

Existing Use Identification Procedures (Comments Received August 27, 2018)

Background and Statement of Purpose

The Clean Water Act (CWA) establishes the statutory basis for restoring, protecting, and enhancing the nation's waters. Under the CWA, one of the fundamental tools afforded to states for managing their waters are water quality standards. Water quality standards consist of the designated uses of a given water body, water quality criteria to ensure that designated uses are supported, and antidegradation policy for maintaining water quality that has already been achieved. States, territories, and authorized tribes may then adopt such water quality standards so as to best describe and protect the uses of their unique water bodies.

Maryland has adopted a use classification system which groups specific designated uses (e.g. aquatic life and wildlife, water contact recreation, industrial water supply, etc.) into a small number (4) of use classes. Each waterbody in Maryland is assigned a use class representing a group of specific designated uses. These designated uses may or may not be currently supported, but should be attainable. These use classes are predominantly differentiated based on the aquatic life assemblage likely to be found in these waters or, in one case (Use Class IV), based on the beneficial use of trout stocking and fishing. Maryland's use classes are described briefly below.¹

- Use Class I: Water Contact Recreation, and Protection of Nontidal Warmwater Aquatic Life
- Use Class II: Support of Estuarine and Marine Aquatic Life and Shellfish Harvesting
- Use Class III: Nontidal Cold Water²
- Use Class IV: Recreational Trout Waters

In addition to defining designated uses as part of water quality standards, the CWA (Code of Federal Regulations (CFR) Title 40 § 131.3) also establishes the concept of an "existing use", one of the foundational principles for antidegradation policy. The CWA defines existing uses as "...those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards". Federal regulations additionally discuss existing uses in 40 CFR § 131.12(a), part of the Code of Federal Regulations that establishes the basis for EPA and state's Antidegradation Policy. Here the regulation asserts that "*at a minimum... (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.*" Existing uses therefore represent the highest level of use and water quality (necessary to support that use) that has been achieved since 1975. In this manner, existing uses function as the baseline or floor of water quality that must be maintained.

¹ Water bodies of any of these use classes may also be given a "-P" suffix to denote that the public water supply designated use also applies.

² Maryland's water quality criteria for temperature, dissolved oxygen, and ammonia are different for cold and warm waters

Maryland’s Code of Regulations (COMAR) also address the potential for a water body to have existing uses that are not formally designated in state water quality standards. Section 26.08.02.02 A. explicitly states that “(2) *The actual uses of surface water are not limited to those designated in this chapter. Any reasonable and lawful use is permitted provided that the surface water quality is not adversely affected by the use.*” In addition, Maryland’s Antidegradation Policy (Section 26.08.02.04 A.) echoes the federal regulations by saying “*Waters of this State shall be protected and maintained for existing uses and the basic uses of water contact recreation, fishing, protection of aquatic life and wildlife, and agricultural and industrial water supply as identified in Use I.*”

Several aspects distinguish an existing use from a designated use. For example, the existing use of a water body can be lower, higher, or identical to the codified designated use for the surface water body since it describes a past or present condition (while a designated use should describe the highest attainable condition). Existing uses can also be expressed in more specific terms than a designated use since they describe an attained condition and are not designed to apply broadly throughout regions of a state.

Recent data have become available which demonstrates that the existing use of some waters is different than the codified designated use classification found in Code of Maryland Regulations 26.08.02.08. Specifically, several streams with warm or semi-warm use classifications (Class I, I-P, and IV) have been found to contain naturally reproducing populations of cold or cool-water obligate species. The cold or coolwater species require (and are present because of) the cooler temperatures currently found in the stream. However, the applicable temperature criterion is significantly warmer than the current, site-specific conditions. If permits have Class I-derived temperature criteria limits (or no temp limits) then the [Maryland Department of the Environment](#) (Department) may not in all cases be ensuring protection of the cold or coolwater obligate species currently present, depending on location and site-specific characteristics.

Comment [t1]: As stated during the last meeting, DNR has provided data in the past (not recently) for certain waterbodies that indicated an existing use that is different than the current designated use.

In some cases, water temperature readings at such locations meet the class III water quality criterion which thereby provides justification for describing the existing use similar to a class III water. In many other cases, water temperature readings do not meet the Class III criterion and, as a result, the existing use will need to be described differently than a Class III water. The Department previously had a use class redesignation methodology that would have applied in such instances. However, based on EPA recommendations and concerns over the attainability of the water temperature criterion, MDE felt it necessary to reconsider this methodology and take a closer look at how it handles existing use determinations.

