The Honorable Governor Bill Haslam
State Capitol, 1st Floor
600 Charlotte Ave
Nashville, TN 37243

April 12, 2016

RE: Veto Request for SB1830/HB1892

Dear Governor Haslam,

The undersigned organizations, representing tens of thousands of Tennesseans, respectfully request that you veto SB1830/HB1892. This legislation threatens harmful and major changes in the State's Water Quality Control Act as it relates to municipal stormwater programs (MS4s).

HB 1892 is an attempt by a narrow special interest to provide itself an unjustified exemption from laws that apply to everyone else and thus to shift to other property owners and the public costs that this special interest should itself bear. It further flies in the face of efforts to allow local communities flexibility in the application of federal mandates, with the potential for actually increasing the cost of environmental compliance for all involved and delaying economic growth and development in Tennessee.

Tennessee is required by the US Clean Water Act to protect our streams from stormwater pollution to the "maximum extent practicable." Many Tennessee communities decided long ago that this was best achieved by requiring new housing and commercial developments to retain and slowly release or infiltrate (allow to soak in) the first, and most polluted, inch of rain from any storm. Many, if not most, developers have no problem working these requirements, but a vocal minority, apparently putting profit ahead of public interest, is using HB 1892 to attempt to force the Tennessee Department of Environment and Conservation (TDEC) to rollback this proven approach to stormwater management.

HB 1892 would substantially inhibit these communities' efforts to require that new developments be designed to retain and/or infiltrate the first inch of rain after any 72 hour period of clear skies. This is one of the most important tools available to stormwater managers to allow them to ensure public safety in terms of downstream flooding and the pollution of our streams with nutrients, automotive chemicals, sediment and fecal coliform.

HB 1892 would also create a terrible precedent of restricting TDEC from implementing any regulations that "exceed the minimum requirements of federal law." Federal law (the Clean Water Act) intentionally allows state and local community's flexibility to take into account differing geological conditions and community needs.

The intent of the Clean Water Act and other federal environmental laws was to establish minimum standards that the states would, in turn, be allowed and encouraged to adapt to local conditions. If this precedent of restricting state regulations to minimum federal standards becomes law, TDEC and local governments will be forbidden from having this flexibility to adapt federal mandates to local conditions to reduce pollution and protect public health.

If passed, this legislation would:

- Destroy urban streams and increase flooding. When watersheds become paved over, the land that used to soak up rain and storms becomes "impervious" and instead "flushes" like toilets when it rains. This washes pollutants into the water, causes severe erosion; destroys property, wildlife and critical habitat.
- Put the burden on other regulated businesses and entities like sewer plants to remove more pollutants to compensate for the pollutants added to waterways from the homebuilding industry.
- Result in litigation as to what is or isn't stricter than federal requirements.
- Damage fishing and other recreational stream, river and lake use.

The proposed legislation would not achieve its stated goals because it is internally contradictory and incoherent on its face. The legislation creates a circular, "chasing its tail" standard. As noted, the federal Clean Water Act does NOT contain a "black letter law" rule about what is required with respect to stormwater management. Instead it (Clean Water Act Section 402(p)(3)(B)(iii)) provides that MS4 permits "shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*, . . ." (Emphasis added). HB1892 would prohibit any "… permit issued pursuant to this section to a local governmental entity administering a municipal separate storm sewer system … [from imposing] post-construction stormwater requirements, *except to the extent necessary to comply with the minimum requirements of federal law*." (Emphasis added.)

Therefore, HB1892 would not create the certainty that is important to business. It would create, for each permit issued, a quixotic quest to determine what the intentionally flexible "minimum

requirements of federal law" are. This is likely to lead to delays in the approval of development projects and to challenges – costly litigation -- from both development proponents and opponents. Therefore, an unanticipated, unintended side effect of HB 1892 will be to significantly increase the cost of development in Tennessee, possibly impairing growth in the state.

A further unanticipated, unintended consequence of HB1892 is the impairment of others' property rights and the transfer of costs from project proponents to adjoining property owners and to taxpayers. Failure to effectively control post-construction stormwater will likely result in flooding of adjoining owners' property. These adjoining owners' property rights will thus be impaired, and they will have to clean up any damage caused, which may result in additionally costly litigation by them against project proponents who do not effectively control runoff. Post-construction flooding that enters public property (like streets, parks, and streams) will also cause taxpayers in affected communities to have to "pick up the tab" for easily preventable damage.

This legislation has the potential to subject local municipalities to a great deal of costly litigation. We agree with the points made by TDEC Commissioner Martineau in his April 4 Memorandum to Phase I and Phase II MS4's, attached.

Stormwater programs must control pollution from surface run-off. The federal standard is that state and municipal programs must implement stormwater controls to the "maximum extent practicable".

SB1830/HB1892 would require that Tennessee cities, in their municipal stormwater programs, impose no post construction requirements stronger than the minimum required by federal law. Many cities have successful stormwater programs in which local geography and soil conditions have led them to impose requirements that may or may not be beyond whatever is argued to be the federal "minimum".

To limit cities' ability to protect the water quality in their localities in the best way they deem practicable will degrade our water quality. The legislation creates, at the least, ambiguity and uncertainty and, at worst, litigation.

Under the bill, city stormwater programs may impose, by resolution or ordinance, requirements stronger than the federal minimum (whatever that is), if they give 30 days' advance notice to the local legislative body of their intent to do so, with a list of specific pollution control measures which exceed the federal minimum (but which controls must be to the maximum extent practicable). This glaring contradiction makes the proposed process unworkable.

TDEC has extended the time for Phase II MS4 jurisdictions to implement the 2010 General Permit with necessary local laws and procedures. Some local governments have conformed their stormwater management laws and practices to the requirements of the 2010 General Permit while others have not yet done so. The 2010 General Permit remains in effect until it is replaced by a later adopted permit. After months of meeting with the Tennessee homebuilders TDEC has recently noticed a revised General Permit for public comment, which draft responds to many of the homebuilders concerns. TDEC should

be allowed to do its legislatively mandated job by going through the public participation process and adopting a revised general permit.

In addition, we fear that the “no stronger than the federal minimum” and/or the thirty day notice requirement argument will be made when municipalities try to pass ordinances or implement requirements similar to those included in stormwater programs, such as stream buffer zones or tree planting, for other valid governmental purposes such as planning or zoning or for flood control or greenway construction.

Further, the legislation subjects the state NPDES permit to challenges in federal court for “backsliding” from current requirements, in violation of the Clean Water Act, Section 402(o).

Please exercise your veto on this poorly written and confusing legislation, SB1830/HB1892.

Thank you for listening to our concerns and protecting Tennessee’s water quality.

Sincerely,

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Tennessee Environmental Council

Stewart Clifton, J.D. Advocate.
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Scott Banbury, Conservation Program Coordinator,
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