

MEMORANDUM

February 19, 2015

TO: Transportation, Infrastructure, Energy & Environment Committee

FROM: *KL* Keith Levchenko, Senior Legislative Analyst

SUBJECT: Water Quality Protection Charge

- Agenda Item #5: Executive Regulation 16-14: Water Quality Protection Charge
- Agenda Item #6: Discussion: Water Quality Protection Charge Issues

Council Staff Recommendation Regarding Executive Regulation 16-14: Support submittal of an amended regulation addressing some additional issues.

Attachments to this Memorandum

- County Executive Transmittal Memorandum and Fiscal Impact Statement (©1-5)
- Executive Regulation 16-14 (Method 1)¹ with markup (©6-16)
- Office of the Inspector General Preliminary Inquiry Memorandum: Water Quality Protection Charge (©17-24)
- November 12, 2014 Memorandum from Councilmember Leventhal to Councilmembers Berliner and Navarro (©25-26)
- January 23, 2015 memorandum from Miller, Miller & Canby on behalf of Paul N. Chod and Minkoff Development Corporation (©27-33)

Background

On December 10, the Council received Executive Regulation 16-14 – Water Quality Protection Charge. This regulation is intended to implement changes to County law included in Bill 2-15 introduced by the Council on January 20, 2015. This bill is to be discussed by the T&E Committee on February 23 (Agenda Item #4) at the same meeting as Regulation 16-14.

Last November, Councilmember Leventhal asked for a review of the Water Quality Protection Charge in light of concerns he had heard of the potentially erroneous charges and the fact that the appeals process may be underutilized by property owners.

¹ As a Method 1 regulation, Regulation 10-13 is not adopted until the Council approves it. The Council may approve or disapprove the regulation by resolution. The regulation takes effect upon adoption unless a later date is specified.

Given the common subject of these issues, Council Staff has combined these items into one packet for purposes of Committee review and discussion.

Executive Regulation 16-14

As noted in the transmittal memorandum (see ©1-2), Executive Regulation 16-14 would:

- extend the deadline for a property owner to apply for a credit: from October 31 of the year before a property tax bill is mailed out to September 30 of the year that the property tax bill is mailed out; and
- extend the deadline for applying for a hardship exemption (available to owner-occupied residential properties and non-profit organizations that own properties) from April 1 of the year before a property tax bill is mailed out to September 30 of the year that the property tax bill is mailed out.

The applicable language changes in the regulation are presented in Section 19.35.01.05 (for Credits) on ©12 and Section 19.35.01.08 (Hardship Exemption) on ©14-15.

The Fiscal Impact Statement notes that revenue reduction estimates from the credits and hardship exemptions are already built into the current fiscal plan for the Water Quality Protection Fund (see ©3-4).

The deadline changes are consistent with Bill 2-15. **Council Staff is supportive of the changes, as they provide more user-friendly deadlines for property owners as noted in the County Executive's transmittal memorandum. However, as discussed later, Council Staff believes there are some additional changes that should be considered and, therefore, Council Staff supports submittal by the County Executive of an amended Executive Regulation.**

Office of the Inspector General Preliminary Inquiry Memorandum

On February 10, 2015, the Council received a Preliminary Inquiry Memorandum from the County's Office of the Inspector General (OIG) that raised some issues regarding the Water Quality Protection Charge as implemented in the Code of Montgomery County Regulations (COMCOR).

Based on a complaint received from a property owner regarding potentially erroneous charges for eight properties, the OIG reviewed a total of 36 property tracts (including the eight properties cited by the complainant). The OIG identified 29 classification issues regarding 25 of the 36 properties reviewed. A summary chart on page 3 of the report (©20) presents these issues in two major categories: incorrect tract classification and "Zero Dollar" WQPC. While the memorandum does not conclude that charges were or are being incorrectly assessed, the OIG notes that "a large number of issues and ambiguities" could reasonably lead property owners to question the overall accuracy and fairness of the program."

Some of the issues raised by the OIG speak to broader policy issues that would benefit from a more comprehensive review. DEP is in the process of initiating a request for proposal (RFP) for a thorough assessment of the Water Quality Protection Charge program. A portion of this work involves determining if the program's design and operation are consistent with the County Code and COMCOR.

