

**MAMWA Comments on Developing an Interim Policy for Protecting
Cold/Coolwater Existing Uses
August 8, 2018**

General Comments Regarding the Cold/Coolwater Committee Process and Goals

- **Expansion of Tier II Antidegradation Review** -- MAMWA is concerned that developing an interim policy to protect cold/cool water species will actually result in a substantial expansion of the State's Tier II antidegradation policy to (1) treat waters that have not been identified as Tier II waters as if they had been so identified, without going through the formal regulatory process (i.e., the Triennial Review, with public notice and comment); (2) require that permittees go through an antidegradation-type review even for waters that are not identified as Tier II; and (3) expand review to include existing discharges (as compared to current antidegradation policy that only impacts new or expanding discharges).

The interim policy could have potentially significant negative impacts for the State's publicly-owned treatment works (POTWs). The policy could result in a much more burdensome process for renewing discharge permits. In addition, POTWs could be asked to address temperature issues, even if options for doing so are extraordinarily expensive. MAMWA questions whether the State has adequately considered the impacts of adding significant time and expense to both obtaining and complying with a discharge permit given myriad other competing environmental obligations (for example, making nutrient and sediment reductions to improve the health of the Bay).

- **Need to Consider Other Societal Issues** -- MAMWA is also concerned that MDE and other stakeholders are focusing on cold water species to the exclusion of other societal issues. Cold/coolwater fisheries are one of multiple designated beneficial uses of the State's waters, and all uses must be looked at as a part of any process. In addition to protection of trout and other coldwater species, the State's Class III and IV waters are also designated for water contact sports, play and leisure activities involving direct contact with surface water, fishing, agricultural water supply, and industrial water supply. COMAR 26.08.02.02(B). Further, several of the State's reservoirs serve important flood control and recreational purposes, and augment public water supply downstream. Any interim policy to protect streams for cold or coolwater species must also consider, and more importantly not negatively impact, these other important goals.

MAMWA has long supported a strong State economy and a high quality of life for local residents. Protecting trout and other coldwater species should not come at the expense of needed, reasonable local development (including the development of Bay-related best management practices by the stormwater and/or agricultural sector).

Accordingly, and because what is being proposed are in fact changes to designated uses of Maryland waters which are established by regulation, we recommend that the “Convening of Advisory Body” and “Summary Rationale and Final Notification Process” described in the Department’s draft Existing Use Identification Procedures document be considered only in conjunction with a Triennial Review or other regulatory process.

- **Ad Hoc Identification of Coolwater Streams** – The following points are submitted, notwithstanding our more general objections to the process addressed above. During the May 31 Committee meeting, MDE suggested that it would favor establishing a committee that would review the need for establishing an existing use for trout and cold water species on an individual stream-by-stream basis. MAMWA objects to this approach because (1) it would supersede MDE responsibilities; (2) it is not appropriate for a committee (however formed) to develop or propose provisions that would have a presumptive regulatory effect on other persons; and (3) results from the committee process would likely be highly inconsistent from stream to stream.

MAMWA favors the development of public guidance that would be generally applicable to all existing use determinations. We completely understand that this would be tricky, given the number of possible scenarios involved across the State. Nonetheless, developing guidance that would state the general rules, for example how many trout must be present in a particular stretch of a stream or the necessary determinations that conclude that a population is naturally reproducing, before establishing an existing use would be very helpful.

MDE could apply guidance to a particular stream, develop a recommendation for whether to establish an existing use, and then post the recommendation for public comment on its website (the public comment period could be short). MDE, working with DNR, has the expertise to make this initial determination, and would be better able to cross-compare specific situations (e.g. whether this existing use is more or less compelling than a similar situation that has been previously identified) than a committee.

- **Use of Advisory Committee** -- Lastly, if the work of the Committee will result in regulatory or quasi-regulatory changes, MAMWA would be much more comfortable taking a more traditional approach—i.e., reviewing these issues as part of a Triennial Review or other MDE regulatory processes. An Advisory Committee, particularly one with restricted participation and an absence of general public notice and opportunity to contribute, is unfair to those interested stakeholders who have not been invited to participate.

Specific Comments Regarding the Draft Existing Use Identification Procedures

- At page 2 of the draft, MDE states that if there are discharge permits in a particular cool water stream that are based on Class I criteria “...the Department

may not in all cases be ensuring protection of the cold or coolwater species currently present...” MAMWA believes that MDE is giving short-shrift to the fact that there are naturally reproducing species in these streams. The existence of the trout or other species suggests the opposite of what MDE posits—that the species are being adequately protected. If MDE wants to do more to ensure their future health, it could take the necessary regulatory steps to identify the stream as Tier II for temperature, which would trigger the established antidegradation process for new and expanding dischargers. MAMWA sees no evidence that waiting until the next review would negatively impact trout currently living in cooler streams.

- At p. 3 of the draft, MDE states that taking interim steps to address cool water is important because “existing use determinations can have the same regulatory impacts as designated uses...” First, it is unclear from past Committee discussions what those “regulatory impacts” will be for dischargers. Although several Committee members have posed the question, the Committee has not reviewed what would be expected if a stream is identified as cool water. Second, MDE’s statement suggests that MDE intends to issue permits as if the designated use had changed. Perhaps, as a result of Committee discussions, MDE will decide to impose additional measures on dischargers into cool water streams. It is extremely worrying that MDE is already considering imposing the most aggressive measure possible, permit limits, without having even heard other options from Committee members. *See also* MDE statement on p. 6: If an existing use is found the final document will include “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.”
- At p. 5 of the draft, MDE states that an entity submitting data to document an existing use may submit “trout species identification and total length per individual (if trout were found)” and benthic information if “coldwater benthos were found...” It is unclear whether MDE would allow documentation of an existing use if there are no trout or cold water species found. MAMWA requests clarification. In MAMWA’s view, trout and/or coldwater benthos should be present (and thriving) in order for MDE to identify an existing use.
- At p. 7 of the draft, MDE suggests that existing use determinations may be made even if there is missing data (for example, necessary sampling data for temperature). MAMWA objects to identification of cool water streams if there is missing data on species or temperature. Identification should be based on rigorous review of a full set of data; there should no option to identify a stream and then “reopen an existing use evaluation to further refine the scale and water quality thresholds in the final determination and rationale document.”