



# Mid-Atlantic Council Trout Unlimited

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## *Electronic Mail*

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

FROM: Art Senkel, Mid-Atlantic Council Trout Unlimited

DATE: August 22, 2018

RE: COMMENT REQUEST DATED AUG.13, 2018

This is a response to your request for comments on the DRAFT EXISTING USE IDENTIFICATION PROCEDURE document as well as other issues considered during the third Coldwater Advisory Meeting. I will address the issues separately.

### ISSUE: ADMINISTRATIVE VERSUS REGULATORY EXISTING USE PROCESS

This is a topic of extreme importance and one that Trout Unlimited needs more time to discuss with our legal representation. For this reason, I am requesting that this issue be placed on the agenda for the next Advisory Committee meeting.

Rather than using a primarily administrative or wholly regulatory approach, we may ask MDE to consider 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. Within a COMAR framework, the following could be addressed:

- (1) existing use descriptions;
- (2) water quality and spatial criteria;
- (3) use attainability analysis
- (4) Triennial Review
- (5) implementation procedures
  - (a) official immediate notification with initial protective criteria and scale
  - (b) Advisory Body and public participation
  - (c) official final notification ("listing") with protective criteria and scale
  - (d) enforcement

(e) appeal

Using this framework, a new existing use water would not have to undergo a special COMAR process (although UAA and Triennial Review may eventually assign a use class designation). Separate COMAR processes for each newly identified existing use could be problematic and very time-consuming and therefore delay protection. A codified framework could provide enforceable interim protection between the identification of an existing use and addressing the use at Triennial Review.

ISSUE: CONCERNS OF PERMITTED ENTITIES AND LAND-USE OFFICIALS

A water has an existing use based solely on in-stream conditions and existing law. Once identified, it is the responsibility of MDE to ensure that the existing use is not degraded. While Trout Unlimited understands that an initial finding will have an impact on permits, the State's protective responsibilities and actions must be paramount.

TU has worked with regulated entities to find equitable solutions regarding discharges to both existing use and designated trout waters. MDE has procedures in-place that provide a level of flexibility in the enforcement of water quality standards. It is likely that in many permit cases, solutions can be found.

Our position is that work that represents an identifiable risk to an existing use water, even work that has received a permit, cannot be allowed to proceed without modifications to protect the use. Entities that apply or have applied for permits that may impact streams, should be made aware that with a finding of an existing use natural trout water, there will be: 1) an increased level of scrutiny for potential impacts; 2) a possibility for the application of more strict water quality criteria; and 3) in cases where the work will violate the anti-degradation rule, changes in permit status or conditions. Renewal permits for discharges of equal or less volume and pollution and that have not precluded an existing use may not be as problematic. The effects of these discharges and all other man-made impacts can be evaluated as part of a use-attainability analysis done to establish a water's proper use-designation.

ISSUE: DRAFT EXISTING USE IDENTIFICATION PROCEDURES

We appreciate the substantial thought that went into this document. The below comments follow the document outline.

Background and Statement of Purpose

First paragraph - Recommend including general policies for implementation as fourth part of the State's water quality standards.

Sixth paragraph – Recommend deleting the word “recent” to describe the data that has been submitted to MDE documenting existing uses. Data has been submitted on the existing uses under consideration since at least 1991.

Sixth paragraph – Recommend highlighting that besides temperature, adherence to other water quality parameters and a closure period which are not enforced for Use Class I and IV waters are critical for natural trout propagation.

Eight paragraph – Recommend not using the term “existing use determination.” An existing use is not determined by a process but rather natural conditions and law. After an existing use is documented, the responsibility of the State to protect the use begins. The existing use process could involve: 1) identification and description; 2) immediate notification and protection using a description with spatial scale and water quality criteria; 3) additional review by an Advisory Group to identify data gaps and determine a final spatial scale and water quality criteria; 4) public participation; 5) final notification or “listing” of the existing use with spatial and water quality criteria; and 6) use of UAA and the possible assignment of codified use-designation at Triennial Review.

#### Coordination of Monitoring Activities

TU recommends that MDE and MD DNR work together to develop a formal strategy for collecting information on streams that may support natural trout populations. The locations of these waters are somewhat predictable. With some interagency cooperation, a systematic approach to identifying and protecting new trout waters is possible and TU would be happy to be part of such an effort. The Maryland Water Monitoring Conference and similar venues could be used to garnish NGO support.

#### Documenting an Existing Use

These procedures for documenting an existing use are reasonable. However, the steps MDE proposes following the documentation are unsatisfactory. Once an existing use is documented, MDE must initiate protective action and the steps in the last paragraph of this section do not provide timely regulatory protection.

#### Early Notification and Convening an Advisory Body

TU argues that an immediate notification to stakeholders should provide a description of the use and its location and an initial set of water quality and spatial criteria that must be adhered to pending further review. The temperature criterion could be based on the mandatory temperature information submitted for the identification of the existing use.

TU fully supports an Advisory Body meeting open to public participation following an initial existing use notification. The objectives of the Body would be to more comprehensively study the waters under consideration for an existing use final notification or “listing.” This Body could work to finalize an appropriate description, scale, and water quality criteria for an official listing in the Maryland Register.

#### Summary Rationale and Final Notification

As stated earlier, we believe an existing use does not require a “determination” through a public process. A substantial delay in initiating protection could potentially place an existing use water at risk of degradation. TU’s recent experiences with Deep Run and

Big Pipe Creek and the Committee's findings of a substantial number of pending permits and work relative to the pending list of water (13 waters) show this to be true.

Data Gaps and Identifying Monitoring Needs

Please refer to comment on coordination of monitoring activities.

Because of lingering issues with this protocol and because we are eager to listen to other perspectives, we request the that existing use issue undergo further discussion and review by the Committee.