Council Staff would also suggest that DEP look at some of the policy issues and options for how the charge is assessed.

Tract Classification

DEP has begun to address the tract classification issues by correcting its bill labels to match the State Department of Assessments and Taxation (SDAT) classification for agricultural properties (13 of the 22 tract classification issues involved agricultural properties). NOTE: The OIG did not find that these properties were charged incorrectly, but rather suggested the classification label should be corrected and a separate tier structure for agricultural properties should be created.

Council Staff believes DEP's labeling change addresses the key OIG classification concerns regarding agricultural properties. However, instead of adding a separate agricultural tier structure that would mimic the single-family residential tier structure, Council Staff suggests a simpler approach would be to add language to Section 19.35.01.04(A) to note that single-family houses on agricultural properties are treated as single-family residential properties for purposes of establishing rates.

The OIG also notes some issues with how DEP classified non-profit organizations (see ©21-22). The OIG suggests that DEP consider amendments to COMCOR to clarify the qualifying criteria for non-profit organizations.

Also, the OIG found that, in one case it reviewed, DEP classified a property as "Federal", despite there being no defined category for "Federal" in COMCOR.

Council Staff will work with DEP to see if clarifying language can be included in Executive Regulation 16-14AM to address these issues.

Zero Dollar Charges

The OIG found seven properties that were charged no WQPC. These properties had no impervious area and therefore their WQPC assessment was zero. Council Staff believes this approach is consistent with the legislative intent of the Council at the time the current law and regulations were put in place. However, the OIG points out language in County Code Section 19-35(b) that says a WQPC "must be imposed on each property", which could be interpreted as assuming all properties would pay some charge. Further, Section 19.35.01.03(A) of COMCOR could be interpreted as saying that a property with zero imperviousness pays a Tier 1 rate, since its total imperviousness (zero) "is less than or equal to 1,000 square feet."

A simple fix to COMCOR would be to add the phrase, "greater than zero" in the Tier 1 classification. This would clarify current practice.

A broader policy issue is whether all properties (even those with no imperviousness) should contribute some amount to the Water Quality Protection Fund, since a significant portion of expenditures in the Fund are intended to address County-owned land and/or County-wide initiatives such as street-sweeping and trash cleanup. More specifically, is the amount of imperviousness on a property the only factor that should be considered in establishing how much a property pays into the Fund? **This issue deserves further study by DEP.**

DEP staff will be available at the T&E meeting to discuss the OIG memorandum and what DEP is doing to address the issues raised. As noted earlier, some of the issues (such as the classification labeling of agricultural properties) have already been addressed. Other issues can be addressed through fairly simple corrective language in COMCOR. **For this reason, Council Staff suggests that the T&E Committee ask the Executive to transmit an amended regulation that deals with these issues.**

Other Water Quality Protection Charge Issues

Based on Councilmember Leventhal's memorandum as well as on correspondence received by the Council from some property owners, Council Staff has identified some additional issues for discussion by the Committee.

Erroneous Water Quality Protection Charges

One property owner identified a situation where he owned multiple properties, some of which were undeveloped (zero imperviousness) but which were being incorrectly assessed as if they contained impervious area. DEP confirmed that there was a coding error in its computer system that resulted in incorrect charges to about 200 accounts where property owners had multiple properties. DEP subsequently fixed the problem before any incorrect bills were mailed to property owners.

Other potential errors identified by the same complainant involved portions of roads assessed to single-family properties and some impervious areas shared by multiple properties (such as driveway pipe stems) being assessed only to one property. Upon further investigation, DEP determined that the WQPC assessments were accurate based on the existing property boundaries.

Property boundary information is maintained by the Planning Department. When issues such as those above are raised, DEP confirms the property boundary information with the Planning Department.

