OFFICE OF THE INSPECTOR GENERAL

PRELIMINARY INQUIRY MEMORANDUM

February 5, 2015

TO: Timothy L. Firestine
Chief Administrative Officer

FROM: Edward L. Blansitt III
Inspector General

SUBJECT: Water Quality Protection Charge
OIG PIM #15-005

This Preliminary Inquiry Memorandum (PIM) describes specific issues or complaints and the outcomes of limited procedures undertaken during a Preliminary Inquiry conducted by the Office of the Inspector General (OIG). The actions we propose do not rise to the level of recommendations. Please provide your response to this memorandum, if any, by February 19, 2015. Your response will be included in the copy of this memorandum that we provide to the members of the County Council and the County Executive.

Complaint Summary and Background:

In a telephone call to the Office of the Inspector General (OIG) Hot Line on the morning of September 29, 2014, a complainant asserted that the Montgomery County Department of Environmental Protection (DEP) failed to respond to the complainant's request for reconsideration and correction of Water Quality Protection Charges (WQPC) assessed on the Complainant's properties. Later that day, the Complainant expanded the scope of his complaint with the assertion that wide-spread classification and assessment errors existed within the DEP's WQPC system.[1] The Complainant presented eight properties as evidence of his assertions. Two of these properties were Complainant-owned.

In April, 2013, the Council and Executive of Montgomery County approved Expedited Bill 34-12 to amend Chapter 19 - Erosion, Sediment Control and Storm Water Management of the Montgomery County Code in order to implement a WQPC. This change resulted from

[1] In July, 2013, the OIG received a complaint that similarly asserted there was an error in the computation of the WQPC. That matter was placed on the OIG's Watch List for incorporation within the upcoming Four-Year Work Plan.

the passage of Maryland House Bill 987[2] which required the annual collection of a storm water remediation fee from owners of property in certain counties and municipalities.

County Code provides that a "Charge must be imposed on each property, as specified in regulations…[that] may define different classes of real property, depending on the amount of impervious surface[3] on the property…".[4] The Code of Montgomery County Regulations (COMCOR) identifies the structures that qualify as WQPC impervious surfaces for five property classification types:[5]

> ***Single Family Residential*** property, whose impervious area contains a detached dwelling unit (house), driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water;
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> ***Multifamily residential*** property, whose impervious area contains the residential structures,[6] the sidewalks, parking lots and any other permanent installations on the developed parcel (whether under single or common ownership) that is impenetrable by water;
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> ***Nonresidential*** property, whose impervious area contains all buildings, parking lots, sidewalks, and any other impermeable installations permanently attached to the land parcel containing those installations;[7]
>
> ***Nonprofit*** property, whose impervious area contains all buildings, driveways, parking lots, sidewalks, and any other impermeable installations permanently attached to the land parcel containing those installations that is owned by a nonprofit organization;[8] and
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> ***Agricultural*** property,[9] whose impervious area contains only the house on the property.

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[2] House Bill 987 became effective on July 1, 2012.

[3] County Code §19-21 defines an Impervious Area or Surface as any surface that prevents or significantly impedes the infiltration of water into the underlying soil, including any structure, building, patio, sidewalk, compacted gravel, pavement, asphalt, concrete, stone, brick, tile, swimming pool, or artificial turf. Impervious surface also includes any area used by or for motor vehicles or heavy commercial equipment, regardless of surface type or material, including any road, driveway, or parking area.

[4] County Code §19-35(b)

[5] County Regulation §19.35.01.03

[6] County Regulation §19.35.01.02 defines a Multifamily Residential Property as a mobile home park, or a residential building where one or more dwelling units share a common entrance from the outside with other dwelling units that are arranged above, below or next to one another in the same building, or any housing unit that is subject to the condominium regime established under the Maryland Condominium Act.

[7] County Regulation §19.35.01.03(I) enumerates nonresidential structures as office buildings, hotels, retail establishments, factories, and warehouses. Nonresidential properties may also include properties owned by homeowner associations, nonprofit organizations such as religious institutions, healthcare facilities, other developed properties devoted to non-governmental charitable and institutional uses, and any government-owned properties subject to the WQPC.

[8] County Code §19-21 defines a Nonprofit organization as a corporation, foundation, or other legal entity that is exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code.

