

MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: *MF* Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Executive Regulation 12-10, Excise Tax on Major Emitters of Carbon Dioxide

Background

Temporary Executive Regulation 12-10T was submitted for Council review on August 17, 2010, but this regulation expired on November 15, 90 days after it was submitted.

Executive Regulation 12-10 was submitted for method 2 Council review on October 27, 2010. See ©1. This regulation implements the excise tax on the emission of carbon dioxide imposed under County Code §§ 52-95 through 52-100, enacted by Bill 29-10.

The purposes of this regulation are to:

- ensure that the appropriate tax is levied on all taxpayers that are subject to the tax;
- provide for a mechanism to estimate the tax if the taxpayer fails to report the tax due;
- assess interest and penalties in the event of a delinquency; and
- establish procedures to verify the tax owed.

Under Method 2, the Council has 60 days to act on the regulation or extend time for Council action. It was advertised in the September issue of the County Register with a comment deadline of September 30. The County received one comment, which is attached at ©6-7. That comment, from an attorney for the principal taxpayer under this law, objects to the regulation on the same grounds that it objected to the underlying law. The Council has until December 27 to act on this regulation.

This regulation is consistent with the underlying law, and Council staff sees no issues raised by it. **Council staff recommendation:** approve this regulation.

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Isiah Leggett
County Executive

OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

MEMORANDUM

059231

October 27, 2010

TO: Nancy Floreen, President
Montgomery County Council

FROM: Isiah Leggett, County Executive

[Handwritten signature] Method 2

SUBJECT: Executive Regulation 12-10, Excise Tax on Major Emitters of Carbon Dioxide

The purpose of this memorandum is to submit Executive Regulation 12-10 to the County Council for review and approval. This regulation implements the excise tax on the emission of carbon dioxide imposed under Section 52-95 through 52-100. It ensures that the appropriate tax is levied on all taxpayers that are subject to the tax, provides for a mechanism to estimate the tax if the taxpayer fails to report the tax due, assesses interest and penalties in the event of a delinquency, and establishes procedures for verification of the tax, and by amendment at a later date will define and describe the administrative process to apply for and obtain a credit under Section 52-97 and the basis for the credit.

Executive Regulation 12-10 was processed under Method 2. It was advertised in the September issue of the Montgomery County Register with a comment deadline of September 30, 2010. The County received one comment – a copy of which is enclosed with this transmittal memo – which notes an objection to the proposed regulation on the same basis as it objects to the underlying legislation. Since there are no objections to the specific procedures in the proposed regulation, there is no recommendation for subsequent changes to the document based on the submitted comment. In addition to the Executive Regulation 12-10 and comment letter, a fiscal impact statement is enclosed with this transmittal memo.

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RECEIVED
MONTGOMERY COUNTY
COUNCIL



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

COPY

Subject Excise Tax: Major Emitters of Carbon Dioxide	Number 12-10
Originating Department Finance	Effective Date

Montgomery County Regulation on:

EXCISE TAX ON MAJOR EMITTERS OF CARBON DIOXIDE

DEPARTMENT OF FINANCE

Issued by: County Executive
Regulation No. 12-10

Authority: Montgomery County Code Sections 52-95 through 52-100, and
Section 2A-15(j)
Council Review: None under Section 2A-15(j)
Register Vol. 27, Issue 9

Comment Deadline: September 30, 2010

Effective Date:

Sunset Date: None

SUMMARY: This regulation implements the excise tax on the emission of carbon dioxide imposed under §§ 52-95 through 52-100, ensures that the appropriate tax is levied on all taxpayers that are subject to the tax, provides for a mechanism to estimate the tax if the taxpayer fails to report the tax due, assesses interest and penalties in the event of a delinquency, and establishes procedures for verification of the tax.

ADDRESS: Written comments on this regulation should be sent to:

Robert Hagedoom, Chief
Division of Treasury
Department of Finance
255 Rockville Pike, Suite L-15
Rockville, MD 20850

STATE CONTACT: For further information or to obtain a copy of this regulation, please contact Sarah Gomez at 240-777-8994



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Excise Tax: Major Emitters of Carbon Dioxide	Number 12-10
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Sec. 1. Regulation

Section I: General Provisions

- A. Authority. In accordance with the authority conferred under Chapter 52, Article XIII, and Section 2A-15(j) of the Montgomery County Code, 2004, the County Executive promulgates this regulation to implement the excise tax on major emitters of carbon dioxide in Montgomery County, Maryland.
- B. Applicability. This excise tax on carbon dioxide emissions is levied on any person who owns or operates any stationary source of carbon dioxide located in the County that emits more than 1 million tons of carbon dioxide in any calendar year.