Correction of Erroneous Assessments Requires Action by the Property Owner

This is a key issue noted in Councilmember Leventhal's memorandum. For levy year 2014, DEP processed approximately 336,000 property tax accounts and sent out about 276,000 bills. However, only 23 credit applications, 16 hardship exemptions, and 89 appeals were received.²

DEP performs quality control work on about 10 percent of the assessments each year. If imperviousness assessments have changed from prior calculations (every property has its imperviousness calculated via GIS mapping every three years), DEP researches the property records to ascertain whether the change is valid. Imperviousness tends to remain unchanged on most properties from year to year, so a change in an imperviousness calculation may be indicative of an error.

Given that DEP processes so many bills, it would be impractical for DEP to physically inspect every property to verify its imperviousness calculations. However, on those occasions where property owners have questioned DEP's imperviousness calculations for a house, driveway, etc., the calculations were found to be accurate. As noted earlier, errors tend to occur when other information (such as property records) are inaccurate or out of date. When these issues are identified, DEP notifies the Planning Department so the property information can be updated.

² Bill 2-15 and Regulation 16-14 may increase the numbers of credit applications and hardship exemptions.

If and when errors are found in the property owner's favor, Council Staff suggests that DEP should consider providing retroactive payments back to levy year 2013 (the first year of the charge in its current form). This seems fair to property owners, as they should not be penalized for a longstanding mistake by the County. COMCOR would seem to allow retroactive payments now, as Section 19.35.01.07(D) notes that the Director of Finance should "refund any overpayment to the property owner." This language does not distinguish between current and past levy years.

Commercial Properties Pay a Disproportionate Share of the WQPC

The Council received detailed correspondence from the attorney representing Paul N Chod and Minkoff Development Corporation (see ©27-33). The attorney contends that commercial property owners such as his client pay a disproportionate share of the WQPC and notes that:

- Commercial properties pay the charge plus the capital and operating costs for on-site facilities.
- Credits for treatment of stormwater on-site are only up to 50% for traditional stormwater management (swm) and 80% for Environmental Site Design (ESD) swm. A combination of treatments is limited to the 50% max, even if the property treats all of its swm on-site.
- The credits do not take into account treatment of stormwater from neighboring properties owned by others.
- Costs to address items for the general good of the County (roads, county facilities, etc.) are disproportionately assessed on large commercial properties, since the charge is based on impervious area and not evenly split among all beneficiaries.
- These properties help pay for the rainscapes reward program but are ineligible to benefit from the program.
- There is an inequity in treatment of new developments versus old developments as old developments cannot as easily take advantage of ESD opportunities as new developments.

Some of these issues were the subject of a recent Board of Appeals case (A-6439).³ In that case, the Board of Appeals affirmed the consistency of the County's Water Quality Protection Charge with State law. The Board of Appeals did support the appellant's contention that the appellant's WQPC credit was improperly reduced administratively by DEP (due to lack of engineering computations being provided by the applicant).

DEP staff will be available to discuss these with the Committee. As with all fee structures, cost allocations may intentionally or unintentionally hit some ratepayers harder than others. In the case of the WQPC, impervious area is the key variable affecting the share of costs one pays into the Fund. The credit limitations may further tilt the charge as well. The issues noted above make a strong case that large commercial properties with regional on-site swm are impacted greater than other properties under the County's current fee structure. However, whether there is a better way to allocate these charges is an open question. **Council Staff suggests that further review by DEP of these issues may be worthwhile to see if some modifications to the current fee structure are warranted and whether changes in County law, regulation, or both are needed.**

Attachment

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³ The Board of Appeals opinion is available at:
http://www.montgomerycountymd.gov/BOA/Resources/Files/pdf/opinions/2014/A-6439_201501161429.pdf



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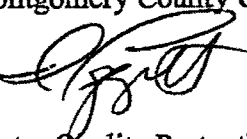
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Isiah Leggett
County Executive

MEMORANDUM

December 10, 2014

TO: George Leventhal, President, Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Executive Regulation 16-14 - Water Quality Protection Charge

I am submitting for Council approval Executive Regulation 16-14, Water Quality Protection Charge, which extends the application deadlines for credits and hardship exemptions under the Water Quality Protection Charge (Charge) program. This regulation implements changes to the County Code that are made in proposed legislation on the same topic that I am submitting to Council contemporaneously in a separate package.