[9] County Regulation §19.35.01.02 defines Agricultural Property as property that is used primarily for agriculture, viticulture, aquaculture, silviculture, horticulture, or livestock and equine activities; temporary or seasonal outdoor activities that do not permanently alter the property's physical appearance and that do not diminish the property's rural character; or activities that are intrinsically related to the ongoing agricultural enterprise on the property.

Inquiry and Outcome:

We tested the WQPC assessments on a non-random, nonstatistical sample of 36 property tracts. The sample included the 8 properties cited by the complainant. Of the 36 property tracts reviewed, 11 (30%) appeared to correctly observe the classification and assessment guidelines set forth in COMCOR. Within the remaining 25 property tracts in our sample, we observed 29 instances[10] (as indicated in Chart 1 to right) where it appeared that the classification or assessment was not consistent with Maryland Code, County Code, or COMCOR.

Chart 1: Observations of Sampled Properties

Observations	Total
Sample Size	36
Correctly stated	11
Issues within remaining 25 tracts:	
Tract Classification	
Agricultural vs. SFR	13
Undefined	6
Nonprofit	3
Zero dollar ($0) WQPC	7
Total Issues	29

We reviewed each issue and discussed the information collected with the DEP management. We have seen evidence that the DEP has worked to address some of the issues raised within this memorandum and have been told that others are being addressed.

Inconsistent use of COMCOR-defined Agricultural and Single Family Residential property classifications

Thirteen property tracts within the OIG sample were classified by the Maryland State Department of Assessments and Taxation (SDAT) as Agricultural. Through observation of aerial and satellite photographs, we were able to confirm these properties met the COMCOR Agricultural definition. However, the DEP classified these thirteen tracts as Single Family Residential.

As COMCOR states, an Agricultural classification is to be assigned to those properties that are used primarily for agriculture and are intrinsically related to an ongoing agricultural enterprise on the property[11]. COMCOR provides for a "charge for each agricultural property…[calculated at a rate] in accordance with the applicable Single Family Residential Tier".[12]

For these 13 properties, the DEP assessed the WQPC on impervious square footage based solely on the house as is specified by COMCOR for Agricultural property assessments.[13] Thus, the WQPC assessment was based on the proper calculation of impervious area and the WQPC rate was correct, but the classification was not Agricultural.

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[10] Some property tracts presented multiple observations.
[11] County Regulation §19.35.01.02.
[12] County Regulation §19.35.01.04(E).
[13] County Regulation §19.35.01.03(M)

The DEP could clarify these matters by:

- reclassifying all properties of this type,
- proposing an amendment to COMCOR §19.35.01.04(E) that would enumerate the seven WQPC Agricultural rate tiers rather than referencing the rate schedule for Single Family Residential,[14] and
- modifying its property data information exchange with SDAT in order to capture and apply future Agricultural classifications to WQPC system coding.[15]

Use of WQPC classifications not defined by COMCOR

In determining the WQPC, the DEP applied certain classifications that are not defined in COMCOR. Within the sample analyzed by the OIG, five property tracts were assigned the classification "Single Family Residential with 0 [Zero] Impervious Area" and one other was assigned a "Federal" classification. Neither of these classifications are defined by COMCOR.

Use of these (and possibly other) classifications and tiers that are not defined by COMCOR could potentially confuse property owners attempting to understand the classification of their property.

The DEP could eliminate possible confusion by properly reclassifying all properties so that they bear COMCOR classifications.

WQPC Nonprofit Classification

The DEP coded six of the properties in the OIG's sample as Nonprofit. We determined that the DEP coded two of these properties as Nonprofit although the ownership organization did not meet the County Code's definition of a Nonprofit organization.[16] One other property, coded as Single Family Residential by the DEP, should have been proportionately assessed to both Single Family Residential and Nonprofit.

Montgomery County Code defines a Nonprofit organization[17] as a "corporation, foundation, or other legal entity that is exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code."[18] Neither of the two DEP-coded Nonprofit classification exceptions were 501(c)(3) organizations although both qualify as tax-exempt

[14] In this memorandum, we make several suggestions that the Montgomery County Department of Environmental Protection propose changes to the Code of Montgomery County Regulations. County Code §19-35(b) states that Regulations to administer the WQPC will be adopted by the Executive under Method (1) of the Code's procedure for adoption of regulations.

[15] Timing of property development projects can result in bonā fidē differences between the WQPC and SDAT systems. Modifications should also consider the issues raised in the section *WQPC Nonprofit Classification* that follows in this memorandum.