The Department decided it needed a transparent set of procedures to follow when determining what the existing use of a stream is in these circumstances. This is important for two main reasons. For one, even in cases where data demonstrates the presence of a reproducing population of a coldwater obligate species and temperature readings are below Class III water

quality criteria, use class redesignation most often occurs with the Triennial Review of Water Quality Standards (which is completed once every 3 years). This can leave a long temporal gap of protection if such existing use information is not adequately advertised to the appropriate stakeholders. Secondly, existing use determinations can have the same regulatory impacts as designated uses and thus all potentially-affected parties should be aware of such information at the earliest stage possible in the process.

The procedures outlined in this document are meant to be applied when identifying an existing use for a water body that may require cooler water temperatures than those specified (as a water quality criterion) for the water body's codified designated use. The purpose of this document is to not only address the concerns described in the preceding paragraph but to also accomplish the following objectives:

- describe the steps in the existing use determination process,
- establish clear responsibilities and pathways for data submission, communications, and notifications,
- lay out a defined timeline for completing the various steps in the existing use determination process,
- incorporate robust public participation for existing use determinations, and
- ensure that appropriate protections are in place

This document is not intended to determine any specific waterbody's existing use or the scale of any such existing use. That data-driven work and related discussions (as described later in this document) will occur separately on an ad hoc basis as existing use data become available.

The following sections outline the steps used for reaching an existing use determination. In brief, the process entails:

1. The Coordination of Monitoring Activities
2. Documenting an Existing Use
3. Early Notification and Convening of an Advisory Body
4. Summary Rationale and Final Notification
5. Data Gaps and Identifying Monitoring Needs

Coordination of Monitoring Activities

The State of Maryland is fortunate to have many different organizations that monitor the physical, chemical, and biological characteristics of Maryland streams. Though the Maryland Department of Natural Resources and the Maryland Department of the Environment collect the largest portions of this water quality information, an increasing amount of information is also

being produced by non-governmental organizations, local governments, and academia. These additional data sources have been essential to State assessors, allowing for improved spatial and temporal resolution for assessments relating to the Integrated Report, TMDL development, and existing use determinations.

Comment [t2]: I'm not sure who will be reading this draft policy, but select readers may not know what the Integrated Report is or what TMDL stands for/means. May want to define/describe.

Since existing use determinations can have such wide-ranging effects on the regulation of state waters, the sooner the Department is aware of such monitoring efforts that may prompt an existing use evaluation, the better it can plan for such water quality standards changes and the sooner it can inform regulated entities. Even though such monitoring efforts may not produce any new information that leads to an existing use evaluation effort, being notified early on of the potential may help the State avoid conflicts later when issuing permits or other approvals. To help avoid such conflicts, monitoring activities which have the potential to identify new existing uses should be coordinated (which would largely consist of notification) with MDE's Water Quality Standards Section. The Water Quality Standards Section, in concert with other WSA programs, would then be responsible for communicating the possibility of an existing use evaluation to potentially regulated entities so as to avoid surprises during permit applications and/or renewals.

Documenting an Existing Use

Once data or information becomes available which demonstrates the potential presence of an existing use that is different than the codified designated use, that information should be submitted to MDE's Water Quality Standards Section for evaluation and potentially distribution to MDE's permitting programs. As with any data used by the Department to support regulatory decision-making, quality assurance and quality control checks must be performed to ensure the data are valid. Thus, for the purposes of determining whether the existing use of a water is different than the codified designated use, MDE requires that data submitted should be collected using protocols that are consistent with "Tier I" data as described in the data evaluation process for the Integrated Report of Surface Water Quality. To read about what is needed for a dataset to be considered as Tier I data please visit Section A.1 of Maryland's Draft 2018 Integrated Report.

Comment [t3]: Is MDE comfortable with the current process by which DNR provides data? How can it be improved?

For the types of existing use evaluations covered by this document, biological (verifying the presence of a coldwater species) and/or water temperature data are the predominant kinds of data submitted for review. However, the Department will review and consider all available data in determining whether there is an existing use that is different than the water's codified designated use. As a guide for data submitters, the following types of information should be provided with any such submittal. This list notes, in parentheses, whether each data type is mandatory for evaluation.

Comment [t4]: Can you just insert a link to the Draft 2018 Integrated Report so the reader does not need to go looking for it?

- Geographic coordinates for station sampled or start and end points for transect sampled (mandatory)
- Date(s) of sampling (mandatory)

- Data collector names and contact information (mandatory)
- Trout species identification and total length per individual (if trout were found)
- Benthic macroinvertebrates identified to genus and counts (if coldwater benthos were found)
- Basic water quality parameters such as pH, dissolved oxygen, etc (if available)
- Water temperature readings taken preferably at 30 minute or more frequent intervals during the summer between June 1 and August 31 (if available).

