

§47-2-6. Water Use Categories.

6.1. These rules establish general Water Use Categories and Water Quality Standards for the waters of the State. Unless otherwise designated by these rules, at a minimum all waters of the State are designated for the Propagation and Maintenance of Fish and Other Aquatic Life (Category B) and for Water Contact Recreation (Category C) consistent with Federal Act goals. Incidental utilization for whatever purpose may or may not constitute a justification for assignment of a water use category to a particular stream segment.

6.1.a. Waste assimilation and transport are not recognized as designated uses. The classification of the waters must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial and other purposes including navigation.

Subcategories of a use may be adopted and appropriate criteria set to reflect varying needs of such subcategories of uses, for example to differentiate between trout water and other waters.

6.1.b. At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under section 301(b) and section 306 of the Federal Act and use of cost-effective and reasonable best management practices for non-point source control. Seasonal uses may be adopted as an alternative to reclassifying a water or segment thereof to uses requiring less stringent water quality criteria. If seasonal uses are adopted, water quality criteria will be adjusted to reflect the seasonal uses; however, such criteria shall not preclude the attainment and maintenance of a more protective use in another season. A designated use which is not an existing use may be removed, or subcategories of a use may be established if it can be demonstrated that attaining the designated use is not feasible because:

6.1.b.1. Application of effluent limitations for existing sources more stringent than those required pursuant to section 301 (b) and section 306 of the Federal Act in order to attain the existing designated use would result in substantial and widespread adverse economic and social impact; or

6.1.b.2. Naturally-occurring pollutant concentrations prevent the attainment of the use; or

6.1.b.3. Natural, ephemeral, intermittent or low flow conditions of water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges to enable uses to be met; or

6.1.b.4. Human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or

6.1.b.5. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water to its original condition or to operate such modification in a way that would result in the attainment of the use; or

6.1.b.6. Physical conditions related to the natural features of the water, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to

water quality, preclude attainment of aquatic life protection uses.

6.1.c. The State shall take into consideration the quality of downstream waters and shall assure that its water quality standards provide for the attainment of the water quality standards of downstream waters.

6.1.d. In establishing a less restrictive use or uses, or subcategory of use or uses, and the water quality criteria based upon such uses, the Secretary shall follow the requirements for revision of water quality standards as required by W. Va. Code §22-11-7b and section 303 of the Federal Act and the regulations thereunder. Any revision of water quality standards shall be made with the concurrence of EPA. The Secretary's administrative procedural regulations for applying for less restrictive uses or criteria shall be followed.

6.2. Category A -- Water Supply, Public. -- This category is used to describe includes waters which, after conventional treatment, are used or are capable of being used for human consumption. This category includes streams-waters on which the following are located or could potentially be located:

Comment: Clarifies that the use category includes both existing and future water supplies

6.2.a. All community domestic water supply systems;

6.2.b. All non-community domestic water supply systems, (i.e. hospitals, schools, etc.);

6.2.c. All private domestic water systems;

6.2.d. All other surface water intakes where the water is used for human consumption. (See Appendix B for partial listing of Category A waters; see section 7.2.a.2, herein for additional requirements for Category A waters.) The manganese human health criterion shall only apply within the five-mile zone immediately upstream above a known public or private water supply used for human consumption.

6.3. Unless otherwise specified in subdivision 7.2.d, all State waters are designated as Category A, Water Supply waters except those determined by the Secretary in the permitting process to have insufficient flow or hydrologic modifications that make the water or portion thereof unsuitable for the water supply use. In making a determination of unsuitability, the Secretary shall consider the following criteria:

6.3.a. Insufficient Flow

Comment: Requirements for Insufficient flow and Hydrologic Modifications are separated for clarification of requirements

6.3.a.1. Whether the insufficient flow may be compensated for by the discharge of sufficient volume of effluent discharges to enable the use to be met;

Comment: Added to satisfy requirements of paragraph 6.1.b.3, as well as requirements in 46CSR6

6.3.a.2. Whether reasonable provision for storage or impoundment of the water could be made that would allow the water to serve as a reliable water supply;

6.3.a.3. Whether the water, though having insufficient flow to serve as a primary water supply source, could serve as an emergency or backup supply;

6.3.a.4. The size and location of the waterbody;

6.3.a.5. The effect of withdrawal on downstream users;

6.3.b. Hydrologic Modifications

6.3.b.1. Whether the pre-existing modifications or diversions preclude the attainment of the use, and it is not feasible to restore the water to its original condition or to operate such modification in a way that would result in the attainment of the use; and

6.3.c. For insufficient flow or hydrologic modifications, any other information considered appropriate by the Secretary.

6.4. Any person seeking a determination of unsuitability in accordance with subsection 6.3 shall submit an application to the Secretary containing information and data addressing the applicable criteria under the subsection. The applicant shall also submit the information specified in 46 CSR 6, subdivisions 3.1.a through 3.1.f and subdivisions 4.2.a and 4.2.c.

