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NASHVILLE, TENNESSEE 37243

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June 19, 2017

**Via Electronic Submittal to [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov) and [Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)**

U.S. Environmental Protection Agency  
Scott Pruitt, *Administrator*  
C/O Andrew Hanson, Office of Congressional and Intergovernmental Relations  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
ATTN: E.O. 13132 Federalism Consultation – WOTUS

RE: Tennessee Department of Environment and Conservation and the Tennessee Department of Agriculture  
Comments regarding the Definition of “Waters of the United States.”

Dear Administrator Pruitt:

The Tennessee Department of Environment and Conservation (TDEC) and the Tennessee Department of Agriculture (TDA) (hereinafter referred to as the state agencies) appreciate the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE) regarding potential changes to the regulatory definition of “waters of the United States” for the purposes of the Clean Water Act (CWA).<sup>1</sup> TDA is the state agricultural agency in Tennessee with the authority to manage programs to abate nonpoint source pollution through voluntary, incentive-based approaches. TDA manages the federal nonpoint source program authorized in Section 319 of the CWA, and the custom application of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act. TDEC is the environmental agency in Tennessee with responsibility for implementing regulatory programs under the CWA in addition to responsibilities under the Tennessee Water Quality Control Act of 1977 (TWQCA). TDEC specifically implements the programs under Sections 303, 401, and 402 of the CWA, as well as establishes and implements water quality standards by designating use

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<sup>1</sup> 33 U.S.C. § 1362(7). On February 28, 2017, the President issued an executive order directing EPA and USACE to review the rule previously promulgated by EPA and USACE that purported to define “waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015), and to publish for notice and comment a proposed rule rescinding or revising that rule. Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule. (February 28, 2017) The White House. <https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>. As part of the rulemaking process, EPA and USACE have specifically requested comments from states regarding the definition of “relatively permanent” waters and wetlands with a “continuous surface connection.” See The Definition of “Waters of the U.S.” presentation shared during the E.O. 13132 Federalism Consultation Meeting held on April 19, 2017.

classifications for surface waters and establishes water quality criteria for the various uses. TDEC also works as a co-regulator with the USACE in implementing the Section 404 program, as well as with the Tennessee Valley Authority (TVA) to implement its regulatory responsibilities under the TVA Act. Finally, TDEC also implements the TWQCA, which requires permits to authorize various activities, including but not limited to, “[t]he alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state.”<sup>2</sup>

The state agencies strive to improve and maintain the quality of Tennessee’s water resources such that they are protective of human health and the welfare of Tennesseans while maximizing employment and enhancing economic development within the State. Securing and supporting a clean water future is critical to the State’s continued prosperity. Tennessee is fortunate to be a water-rich state, with a diversity of landscapes, stream types, groundwater sources, wetlands, cave systems, karst topography, and fish and aquatic life.

We appreciate the outreach that EPA and USACE have initiated to gather input from states regarding potential revisions to the definition of “waters of the United States.” However, we hope that this action is the beginning of a series of conversations among EPA, USACE, and the states regarding this topic. Efforts to define the scope of waters protected under the CWA have a controversial history and the implications of this definition’s application are extensive. Engaging with states to shape this rule and its related concepts is imperative to successful rulemaking and implementation, and serves as a basis of Congress’ intended roles and functions of states and federal agencies under cooperative federalism. TDEC and TDA look forward to continued interactions with EPA and USACE regarding this rulemaking.

The state agencies offer the following comments on potential revisions to the definition of “waters of the U.S.” Specifically, TDEC and TDA submit feedback regarding one potential approach for defining the concept “relatively permanent” water based on Tennessee’s experience with stream determination. In doing so, we recognize that if a similar approach were adopted by EPA and USACE, regional variations may be necessary to accommodate unique characteristics of water features, landscapes, geology, etc.