Under current law, a property owner may apply to the Department of Environmental Protection (DEP) to receive a credit against the Charge for treating stormwater runoff with a stormwater management facility that is not maintained by the County. This regulation extends the deadline for applying for a credit from October 31 of the year before a property tax bill is mailed out to September 30 of the year that the property tax bill is mailed out. Under current law, the owner of residential property that is owner-occupied or a nonprofit organization that owns property subject to the Charge may apply to the Department of Finance (Finance) for a hardship exemption. This regulation extends the deadline for applying for a hardship exemption from April 1 of the year before a property tax bill is mailed out to September 30 of the year that the property tax bill is mailed out.

The current credit and hardship exemption deadlines were established so that DEP and Finance could make decisions about credits and hardship exemptions prior to the applicable fiscal year in which reduced revenues would occur so that these reduced revenues could be accounted for in the development of DEP's annual budget. However, experience has shown that property owners often do not focus on credit and hardship exemption opportunities until after they receive their property tax bills. In addition, DEP now believes that it can develop reasonable projections for reduced revenues from credits and hardship exemptions in a particular fiscal year even if applications are received later in the process.

①

George Leventhal, President
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In essence, extending the application deadlines for both credits and hardship exemptions until September 30 of the year in which the property tax bill is mailed out gives property owners additional time to prepare these applications after receiving property tax bills. This change will make these application deadlines consistent with the current deadline for requesting an adjustment to the Charge based on consolidation of contiguous properties, property classification, impervious area calculation or inapplicability of the Charge to the property.

Executive Regulation 16-14 was advertised in the October 2014 County Register and no comments were received. The Fiscal Impact Statement for the regulation is attached. If you have any questions about this proposed regulation or need additional information, please contact Fariba Kassiri, DEP Acting Director, at 240-777-7781.

Attachments (3)

- Executive Regulation 16-14 (clean version)
- Executive Regulation 16-14 (amended version)
- Fiscal Impact Statement

Fiscal Impact Statement

Executive Regulation 16-14, Stormwater Management – Water Quality Protection Charge

1. Executive Regulation Summary.

This regulation, which amends Executive Regulation 8-14AM, changes the due date (to September 30) for both credit and financial hardship exemption applications.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

Executive Regulation 16-14 would result in the mailing of updated tax bills after initial mailings. The Department of Finance reports that only a small amount of unit costs for mailing, proportional to the amount of bills mailed, would result from the bill. In the next six years, the total costs of these mailings to ratepayers with approved credit applications will not exceed \$200, based on DEP's current experience administering the credit and hardship exemption programs.

In FY14, DEP received 110 credit applications and 24 hardship exemptions. Of these applications, all 110 credit application and 19 of 24 hardship exemptions were approved. The FY15 approved budget and the WQPC rate incorporate these estimates of credits and hardship reductions.

Revenue reduction estimates for the WQPC Credit and Hardship Exemption program are assumed in the current fiscal plan for the Water Quality Protection Fund (WQPF) and assume the following reductions in revenue:

The WQPC credit program:

FY15: \$437,000

FY16: \$656,000

FY17: \$680,000

FY18: \$720,000

FY19: \$923,000

FY20: \$963,000

The WQPC hardship program:

FY15: \$39,000

FY16: \$59,000

FY17: \$61,000

FY18: \$65,000

FY19: \$83,000

FY20: \$86,000

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Revenue reduction estimates related to the WQPC credit and hardship programs may fluctuate in future fiscal years depending on the number of ratepayers that apply for the credit and the amount of the WQPC. DEP has estimated the total fiscal impact of each program below:

The WQPC credit program:

FY15: \$437,000

FY16: \$656,000

FY17: \$680,000

FY18: \$720,000

FY19: \$923,000

FY20: \$963,000

These estimates are based on the current phase-in of the WQPC credit program, 10% annual increase in credit participation, and future WQPC increases assumed in the FY15-20 Fiscal Plan. Any revenue reduction due to credits is offset by adjustments to the WQPC in order to generate sufficient revenues to pay for required stormwater management expenditures.