[16] Nonprofit tax exempt status of the property owners was confirmed by OIG review of the organizations' most recent, publically available Form 990 tax return and reference to web sites www.guidestar.org and www.501clookup.org.

[17] County Regulation §19.35.01.02 introduces another definition of Eligible Nonprofit property as "real property owned by a nonprofit organization that is exempt from ad valorem property taxes under State law."

[18] County Code §19-21.

under US Internal Revenue Service (IRS) code.[19] Only one of these organizations was classified as tax-exempt by SDAT.

SDAT records indicate that ownership of the third, Single Family Residential-classified property is subdivided between two SDAT tax accounts – a smaller Residential tract and a larger Exempt Commercial tract[20] owned by a 501(c)(3) Private Foundation established by the owner of the smaller tract.

Reliance upon 501(c)(3) status as the determinant of a Nonprofit owner is troublesome, is inconsistently applied, and likely promotes confusion among property owners.

The DEP may wish to propose amendments to COMCOR to clarify the qualifying criteria of nonprofit organizations for use of the WQPC Nonprofit property classification, and modify WQPC systems to handle nuances of multi-ownership SDAT data feeds.[21]

Zero dollar WQPC

Seven of the 36 properties we reviewed were charged no WQPC.

One can reasonably interpret that COMCOR indicates a $0 (zero dollar) WQPC is appropriate in some circumstances. If no house is present on an Agricultural property tract, there is no impervious surface and, arguably, no WQPC assessment. We found evidence of this within our sample. WQPC calculations for Nonresidential and Nonprofit properties can also produce a $0 WQPC if the property contains no impervious surface.

One can also reasonably interpret that COMCOR's Rates section[22] directs an owner of house-free, Agricultural property to the Single Family Residential Tier 1, which, for the 2015 period, assesses a $29.17 WQPC. This interpretation and assessment of a fee is consistent with County law that a WQPC "must be imposed on each property".[23]

Through its construction and its failure to specify whether zero is an acceptable outcome for a WQPC assessment, COMCOR's ambiguity promotes confusion among property owners and staff of the DEP. The DEP should consider whether it was the legislative intent of the Montgomery County Council that all properties, unless specifically exempted by code, be assessed a WQPC even if at some de minimis amount, and propose amendments to COMCOR to remove any ambiguity.

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[19] As Nonprofit organizations that are not exempt under IRS 501(c)(3), these 501(c)(10) Fraternal and a 501(c)(19) Armed Forces membership organizations only meet COMCOR's criteria for Nonresidential property owned by a nonprofit organization. Under COMCOR, the WQPC rates for Nonresidential and Nonprofit are calculated using the same formula; however, the maximum Nonprofit WQPC rate is presently capped at $2,033.20, while the maximum Nonresidential WQPC rate is unlimited.

[20] "Residential" and "Exempt Commercial" are SDAT Ownership Use classifications.

[21] See also *Inconsistent use of COMCOR-defined Agricultural and Single Family Residential property classifications* earlier in the memorandum.

[22] County Regulation §19.35.01.04(E).

[23] County Code §19-35(b). Both State and County code provide for WQPC exemptions for State, County, and certain Municipal-owned properties at Maryland Environment Article §4-202.1(e)(2) and County Code §19-35(g).

Summary and Conclusion:

A nonstatistical sample of properties reviewed in this analysis suggests a large number of issues and ambiguities that could reasonably lead property owners to question the overall accuracy and fairness of the program. Management should consider undertaking a comprehensive review of these matters.

cc: Fariba Kassiri, Assistant Chief Administrative Officer
Lisa Feldt, Director, Department of Environmental Protection

A Preliminary Inquiry Memorandum (PIM) is appropriate in situations where we have, in reaction to a complaint, gathered and assessed sufficient information for us to draw limited conclusions related to the specific complaint. Since PIMs do not result from full inspections, investigations, or audits, it would not be appropriate for us to provide full findings and recommendations in PIMs. Instead, we may identify specific conditions, transactions, and events that management may want to continue to research from an investigative or policy standpoint.

Response to this Preliminary Inquiry Memorandum:

From Montgomery County Chief Administrative Officer:

On February 9, 2015, the Assistant Chief Administrative Officer responded via email:

> "As you know, DEP has already started a comprehensive self-assessment and review of our recently implemented Water Quality Protection Charges program/process."