## **INTRODUCTION**

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>3</sup> On April 21, 2014, EPA and USACE issued a proposed rule purporting to define the scope of the “waters of the United States” protected under the CWA (hereinafter referred to as the “Clean Water Rule”). TDEC and TDA submitted comments regarding the proposed Clean Water Rule under Docket ID No. EPA-HQ-OW-2011-0880 on November 14, 2014. Subsequently, following an extensive public comment period, EPA and USACE published a final Clean Water Rule on June 29, 2015, with an effective date of August 28, 2015.<sup>4</sup>

In July 2015, Tennessee joined the states of Ohio and Michigan in bringing a lawsuit to challenge the Clean Water Rule, arguing that it violated the federal Administrative Procedures Act, exceeded the powers of the federal government, and conflicted with existing precedent of the United States Supreme Court.<sup>5</sup> Tennessee, Ohio, and Michigan also filed a protective petition for review in circuit court. Numerous other states and other parties filed similar lawsuits in district courts and petitions for review in circuit courts across the country. The various petitions for review were transferred to and consolidated in the U.S. Court of Appeals for the Sixth Circuit.<sup>6</sup> On October 9, 2015, the Sixth Circuit stayed implementation of the Clean Water Rule nationwide, concluding that the

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<sup>2</sup> Tenn. Code Ann. § 69-3-108(b)(1) (2016).

<sup>3</sup> 33 U.S.C. § 1251(a). The CWA underwent amendments in the 1970s and 1980s, but has not had any recent amendments prior to the new rule redefining “waters of the United States” in 2015.

<sup>4</sup> 80 Fed. Reg. 37054 (June 29, 2015).

<sup>5</sup> Ohio First Amended Complaint, 10, 15-17, State of Ohio, et al. v. U.S. Army Corps of Eng’rs, et al., No. 2:15-cv-02467 (filed July 23, 2015).

<sup>6</sup> Order of Stay, 2-3, State of Ohio, et al. v. U.S. Army Corps of Eng’rs, et al. (6th Cir. Oct. 9, 2015).

petitioners had established a “substantial possibility of success on the merits.”<sup>7</sup> The stay restored the regulatory regime in place prior to the issuance of the Clean Water Rule.<sup>8</sup>

On February 28, 2017, President Donald Trump issued an Executive Order directing EPA and USACE to review and rescind or revise the 2015 Clean Water Rule, interpreting the term “navigable waters” consistent with Justice Scalia’s opinion in *Rapanos v. U.S.*<sup>9</sup> Justice Scalia’s opinion holds that CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.<sup>10</sup> EPA and USACE are engaging in a two-step process to implement the Executive Order. First, the federal agencies will recodify the regulation that was in place prior to issuance of the 2015 revised regulatory definition and that is being currently implemented under the stay of the Clean Water Rule.<sup>11</sup> Second, the federal agencies will propose a new definition that (1) would replace the definition in the 2015 Clean Water Rule, and (2) would align with Justice Scalia’s opinion in *Rapanos*.<sup>12</sup> The current request for information regarding potential approaches to defining “relatively permanent” waters and wetlands with a “continuous surface connection” is being conducted as a consultation that will inform the new definition proposed by EPA and USACE in the future.<sup>13</sup>

## COOPERATIVE FEDERALISM

The concept of cooperative federalism is central to successful implementation of environmental regulatory programs at the federal, state, and local levels. The CWA is no exception, with federal and state governments sharing regulatory authority. It states, “It is the policy of Congress to recognize, preserve and protect 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 in the exercise of authority under this chapter.”<sup>14</sup> Tennessee has invested significant resources to understand its water resources and develop processes for delineating water features within the state. These procedures are grounded in sound scientific and legal bases and are documented in statute and regulation. They also were created through comprehensive processes involving environmental regulators, environmental professionals, legal professionals, business interests, environmental advocates, and various other stakeholders, as well as years of experience in stream delineation throughout the state. The system that has been created for and implemented in Tennessee works, and Tennessee takes great pride in its ability to use these procedures to advise stakeholders on the extent and limit of federal as well as state waters.

TDEC and TDA appreciate EPA and USACE efforts to provide greater clarity and specificity to definitions of “waters of the United States.” However, the state agencies encourage EPA and USACE to do so in a manner that preserves states’ rights to be the primary entities responsible for protection of water resources.

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<sup>7</sup> *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015).