Section II. Definitions

For purposes of this regulation, the following words and phrases have the following meaning unless the context clearly indicates otherwise:

- A. Calendar year – means a year that applies to the period January 1 through December 31, except for 2010. In 2010, calendar year means June 1, 2010, through December 31, 2010.
- B. Department – means the Department of Finance.
- C. Director – means the Director of Finance.
- D. Emission report – means the tax return form provided by the Director that must be filed with the County by a major emitter, to report carbon dioxide emissions for the previous month and to remit taxes due under Section 52-96.
- E. Major emitter – means any person who owns or operates any stationary source of carbon dioxide located in Montgomery County that emits more than 1 million tons of carbon dioxide in a calendar year.
- F. Person – includes any individual, business, corporation, association, firm, partnership, group of individuals acting as a unit, trustee, receiver, assignee, or personal representative.
- G. Ton – means a measurement that, when applied to carbon dioxide in gaseous form, means the amount of gas in cubic feet that is the equivalent of 2000 pounds on a molecular weight basis.

Section III. Obligation to File Emission Report

- A. Each major emitter must obtain an emission report and tax account number from the Director.
- B. Each major emitter must file with the Director an emission report not later than the last day of the



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month following the month during which the major emitter has emitted 1 million tons of carbon dioxide during the calendar year. The emission report must report emissions on a monthly basis during each calendar year.

- C. After a major emitter has filed the first emission report during a calendar year, the major emitter must file an emission report covering each remaining month in the calendar year, not later than the last day of the following month.
- D. Example: If a person emits 300,000 tons of carbon dioxide in January; 300,000 tons of carbon dioxide in February; 300,000 tons of carbon dioxide in March; and 300,000 tons of carbon dioxide in April, the person has emitted more than 1 million tons of carbon dioxide during a calendar year and has, therefore, become a major emitter. The person must file an emission report not later than the last day of May in that calendar year.

Section IV. Calculation and Payment of Tax

- A. The excise tax on a major emitter of carbon dioxide is due not later than the last day of the month following the month during which the major emitter has emitted 1 million tons or more of carbon dioxide in a calendar year. The major emitter must pay the tax due on each ton of carbon dioxide emitted during the calendar year through the end of the month covered by the emission report.
- B. After a major emitter has emitted more than 1 million tons of carbon dioxide in a calendar year, the major emitter must pay the tax due on a monthly basis, not later than the last day of the following month.
- C. The tax rate is \$5 per ton of carbon dioxide or an amount set by the Montgomery County Council under Section 52-96(d).
- D. The tax must be paid to the Director with the emission report reporting the carbon dioxide emission associated with the tax payment.
- E. Example: If a person emits 300,000 tons of carbon dioxide in January; 300,000 tons of carbon dioxide in February; 300,000 tons of carbon dioxide in March; and 300,000 tons of carbon dioxide in April, the person must pay to the Director an excise tax of \$6 million (1.2 million tons x \$5), along with an emission report not later than the last day of May in the same calendar year. If the major emitter emits 500,000 tons of carbon dioxide during May, the major emitter must pay to the Director an excise tax of \$2.5 million (500,000 tons x \$5) not later than the last day of June.

Section V. Adjusted and Estimated Tax; Audit; Records

- A. If a major emitter fails to file an emission report or pay the tax by the due date, the Director may send the major emitter an estimated tax bill. The estimated tax may be based on the previous month's reported emissions or on some other reasonable source of information, including



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information reported to the United States Environmental Protection Agency's Continuous Monitoring System. A person must pay the estimated tax within 10 days of the date of the notice from the Director.

- B. The Director may adjust an emission report and the tax due based on an audit of the records of the major emitter or information obtained from a federal or state air pollution control agency, including information from the United States Environmental Protection Agency's Continuous Monitoring System. The major emitter must pay the adjusted tax within 10 days of the notice of the adjusted tax from the Director.
- C. Each major emitter must preserve records necessary to determine and verify the amount of the tax for 3 years. The Director may inspect and audit the records at any reasonable time.

Section VI. Interest and Penalty; Tax Liens

- A. If a major emitter fails to pay the tax when it is due, the major emitter is liable for interest on the unpaid tax at the rate of 1% per month for each month, or a part of a month, after the tax is due, plus a penalty on the unpaid tax of 5% per month, or part of the month, after the tax is due. The penalty must not exceed 25% of the tax due.
- B. If a major emitter fails to pay the tax when it is due, the tax and any interest and penalties are a lien in favor of the County on all property, real or personal, and all rights to the property that belongs to the major emitter under Montgomery County Code, Section 52-18D.

Sec. 2. Severability

If a court holds that a portion of this regulation is invalid, the other portions remain in effect.

Sec. 3. Effective Date

This regulation takes effect upon approval by the County Council County Council.