The WQPC hardship program:

FY15: \$39,000

FY16: \$59,000

FY17: \$61,000

FY18: \$65,000

FY19: \$83,000

FY20: \$86,000

These estimates are based on the first year of actual program participation, adjusted with the current phase-in of the WQPC program, and future WQPC increases assumed in the FY15-20 Fiscal Plan. Any revenue reduction due to hardship applications is offset by adjustments to the WQPC in order to generate sufficient revenues to pay for required stormwater management expenditures.

4. An actuarial analysis through the entire amortization period for each regulation that would affect retiree pension or group insurance costs.

Not applicable.

5. Later actions that may affect future revenue and expenditures if the regulation authorizes future spending.

Not applicable.

6. An estimate of the staff time needed to implement the regulation.

The additional time is not expected to be significant and can be absorbed by existing WQPC staff.

7. An explanation of how the addition of new staff responsibilities would affect other duties.

Not Applicable.

8. An estimate of costs when an additional appropriation is needed.

Additional appropriation is not needed.

9. A description of any variable that could affect revenue and cost estimates.

Revenue reduction estimates related to the WQPC credit and hardship programs may fluctuate in future fiscal years depending on the number of ratepayers that apply for the credit and the amount of the WQPC.

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

See response for item 9.

11. If a regulation is likely to have no fiscal impact, why that is the case.

Not applicable.

12. Other fiscal impacts or comments.

Not applicable.

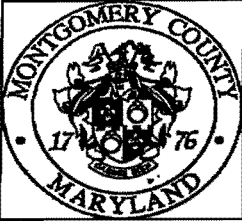
13. The following contributed to and concurred with this analysis:

Vicky Wan, Department of Environmental Protection
Steve Shofar, Department of Environmental Protection
Matt Schaeffer, Office of Management and Budget



Jennifer A. Hughes, Director
Office of Management and Budget

11/18/14
Date



MONTGOMERY COUNTY EXECUTIVE REGULATION

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

Subject Water Quality Protection Charge	Number 16-14
Originating Department Department of Environmental Protection and Department of Finance	Effective Date

Montgomery County Regulation on:

WATER QUALITY PROTECTION CHARGE

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND
DEPARTMENT OF FINANCE

Issued by: County Executive
Regulation No. 16-14
COMCOR No. 19.35.01

Authority: Code Section 19-35
Supersedes: Executive Regulation 8-14AM
Council Review: Method (1) under Code Section 2A-15
Register Vol. 31 No. 10

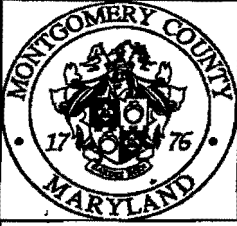
Comment Deadline: October 31, 2014
Effective Date: _____
Sunset Date: None

Summary: This regulation, which amends Executive Regulation 8-14AM, changes the due date for submittal of both credit and financial hardship exemption applications.

Address: Written comments on these regulations should be sent to:

Vicky Wan
Office of the Director
Department of Environmental Protection
255 Rockville Pike
Rockville, Maryland 20850

Staff Contact: For further information or to obtain a copy of this regulation, contact Vicky Wan at (240) 777-7722.



MONTGOMERY COUNTY EXECUTIVE REGULATION

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Subject Water Quality Protection Charge	Number 16-14
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19.35.01.01. General Provisions

- A. **Authority.** In accordance with the authority conferred under Chapter 19, Section 19-35, of the Montgomery County Code, 2004, as amended (hereinafter referred to as the "Code"), the County Executive hereby promulgates this regulation for the purpose of implementing the County's Water Quality Protection Charge as set forth in Chapter 19 of the Code.
- B. **Applicability.** This regulation applies to all owners of residential property and nonresidential property in Montgomery County, Maryland.

19.35.01.02. Definitions

The definitions of the terms used in this regulation are provided in Chapter 19, Section 19-21, of the Code. For purposes of this regulation, the following additional words and phrases will have the meaning respectively ascribed to them in this regulation unless the context indicates otherwise:

Agricultural Property means a 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.