<sup>8</sup> *Id.* at 806. See also About Waters of the United States, U.S. EPA (May 15, 2017), <https://www.epa.gov/wotus-rule/about-waters-united-states>. In a subsequent opinion, the Sixth Circuit held that it had jurisdiction to review the challenges to the Clean Water Rule because the rule was subject to direct circuit court review under 33 U.S.C. § 1369(b)(1). *In re U.S. Dep’t of Defense*, 817 F.3d 261 (6th Cir. 2016). On January 13, 2017, the U.S. Supreme Court granted certiorari on that jurisdictional issue, *Nat’l Assoc. of Manufacturers v. Dep’t of Defense*, No. 16-299 (Jan. 13, 2017). The case will be argued during the Supreme Court’s 2017 term.

<sup>9</sup> *Id.* 1. See *Rapanos v. U.S.*, 547 U.S. 715 (2006).

<sup>10</sup> See generally The Definition of “Waters of the U.S.” presentation shared during the E.O. 13132 Federalism Consultation Meeting held on April 19, 2017.

<sup>11</sup> It is the State of Tennessee’s understanding that a proposal to recodify the regulation in place prior to the 2015 Clean Water Rule has been sent to and is currently undergoing review at the Office of Management and Budget.

<sup>12</sup> Waters of the United States (WOTUS) Rulemaking: Rulemaking Process. U.S. EPA. <https://www.epa.gov/wotus-rule/rulemaking-process>.

<sup>13</sup> *Id.* 11.

<sup>14</sup> 33 U.S.C. §1251(b).

## RELATIVELY PERMANENT WATERS

EPA and USACE are seeking input from states regarding potential definitions for the concept of “relatively permanent” waters as well as input regarding the concept’s implementation.<sup>15</sup> TDEC and TDA offer Tennessee’s approach to defining streams (and wet weather conveyances) and its hydrologic determination process as one potential mechanism for definition and implementation of “relatively permanent” waters for consideration by EPA and USACE.

The TWQCA was enacted “to abate existing pollution of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters, and to plan for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters.”<sup>16</sup> It also directs the government of Tennessee to “take all prudent steps to secure, protect, and preserve” the right of Tennesseans to unpolluted waters.<sup>17</sup> In Tennessee, waters are defined as “all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except those bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters.”<sup>18</sup> Importantly, the TWQCA also provides Tennessee with its regulatory framework for jurisdictional definitions and determination procedures relating to streams.

In 2009, Tennessee passed legislation that directed TDEC to develop rules and guidance for making stream determinations.<sup>19</sup> The process of developing and passing legislation and subsequent rules and guidance documents for stream determinations involved participation from a broad set of stakeholders representing the environmental community, business interests, and local government. While involved and at times highly debated, the outcome has been a regulatory framework that successfully clarifies for regulators, the regulated community, and other stakeholders what are considered streams, or conversely, wet weather conveyances, in Tennessee. The regulatory framework that was developed and is implemented today is based on the natural processes that create, maintain, and shape surface water features and relevant regulatory language and definitions relating to jurisdictional status.<sup>20</sup> Developing similar determination processes at the federal level may assist in making decisions regarding the jurisdiction and regulatory framework governing streams. Full text of legislation, rules, and guidance relating to hydrologic determinations in Tennessee is provided as attachments to these comments for reference.

### Wet Weather Conveyances and Streams in Tennessee

Definitions for the terms “wet weather conveyance” and “stream” are central to hydrologic determinations in Tennessee. A wet weather conveyance is defined as:

*notwithstanding any other law or rule to the contrary, man-made or natural watercourses, including natural watercourses that have been modified by channelization:*

*(A) That flow only in direct response to precipitation runoff in their immediate locality;*

*(B) Whose channels are at all times above the groundwater table;*

*(C) That are not suitable for drinking water supplies; and*

*(D) In which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple*

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<sup>15</sup> *Id* 11 at 11.

<sup>16</sup> Tenn. Code Ann. §69-3-102.

<sup>17</sup> *Id.*

<sup>18</sup> Tenn. Code Ann. §69-3-103.

<sup>19</sup> *See generally* Tennessee Public Chapter No. 464 of 2009. This legislation also outlines procedures for persons desiring to alter a specific water of the state to request a determination from TDEC and determination appeals.

