, which occurs when [waters], either alone or in combination with other similarly situated [waters] in the region, significantly affects the chemical, physical and biological integrity of a traditionally navigable water. The state agencies do not debate the federal jurisdiction with regard to the vast majority of the tributary network to traditionally navigable waters; however, we are concerned with the assertion of federal jurisdiction over waters and features that have not historically been federal waters in Tennessee and should not become such due to this federal proposal. The state agencies also question the approach taken by EPA and the Corps to aggregate the connectivity and/or the functional effects of these remote and/or erosional features that may be small, seasonal and exist on the lower level of the connectivity gradient in order to draw the legal conclusion that they do, in fact, have a significant nexus with traditionally navigable waters. These waters and features are either significantly remote in geographic distance from traditionally jurisdictional waters and/or erosional in nature and should not get absorbed in the reach of federal jurisdiction through the broad definition of tributary and its categorical application. ***The state agencies recommend EPA and the Corps revise the definition of tributary to include qualifying language making it clear that erosional features should not be considered tributaries and provide some minimum threshold for the amount of flow that must be present and/or the amount of time water must be present within the water body.***

EPA and the Corps also define the term significant nexus, but adopt a broader definition than articulated in *Rapanos*. The state agencies recommend that EPA and the Corps revise the definition of significant nexus to be consistent with the language used by Justice Kennedy in *Rapanos*. The proposed definition uses the term “or” rather than the term “and” to connect the terms “chemical, physical, biological.” The standard articulated in *Rapanos* includes the term “and,” requiring all three connections to be present; therefore, the agencies’ regulation must be consistent with that requirement.

EPA and the Corps assert jurisdiction, by rule, over all waters, including wetlands, adjacent to traditionally jurisdictional waters, tributaries or impoundments. The agencies generally retain the existing definition for adjacent as bordering, contiguous or neighboring; however, the proposed rule includes, for the first time, a definition of neighboring that is expansive and would include all waters located within the riparian area or floodplain of an otherwise jurisdictional water or waters with a confined surface or shallow subsurface hydrologic connection to otherwise jurisdictional waters. The terms riparian area and floodplain are also defined for the first time and have potentially expansive scope and application.

The agencies rely on the same explanation in Kennedy’s opinion in *Rapanos* to provide the legal basis for the inclusion of all waters defined as adjacent as jurisdictional under the CWA. Just the same as with remote, small waters captured in the agencies’ definition of tributary, some of these adjacent waters will, likewise, be isolated and remote, with their only connection being to other

remote, small waters considered tributaries under the proposed rule. It is clear that EPA and the Corps rely on the aggregation of the functional effect of these “adjacent” waters to create the legal concept of a significant nexus, but it appears their relative connectivity must also be aggregated to support the required nexus to traditionally jurisdictional waters. This approach takes Kennedy’s standard, as articulated in *Rapanos*, a step too far. ***The state agencies request that EPA and the Corps revise the definition of neighboring to exclude the concept of waters with discrete surface and shallow subsurface connections and only assert jurisdiction by rule over adjacent waters if they are located in the floodplain or riparian zone of jurisdictional waters. Additionally, if EPA and the Corps do not appropriately tailor the definition of tributary as discussed above, the state agencies recommend the agencies limit jurisdiction by rule to adjacent waters that are located in the floodplain or riparian area of traditionally jurisdictional waters.***

EPA and the Corps include “other waters” as jurisdictional when they are found, on a case-by-case basis, to have a significant nexus to traditionally jurisdictional waters. While the state agencies generally support retaining the category of “other waters” as determined to be jurisdictional on a case-specific basis, it is difficult to imagine what waters are left given the breadth of waters included within the definitions of tributary and adjacent waters. However, the case-specific inquiry is a reality the states have become accustomed to and it may serve, in some circumstances, to require that federal agencies achieve some level of consistency with how they go about making case-specific determinations and/or using best professional judgment. ***At this time, the state agencies recommend that EPA and the Corps refrain from making any categorical declarations of jurisdiction with regard to “other waters.” If the agencies believe that certain subcategories of any waters are non-jurisdictional, then they should include that information as it would serve to improve clarity and consistency in the field.***

EPA and the Corps propose various exemptions as waters and features that would not be jurisdictional under the CWA, some are existing exemptions and some are new. The state agencies support the agencies’ inclusions of exemptions for waters traditionally exempted as well as those that have been exempted by practice and/or policy. It is imperative, however, that EPA and the Corps provide additional language and/or clarifying information as to the intended extent of such exemptions given the broad application of categorical jurisdiction proposed for tributaries and adjacent waters and, potentially, for other waters. Finally, the state agencies believe there are some issues with the agencies’ economic analysis in support of the proposed action and other policy considerations that should be addressed.

## **I. Background- Water Quality and Regulation in Tennessee**

TDEC is the environmental regulatory agency in Tennessee that implements programs under the CWA in addition to responsibilities under the Tennessee Water Quality Control Act of 1977 (“TWQCA”).<sup>2</sup> TDEC specifically implements programs and/or duties under sections 303, 401 and 402 of the CWA as related to this proposed rulemaking. The TWQCA recognizes that the waters of Tennessee “are the property of the state and are held in public trust for the use of the

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<sup>2</sup> T.C.A. § 69-3-101 et. seq.