**APPROVED AS TO FORM AND LEGALITY
OFFICE OF THE COUNTY ATTORNEY**

BY: [Signature]
DATE: 8/3/10

[Signature]
Istah Leggett,
County Executive

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September 29, 2010

VIA FEDERAL EXPRESS

Robert Hagedoorn, Chief
Division of Treasury
Department of Finance
255 Rockville Pike, Suite L-15
Rockville, Maryland 20850

Re: Comments on Proposed Montgomery County Regulation No. 12-10,
Excise Tax on Major Emitters of Carbon Dioxide

Dear Mr. Hagedoorn:

On behalf of Mirant Mid-Atlantic, LLC ("Mirant"), we submit the following comments in opposition to Proposed Montgomery County Regulation No. 12-10. Proposed Regulation No. 12-10 implements Montgomery County Code Sections 52-95 through 52-100, entitled Excise Tax on Major Emitters of Carbon Dioxide ("Emissions Legislation").

The Emissions Legislation imposes a levy of \$5 per ton of carbon dioxide emitted by "major emitters" within the County ("Levy"). The County Council set the one million ton threshold for defining a "major emitter" such that Mirant is the only entity that is subject to the Levy. The punitive and pernicious nature of the Emissions Legislation is further evidenced by the fact that Mirant is not simply subject to the Levy on emissions in *excess* of the one million ton threshold; rather, Mirant is subject to the Levy on *every* ton of carbon dioxide emitted, retroactive to its first ton of emissions. No other entity in Montgomery County is subject to the Levy on any of its emissions.

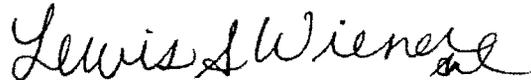
As the County Council is aware, Mirant has challenged the Emissions Legislation on the grounds that the Levy violates the Equal Protection and Due Process Clauses of the United States and Maryland Constitutions; constitutes an excessive fine and an illegal bill of attainder; is void for vagueness; is preempted by Maryland's regulation of carbon dioxide emissions and the

Robert Hagedoorn, Chief
September 29, 2010
Page 2

Regional Greenhouse Gas Initiative state compact; and violates the Maryland Constitution's prohibition against special laws. Mirant's challenge is currently pending before the United States Court of Appeals for the Fourth Circuit.

Proposed Regulation No. 12-10 fails to remedy any of the federal or state law violations detailed in Mirant's complaint. Mirant thus objects to the proposed regulation, as it objects to the underlying legislation.

Very truly yours,

A handwritten signature in black ink that reads "Lewis S. Wiener" with a stylized flourish at the end.

Lewis S. Wiener



OFFICE OF MANAGEMENT AND BUDGET

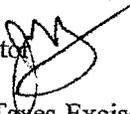
Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

May 13, 2010

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director 

SUBJECT: Expedited Bill 29-10, Taxes-Excise Tax-Carbon Dioxide Emissions

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

This bill will establish an annual excise tax of \$5 per ton for major emitters of carbon dioxide in the County. A "major emitter" is defined as any entity that owns or operates a stationary source of carbon dioxide located in the County that emits more than 1 million tons of carbon dioxide in any calendar year. The bill provides for the monthly collection of the tax, as well as penalties if the tax liability is not paid. At least 50% of the revenue from this tax must be used to fund the annual operating budget that supports the County's greenhouse gas reduction programs, including mass transit.

FISCAL AND ECONOMIC SUMMARY

It is estimated that this tax will produce annual revenue of \$11.7 – \$17.6 million, based on available estimates of CO2 emissions from major emitters located in the County. (The higher figure is based on EPA's 2005 EGrid estimate of CO2 emissions from major emitters located in Montgomery County and is the most authoritative figure available.)

This bill is not expected to impose significant additional costs on the County, either for administration of the tax or for defending possible legal challenges to the tax. However, a legal challenge could delay the implementation of the tax and receipt of the associated revenue for up to two years.

Based on the EGrid report cited above, major emitters located in the County would need to receive an additional \$0.00487 per kilowatt-hour for power generation to offset the impact of the tax. However, wholesale electricity markets are regional, and the eventual impact of the tax increase on Montgomery County consumers is likely to be negligible.

The following contributed to and concurred with this analysis: John Greiner, Office of Management and Budget; Eric Coffman, Department of Environmental Protection; Robert Hagedoorn, Department of Finance; and Marc Hansen, Office of the County Attorney.

JFB:jg

Office of the Director

Resolution No. _____
Introduced: _____
Adopted _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: Executive Regulation 12-10, Excise Tax on Major Emitters of Carbon Dioxide

Background

1. On October 27, 2010, the County Council received Executive Regulation 12-10, Excise Tax on Major Emitters of Carbon Dioxide.
2. Executive Regulation 12-10 would implements the excise tax on the emission of carbon dioxide imposed under County Code §§ 52-95 through 52-100.
3. The Council reviewed the regulation under Method (2) of §2A-15(j) of the County Code. Under Method (2), if the Council does not approve or disapprove a regulation within 60 days after the Council receives the regulation, it is automatically approved and takes effect the day after the deadline for approval or a later date specified in the regulation.

Action

The County Council for Montgomery County, Maryland, approves the following resolution:

Executive Regulation 12-10, Excise Tax on Major Emitters of Carbon Dioxide is approved.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council