<sup>20</sup> Tennessee Department of Environment and Conservation Division of Water Pollution Control. Guidance for Making Hydrologic Determinations, Version 1.4 (May 2011).

*populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two (2) months.*<sup>21</sup>

A stream is the inverse of a wet weather conveyance, equating to what could be considered a “relatively permanent” water at the federal level:

*a surface water that is not a wet weather conveyance.*<sup>22</sup>

These two terms are also defined in rule and clarified in guidance.<sup>23</sup>

### Hydrologic Determinations in Tennessee

As previously noted, the 2009 legislation defined wet weather conveyances and directed TDEC to develop and submit to the Board of Water Quality, Oil, & Gas (the body charged with promulgating rules) proposed rules (and guidance) necessary for accurate and consistent wet weather conveyance determinations, which at a minimum were to include:

- (1) *Standard procedures for making stream and wet weather conveyance determinations that take into consideration biology, geology, geomorphology, precipitation, hydrology, and other scientifically based principles; and*
- (2) *A certification program for department staff and other persons who wish to become certified hydrologic professionals.*<sup>24</sup>

Through the rulemaking process, TDEC, to fulfill the aforementioned statutory requirements, developed rules specifying “standing operating procedures for making stream and wet weather conveyance determinations (hydrologic determinations).”<sup>25</sup> These rules outline procedures to be used in circumstances where there is question whether a watercourse is a stream or wet weather conveyance, taking into consideration all relevant and necessary information on the biology, geology, geomorphology, precipitation, hydrology, and other scientifically based principles regarding the watercourse.<sup>26</sup> Like the legislation passed in 2009, these rules were the collective outcome of an involved stakeholder process whereby participants reached consensus regarding procedures for stream and wet weather conveyance determinations.

Specific components outlined in TDEC’s Division of Water Resources’ rules for hydrologic determination include:

- The establishment of guidance detailing instructions and examples for proper application of rules regarding stream determination, and the requirement for TDEC staff and certified hydrologic professionals not employed by the department who are submitting stream determinations to follow such guidance.
- The creation of a Hydrologic Determination Field Data Sheet, to be used for documenting determinations, and a process for revising this data sheet.
- The length of time for which hydrologic determination will be considered valid—a maximum of five years or the term of a permit based on the hydrologic determination.
- Wet weather conveyance determinations should be made based on locations up and down channel of a point to consider the watercourse’s landscape context (rather than only based off of a single point).

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<sup>21</sup> *Id.* 19.

<sup>22</sup> *Id.*

<sup>23</sup> See TDEC DWR Rule 1200-04-03 attached as appendix. This rule has since been transferred to TDEC DWR Rule 0400-40-03. See also “Guidance for Making Hydrologic Determinations” attached as appendix.

<sup>24</sup> *Id.* 20 at 2.

<sup>25</sup> TDEC DWR Rule 0400-40-03-.05(9).

<sup>26</sup> TDEC DWR Rule 0400-40-03-.05(9)(a).

- Primary indicators of wet weather conveyances, each of which is considered presumptive evidence alone regarding one or more of the four elements, and will allow for an immediate hydrologic determination to be made in most cases:
  - (i) *Hydrologic feature exists solely due to a process discharge,*
  - (ii) *Defined bed and bank absent, watercourse dominated by upland vegetation/grass,*
  - (iii) *Watercourse dry anytime during February through April 15<sup>th</sup> under normal precipitation/ ground water conditions, and*
  - (iv) *Daily flow and precipitation records showing feature only flows in direct response to rainfall.<sup>27</sup>*
  
- Primary indicators of streams:
  - (i) *Presence of multiple populations of obligate lotic organisms with two months or longer aquatic phase,*
  - (ii) *Presence of fish (except Gambusia),*
  - (iii) *Presence of naturally occurring ground water table connection,*
  - (iv) *Flowing water in channel seen days or more since the last precipitation in the local watershed, and*
  - (v) *Evidence watercourse has been used as a supply of drinking water.<sup>28</sup>*
  