6.5. Before making a determination under subsection 6.3 that the Category A use does not apply, the Secretary shall consult with the West Virginia Bureau for Public Health and shall provide public notice and the opportunity to comment on the determination to the general public. The public notice may occur in conjunction with any public notice that is required in the permitting process, provided that a 45-day comment period and public hearing are afforded. Notice of the public hearing shall be given at least 45 days prior to the hearing and the notice of comment and hearing may be combined.

6.5.a. Public notice shall be provided by Class I legal advertisement in addition to any other methods determined appropriate by the Secretary. The public notice shall contain at least the following information:

Comment: Location needs to be clearly identified

Comment: Requirements for Insufficient flow and Hydrologic Modifications are separated for clarification of requirements

Comment: Added to satisfy requirements of paragraph 6.1.b.5, as well as requirements in 46CSR6

Comment: Clarify what is required to be submitted by the applicant to the Secretary for review

Comment: Needed to assure the federal 45-day notice requirement for standards is met

Comment: Clarify how notice will be done by the Agency, and the contents of the notice

6.5.a.1. A brief description of the comment procedures and the date, time and place of the public hearing;

6.5.a.2. Notification of the availability of an information sheet. The information sheet shall be prepared by the Secretary and shall contain the information specified in 46 CSR 6, subdivisions 3.3.a through 3.3.h; and

6.5.a.3. The location where reports and data pertaining to the proposed determination are available for public inspection.

6.6 The Secretary shall also ensure that the water is not currently used as a water supply and shall require the permit applicant to make a demonstration that includes the following documentation:

6.6.a. Contact with the West Virginia Bureau for Public Health and the County Health Department in the county or counties where the action is contemplated to determine the existence/location of drinking water intakes in the stream or segment subject to the application;

6.6.b. The results of a physical survey of the stream, or portion thereof, to determine the existence of drinking water intake pipes and other evidence of use of the stream as a source of drinking water. Where homes/domiciles occur adjacent to the affected portion of the stream, contact with the residents to determine the source of their drinking water must be attempted and such information included in the application; and

6.6.c. Results of research to determine the presence or absence of drinking water wells and springs in the vicinity of the stream or stream segment. If drinking water wells or springs are found in the vicinity, the applicant shall make a determination of the potential for a hydrogeologic connection between the wells or springs and the surface water in question.

6.7. In making a determination under subsection 6.3, the Secretary shall consider the quality of downstream waters and assure that water quality standards are met in those waters.

6.8. Any determination under subsection 6.3 that the Category A use does not apply shall be made with the concurrence of the U.S. EPA.

Comment: Requirement of EPA

6.9. In addition to waters determined unsuitable by the Secretary in the permitting process pursuant to subsections 6.3 through 6.8, the Category A water supply use may be removed from waters or segments thereof in accordance with the provisions of subdivisions 6.1.b through 6.1.d. In any such demonstration, the applicant shall, in addition to the requirements of those subdivisions, make the demonstration required under subsection 6.6 to confirm there are no current uses of the water for water supply.

6.10. The Secretary shall maintain a list of water segments determined unsuitable for the Category A use on the West Virginia Department of Environmental Protection's website.

Comment: Identifies where an updated list will be maintained

~~6.3:~~ 6.11. Category B -- Propagation and maintenance of fish and other aquatic life. --

This category includes:

6.3.a: 6.11.a. Category B1 -- Warm water fishery streams. -- Streams or stream segments which contain populations composed of all warm water aquatic life.

6.3.b: 6.11.b. Category B2 -- Trout Waters. -- As defined in section 2.19, herein (See Appendix A for a representative list.)

6.3.c: 6.11.c. Category B4 -- Wetlands. -- As defined in section 2.22, herein; certain numeric stream criteria may not be appropriate for application to wetlands (see Appendix E, Table 1).

6.4: 6.12. Category C -- Water contact recreation. -- This category includes swimming, fishing, water skiing and certain types of pleasure boating such as sailing in very small craft and outboard motor boats. (See Appendix D for a representative list of category C waters.)

6.5: 6.13. Category D. -- Agriculture and wildlife uses.

6.5.a: 6.13.a. Category D1 -- Irrigation. -- This category includes all stream segments used for irrigation.

6.5.b: 6.13.b. Category D2 -- Livestock watering. -- This category includes all stream segments used for livestock watering.

6.5.c: 6.13.c. Category D3 -- Wildlife. -- This category includes all stream segments and wetlands used by wildlife.

~~6.6. 6.14.~~ Category E -- Water supply industrial, water transport, cooling and power. -- This category includes cooling water, industrial water supply, power production, commercial and pleasure vessel activity, except those small craft included in Category C.

~~6.6.a. 6.14.a.~~ Category E1 -- Water Transport. -- This category includes all stream segments modified for water transport and having permanently maintained navigation aids.

~~6.6.b. 6.14.b.~~ Category E2 -- Cooling Water. -- This category includes all stream segments having one (1) or more users for industrial cooling.

~~6.6.c. 6.14.c.~~ Category E3 -- Power production. -- This category includes all stream segments extending from a point 500 feet upstream from the intake to a point one half (1/2) mile below the wastewater discharge point. (See Appendix C for representative list.)

~~6.6.d. 6.14.d.~~ Category E4 -- Industrial. -- This category is used to describe all stream segments with one (1) or more industrial users. It does not include water for cooling.