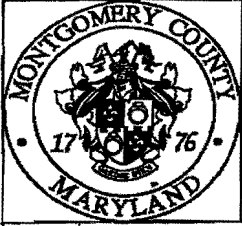
Base Rate means the annually designated dollar amount set by the County Council to be assessed for each equivalent residential unit of property that is subject to the Water Quality Protection Charge.

Condominium means a property that is subject to the condominium regime established under the Maryland Condominium Act.

Director means the Director of the Montgomery County Department of Environmental Protection or the Director's designee.

Eligible Nonprofit Property means real property owned by a nonprofit organization that is exempt from *ad valorem* property taxes under State law.

Equivalent Residential Unit or ERU means the statistical median of the total horizontal impervious area of developed single family detached residences in the County that serves as the base unit of assessment for the Water Quality Protection Charge. The designated ERU for Montgomery County equals 2,406 square feet of impervious surface.



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Multifamily Residential Property means 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, and any housing unit that is subject to the condominium regime established under the Maryland Condominium Act.

Parking Lot means any area that is intended for parking of motor vehicles.

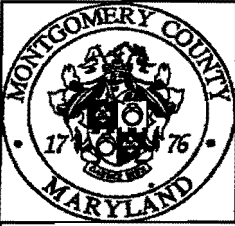
Water Quality Protection Charge or Charge means an assessment levied by the Director of Finance to cover the cost of constructing, operating, and maintaining facilities within the County's stormwater management system and fund related expenses allowed under applicable state law based on the impact of stormwater runoff from the impervious areas of developed land in the County.

19.35.01.03. Classification of Properties

For purposes of determining the appropriate assessment rate, all properties that are subject to the Water Quality Protection Charge are assigned to one of the following classifications:

- A. **Single Family Residential Tier 1 (SFR1):** For single family residential properties where the estimated total impervious area is less than or equal to 1,000 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.
- B. **Single Family Residential Tier 2 (SFR2):** For single family residential properties where the estimated total impervious area is greater than 1,000 square feet and less than or equal to 1,410 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.
- C. **Single Family Residential Tier 3 (SFR3):** For single family residential properties where the estimated total impervious area is greater than 1,410 square feet and less than or equal to 3,412 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.
- D. **Single Family Residential Tier 4 (SFR4):** For single family residential properties where the estimated total impervious area is greater than 3,412 square feet and less than or equal to 3,810 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.
- E. **Single Family Residential Tier 5 (SFR5):** For single family residential properties where the

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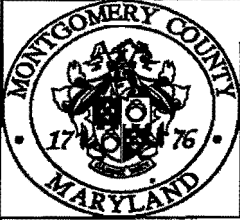
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Originating Department Department of Environmental Protection and Department of Finance	Effective Date

estimated total impervious area is greater than 3,810 square feet and less than or equal to 5,815 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.

- F. Single Family Residential Tier 6 (SFR6): For single family residential properties where the estimated total impervious area is greater than 5,815 square feet and less than or equal to 6,215 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.
- G. Single Family Residential Tier 7 (SFR7): For single family residential properties where the estimated total impervious area is greater than 6,215 square feet and includes the house, driveways, sidewalks, sheds, and any other fixtures on the property that are impenetrable by water.
- H. Multifamily residential property: For multifamily residential properties the impervious area includes the residential structures that contain the dwelling units, the sidewalks, parking lots and any other permanent installations on the developed parcel, whether under single or common ownership, that is impenetrable by water.
- I. Nonresidential property: Nonresidential properties may include commercial properties such as office buildings, hotels, retail establishments or industrial properties such as 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 Charge. The impervious area for these properties includes all buildings, parking lots, sidewalks, and any other impermeable installations permanently attached to the land parcel containing those installations.
- J. Nonprofit Tier 1 (NP1): For properties owned by nonprofit organizations where the estimated total impervious area is greater than 0 square feet and less than or equal to 6,910 square feet and includes all buildings, driveways, parking lots, sidewalks, and any other impermeable installations permanently attached to the land parcel containing those installations.
- K. Nonprofit Tier 2 (NP2): For properties owned by nonprofit organizations where the estimated total impervious area is greater than 6,910 square feet and less than or equal to 54,455 square feet and includes all buildings, driveways, parking lots, sidewalks, and any other impermeable installations permanently attached to the land parcel containing those installations.