- Secondary indicators, which in total are used to evaluate the presence or absence of one or more of the elements of a wet weather conveyance, in the event that primary indicators cannot be used:
  - (i) *Continuous bed and bank,*
  - (ii) *Sinuuous channel,*
  - (iii) *In-channel structure, riffle-pool sequences,*
  - (iv) *Sorting of soil textures or other substrate,*
  - (v) *Active/relic floodplain,*
  - (vi) *Depositional bars or benches,*
  - (vii) *Braided channel,*
  - (viii) *Recent alluvial deposits,*
  - (ix) *Natural levees,*
  - (x) *Headcuts,*
  - (xi) *Grade controls,*
  - (xii) *Natural valley drainageway,*
  - (xiii) *At least second order channel on United State Geological Survey or Natural Resources Conservation Service map,*
  - (xiv) *Subsurface flow/discharge into channel,*
  - (xv) *Water in channel more than forty-eight hours since rain,*
  - (xvi) *Leaf litter in channel,*
  - (xvii) *Sediment on plants or on debris,*
  - (xviii) *Organic debris lines or piles (wrack lines),*
  - (xix) *Hydric soils in channel bed or sides,*
  - (xx) *Fibrous roots in channel,*
  - (xxi) *Rooted plants in channel,*
  - (xxii) *Crayfish in channel (exclude in floodplain),*
  - (xxiii) *Bivalves/mussels,*
  - (xxiv) *Amphibians,*
  - (xxv) *Macrobenthos,*
  - (xxvi) *Filamentous algae, periphyton,*
  - (xxvii) *Iron-oxidizing bacteria/fungus, and*
  - (xxviii) *Wetland plants in channel.<sup>29</sup>*

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

<sup>28</sup> TDEC DWR Rule 0400-40-03.-.05(9)(a)(10).

- The exclusion of watercourses in which flow is solely a result of process or wastewater discharge or other non-natural sources from regulation as streams.<sup>30</sup>
- Minimum required procedures to determine if a watercourse flows only in direct response to precipitation runoff in its immediate vicinity based on recent precipitation patterns, what may constitute “normal weather conditions” for the location, and localized soil and geologic conditions.<sup>31</sup>
- Procedures to determine if the channel is above the ground water table at all times based on review of topographic maps, presence of wetlands in the vicinity of the watercourse, U.S. Department of Agriculture soil surveys, site geological characteristics affecting the elevation of the ground water table, and data from any available water wells within one mile of an in similar landscape position to the watercourse.<sup>32</sup>
- Procedures to determine if a watercourse is suitable for drinking water supplies, such as note of spring boxes, water pipes to a residence, or other evidence that the watercourse is being used as a household water supply within the vicinity of the segment being evaluated.<sup>33</sup>
- Methods to determine if a watercourse under normal weather conditions due to naturally occurring ephemeral or low flow does not have adequate water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months.<sup>34</sup>

To supplement these rules and in compliance with the 2009 legislation that was passed, in 2011, TDEC also developed “Guidance for Making Hydrologic Determinations,” based on concepts and processes originally developed by the North Carolina Division of Water Quality and used by other state environmental regulatory agencies.<sup>35</sup> The intent of the guidance is to provide additional details via specific instructions, examples, and definitions for use in making consistent and accurate hydrological determinations in Tennessee. Topics covered within the guidance include:<sup>36</sup>

- History of hydrologic determinations in Tennessee
- Definitions, general concepts, and basic hydrologic determination guidance
- Approaches for determining “normal weather conditions”
- Instructions regarding hydrologic determination field data sheet use and associated methodology
- A description of and procedures for using primary field indicators
- A description of and procedures for secondary field indicator evaluation, based upon the principle that as continuous stream flow in a stream channel increases in time, the stronger the corresponding observed secondary field indicators are likely to be. All streams are characterized by interactions among hydrologic, geomorphic, (physical), and biological processes and attributes of these three processes are used to produce a numeric score. Each indicator is scored as “Absent,” “Weak,” “Moderate,” or “Strong.” Scores less than 19.0 indicate a wet weather conveyance; scores greater than 19.0 indicate at least an intermittent stream.
- Commonly encountered hydrologic determination variants; such as sinking/losing stream reaches, stream origins/transition breakpoints, wetland-stream interconnection, impoundments/ponds, historic and recent alterations, exposed groundwater, and effects of urbanization/impervious surfaces; and how these variants fit into the department’s regulatory framework.

