



Mid-Atlantic Council Trout Unlimited

P.O. Box 2865

Wheaton, MD. 20715

www.mac-tu.org

Chapters: Maryland, National Capital, Nemacolin, Patapsco Valley, Potomac-Patuxent, Seneca Valley, Youghiogheny

Electronic Mail

TO: Matthew Stover, Chief, Water Quality Standards, Maryland Department of the Environment (MDE)

FROM: Art Senkel, Mid-Atlantic Council Trout Unlimited (TU)

DATE: November 15, 2018

RE: EXISTING USE IDENTIFICATION POLICY AND PROCEDURES

I am providing written comments on this document because of the importance Trout Unlimited places on the topic of "existing use." We appreciate the effort that has gone into developing this document (DRAFT POLICY) and MDE's expressed desire to protect Maryland's coldwater resources. I request that you consider these comments as well as our previous comments during the finalization of an existing use policy.

Trout Unlimited believes the policy must define "existing use." We have been unable to get an answer to how MDE proposes to and with what level of specificity, describe the various types of misclassified streams' "existing use." For example, will a misclassified natural brook trout stream be identified and described the same way as a misclassified natural brown trout stream. Also, will MDE protect misclassified cold waters with no evidence of coldwater obligates for future recolonization by or re-introduction of coldwater species?

Trout Unlimited wishes to know whether this policy will be provided a regulatory authority through future changes to the Code of Maryland Regulations. Rather than using an administrative process based on existing statutes and regulations, we believe there is substantial merit in revising COMAR to provide a clearly defined and enforceable process (regulatory framework) to protect existing use waters and provide a level of certainty to permitted entities. Using such a framework, a new existing use water would not have to undergo an individual regulatory process because that could be problematic and very time-consuming. A codified framework could provide enforceable

interim protection between the identification of an existing use and addressing the use at Triennial Review.

Trout Unlimited strongly recommends that a final policy describe a proactive State plan for identifying likely misclassified streams. The coordination of monitoring activities described in the DRAFT Policy are reactive and heavily rely on a random finding by the State or the work of non-government agencies to locate misclassified waters. We also recommend that a final policy specify a goal that all waters of the State are assigned a proper use classification based on highest attainable use procedures as soon as practicable.

Trout Unlimited requests that MDE be highly flexible regarding the types of information non-government organizations can submit as part of an existing use identification. For example, TU has submitted synoptic temperature information to MDE regarding the North Branch Patapsco watershed that informs on the spatial extent of cold water and natural trout reproduction. The submittal of this type of information should be encouraged. Also, TU collects benthic macroinvertebrate for certified identification at the Family taxa level. We would like the opportunity to submit likely *Sweltza* and *Tallaperla* specimens from the Chloroperlidae and Peltoperlidae families to the State benthic lab under chain of custody for genus level identification.

Trout Unlimited requests that MDE elaborate on the stated flexibility that permit writers have “to customize the permit conditions based on economic and environmental factors associated with each specific circumstance.” For example TU asks the following: who is a permit writer and what are the permits referred to in this Draft Policy and do they include permit writers not employed by the MDE and permits not specifically reviewed by MDE?; what specific authority allows these permit writers to evaluate the value, uniqueness, and sensitivity of a resources and to customize permits with conditions that arguably may not protect an existing use?; and, what credentials does a permit writer need to have to balance the listed potentially conflicting factors? TU believes that the use of some of these factors in permit writing may violate the Clean Water Act. TU argues that decisions on permit conditions for waters that are misclassified and have an existing use that is inconsistent with current criteria, must always incorporate comments from resources specialists at the Maryland Department of Natural Resources and possibly academia. TU asks whether and how the public will be made aware of permit decisions relative to existing use waters especially for permit applications that co-occur with the verification of an existing use.

Finally, TU recommends changes to a couple of statements in the Draft Policy. Regarding the first sentence on Page 4, it is our position that when MDE issues permits with conditions of water-quality effluent limits based on Class I and Class IV criteria, the Department is in all cases not ensuring the protection of coldwater species. It may not extirpate a species but surely these criteria are not protective of coldwater obligates.

In the second paragraph of page 4, TU questions the statement that there is an implicit requirement that MDE not describe a stream as Use Class III based on temperature readings that do not meet the 68°F and no evidence to demonstrate the water body meeting Class III criterion at some time after November 28, 1975. There is insufficient information on many streams within the State and should a use attainability process demonstrate that a stream can reasonably meet Class III criteria by removal of impacts or other means, MDE is required to designate that water as Use Class III.

Thank you.

Art