Comment [t5]: I would suggest photodocumentation of trout be mandatory. This will help confirm identification.

Comment [t6]: I would suggest preserved specimens be encouraged. That way a benthic taxonomist could confirm identification.

Comment [t7]: You could include a link to the temperature SOP we all developed

After the Department receives such data, it will also request information from the Maryland Department of Natural Resources on trout stocking activities in hydrologically connected surface waters. This will help to inform any future discussions concerning the appropriate existing use of that water body.

When MDE receives data related to existing use documentation, a review of those data will be completed as soon as possible with the goal of ten business days or less, after receipt. The results of the review will have three possible outcomes:

1. Data are not considered high quality or do not demonstrate the presence of a new existing use. In this case, the Department will not move forward with establishing a new existing use.
2. Data that are submitted are high quality but are incomplete. The Department will respond within five business days to data submitter outlining additional data needs.
3. Data are high quality, complete, and verify the presence of an existing use different than the codified designated use. The Department will move forward with identifying and recognizing a new existing use.

When the Department has determined that data are of sufficient quality and completeness, staff will create a data summary and recommendation document to post to the MDE website and to provide to interested stakeholders. Materials including in this document may include maps depicting sampling and/or stocking locations, biological and chemical data summary tables, and text descriptions of the available data and any data gaps that may exist. Along with these summary materials, the Department will also include draft recommendations as to the geographic extent (scale) of an existing use determination and the water quality thresholds that should be met to maintain this existing use.

Comment [t8]: Will this initial determination be done in consultation with DNR?

Early Notification and Convening of Advisory Body

Using the summary materials and draft recommendations created in the preceding step of this existing use evaluation process, the Department will provide notification of an existing use to a broader audience including, but not limited to: permitting programs at MDE, other state staff (e.g. State Highway Administration), local government staff, regulated entities, landowners,

environmental organizations, and any other potentially interested parties. The primary methods to be used for providing such notification may include an announcement in the Maryland Register, the Department's website and social media platforms, and any other methods as appropriate. This notification will also solicit participation on the ad hoc advisory committee for that particular existing use evaluation with the goal of convening this committee 35 days after the Department's existing use confirmation. This committee will meet one time, in a setting open to the public, to provide comment on the proposed scale and water quality threshold recommendations. An audio recording of this meeting will be saved and made available to the public via the MDE website. Based on the available information and the comments provided at the advisory committee meeting, the scale of the existing use and protective water quality thresholds will be determined by the Department within ten business days after the meeting.

Summary Rationale and Final Notification

The Department will create a final existing use determination and rationale document that describes the reasoning and justification behind the final scale determination and water quality thresholds. This existing use determination and rationale document will, at a minimum, include the following information:

- Text and cartographic depictions of the sampling locations and available data
- The stream segments (and associated catchments) that support an existing use that is different than the codified designated use
- The water quality thresholds that will be used to protect the existing use in the interim until either more data can be collected or until the stream can be re-designated as another use class.

This document (the existing use determination and rationale document) will then replace the original data summary and recommendation document on MDE's website and will be emailed to interested parties. The Department will also provide notice of the existing use determination in the Maryland Register.

Comment [t9]: First time this was used. Again – not sure who is going to be reading this document.

In addition to the final existing use determination and rationale document, the Department will also produce GIS layers so as to update online maps that display the designated use class and existing use of Maryland's surface waters. The current designated use class map can be accessed at:

<http://mde.maryland.gov/programs/Water/TMDL/WaterQualityStandards/Pages/DesignatedUsesMaps.aspx>.

Data Gaps and Identifying Monitoring Needs

Situations are likely to arise where the data record demonstrates the presence of an existing use that is different from that which is designated but for which water quality information or spatial

resolution is lacking. Though having a complete data record for an area is preferable, it may not be available in many cases. As the Department and interested parties discuss the issues of scale and water quality thresholds, it will become readily apparent what data needs exist. Throughout the existing use determination process, the Department will keep record of these data gaps and in cooperation with the Department of Natural Resources and other willing partners, will prioritize these areas for follow-up sampling. After such follow-up sampling efforts are completed, the Department may then reopen an existing use evaluation to further refine the scale and water quality thresholds in the final determination and rationale document.

Approximate Timetable for Major Existing Use Process Milestones

Milestone	Day
Data Received by MDE’s Water Quality Standards Section	1
Review of Data for Quality and Demonstration of an Existing Use	15 (10 business days after receipt of data)
Early Notification of Interested Parties	20
Convene Advisory Meeting	50
Complete Existing Use Determination and Rationale Document	64 (10 business days after meeting)

Comment [t10]: It was noted that this is a tight timetable. It is good, as long as it can be achieved.