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<sup>29</sup> TDEC DWR Rule 0400-40-03-.05(9)(a)(11).

<sup>30</sup> TDEC DWR Rule 0400-40-03-.05(9)(a)(13).

<sup>31</sup> TDEC DWR Rule 0400-40-03-.05(9)(b)(1).

<sup>32</sup> TDEC DWR Rule 0400-40-03-.05(9)(b)(2).

<sup>33</sup> TDEC DWR Rule 0400-40-03-.05(9)(b)(3).

<sup>34</sup> TDEC DWR Rule 0400-40-03-.05(9)(b)(4).

<sup>35</sup> *Id.* 20. Specifically, the scoring index and guidance language for secondary field indicators is taken directly from the “North Carolina Division of Water Quality Identification Methods for the Origins of Intermittent and Perennial Streams, Version 3.1,” and the “Methodology for Identification of Intermittent and Perennial Streams and Their Origins, Version 4.11.”

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

As a whole, Tennessee’s approach to hydrologic determinations is derived from the science of stream ecology, geomorphology, and hydraulics, and how these manifest themselves in waters with annual periods of extended flow, versus those that only flow in direct response to storm events. That is, a jurisdictional stream begins at the point at which it can be directly demonstrated (such as supporting certain types of aquatic organisms), or inferred through converging lines of evidence, that the watercourse conveys sustained baseflow for a significant portion of a regular year. While Tennessee has developed primary and secondary indicators that are applicable within the state, similar indicators could be developed for various regions of the country, depending upon suitable hydrologic, geomorphic, and biological process indicators associated with each region.

Tennessee’s experience with this approach for making hydrologic determinations has been highly successful. While the state’s procedures are not completely foolproof nor do they eliminate all disagreements regarding determinations (eliminating all disagreement would be impossible; there will always be water features that will exhibit characteristics that are close to one side or the other of a division), they are well-informed and based on sound law and science, documentable, and understandable by the public. Since the implementation of this hydrologic determination approach, environmental and business interests alike have noted a positive improvement in permitting processes in Tennessee. We have found that citizen and business interests seem to grasp intuitively the dividing line between a conveyance that conducts stormwater during a precipitation event, and an ecological feature that supports aquatic life naturally. While complete consensus on where the line should be drawn for ‘relatively permanent’ waters (how large or how permanent a stream should be before it counts as jurisdictional) is challenging to achieve, most people can understand and appreciate the concept of a biological stream versus a lifeless stormwater conveyance.

Aligning the federal WOTUS definition with the opinion of Justice Scalia, adds much needed certainty and clarity to the process. For agricultural producers specifically, this clarity will give them the confidence to know they can produce crops or livestock without fear of being in violation of a regulation based on an extreme, perhaps arbitrary stream determination.

## **CONCLUSION**

In closing, we have provided one potential approach for defining “relatively permanent” waters based on Tennessee’s experience with stream determination activities in Tennessee. While this specific approach may not be appropriate for all regions of the U.S., we believe similar regionally-based methodologies may provide EPA and USACE with a reasonable approach to defining where a jurisdictional stream begins, i.e., a “relatively permanent” water, based on the point at which significant stream ecology and other functional processes originate. Tennessee’s approach is codified in law, documented in rule, explained in detail in guidance, and provides a definition and processes that the public can understand.

TDEC and TDA appreciate the outreach that EPA and USACE are providing during development of a revised “waters of the United States” definition and hope this engagement with stakeholders will continue as development of a formal proposed rule progresses. We trust that our input is of value to EPA and USACE and look forward to future conversations regarding this rulemaking.



Sincerely,



Robert J. Martineau, Jr.  
*Commissioner*  
Tennessee Department of Environment and Conservation



Jai Templeton  
*Commissioner*  
Tennessee Department of Agriculture

cc: Kendra Abkowitz, PhD, *Director of Office of Policy and Planning*, TDEC  
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