MONTGOMERY COUNTY EXECUTIVE REGULATION

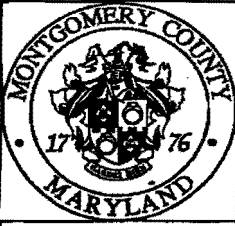
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Originating Department Department of Environmental Protection and Department of Finance	Effective Date

- L. Nonprofit Tier 3 (NP3): For properties owned by nonprofit organizations where the estimated total impervious area is greater than 54,455 square feet and includes all buildings, driveways, parking lots, sidewalks, and any other impermeable installations permanently attached to the land parcel containing those installations.
- M. Agricultural property: The impervious area for agricultural properties only includes the houses on those properties.

19.35.01.04. Rates

- A. Single family residential properties: The Charge for each single family residential property is based on a percent of the base rate for one ERU in accordance with its assigned tier classification as follows:
 - (1) Single Family Residential Tier 1 (SFR1): The Charge for each Single Family Residential Tier 1 property is 33 percent of the applicable base rate for one ERU.
 - (2) Single Family Residential Tier 2 (SFR2): The Charge for each Single Family Residential Tier 2 property is 50 percent of the applicable base rate for one ERU.
 - (3) Single Family Residential Tier 3 (SFR3): The Charge for each Single Family Residential Tier 3 property is 100 percent of the applicable base rate for one ERU.
 - (4) Single Family Residential Tier 4 (SFR4): The Charge for each Single Family Residential Tier 4 property is 150 percent of the applicable base rate for one ERU.
 - (5) Single Family Residential Tier 5 (SFR5): The Charge for each Single Family Residential Tier 5 property is 200 percent of the applicable base rate for one ERU.
 - (6) Single Family Residential Tier 6 (SFR6): The Charge for each Single Family Residential Tier 6 property is 250 percent of the applicable base rate for one ERU.
 - (7) Single Family Residential Tier 7 (SFR7): The Charge for each Single Family Residential Tier 7 property is 300 percent of the applicable base rate for one ERU.
- B. Multifamily residential properties: The Charge for each multifamily residential property is based on the number of ERUs assigned to the property in accordance with the following procedure:



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- (1) The Director determines the number of ERUs for a multifamily residential property by dividing the property's actual impervious area by the designated ERU for Montgomery County.
- (2) The Director computes the billable Charge by multiplying the base rate by the total number of ERUs assigned to the property.
- (3) If the multifamily residential property is a condominium development, the Director calculates the Charge to be billed in equal shares to the owners of the development by dividing the total ERUs calculated for the property by the number of individual condominium units and then multiplying the sum by the base rate to determine the amount billable to each unit owner.

C. Nonresidential properties: The Charge for each nonresidential property is based on the number of ERUs assigned to the property in accordance with the following procedure:

- (1) The Director determines the number of ERUs for a nonresidential property by dividing the property's actual impervious area by the designated ERU for Montgomery County.
- (2) The Director computes the billable Charge by multiplying the base rate by the total number of ERUs assigned to the property.
- (3) If the nonresidential property is a condominium development, the Director calculates the Charge to be billed in equal shares to the owners of the development by dividing the total ERUs calculated for the property by the number of individual condominium units and the multiplying the sum by the base rate to determine the amount billable to each unit owner.

D. Nonprofit properties: The Charge for eligible nonprofit property must not exceed the percent of the base rate for one ERU in accordance with the assigned tier classification as follows:

- (1) Nonprofit Tier 1 (NP1): The Charge for each nonprofit property is based on its total impervious area up to 150 percent of the applicable base rate for one ERU.
- (2) Nonprofit Tier 2 (NP2): The Charge for each nonprofit property is based on its total impervious area up to 900 percent of the applicable base rate for one ERU.
- (3) Nonprofit Tier 3 (NP3): The Charge for each nonprofit property is based on its total impervious area up to 2,300 percent of the applicable base rate for one ERU.



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- E. Agricultural properties: The Charge for each agricultural property is based on a percent of the base rate for one ERU in accordance with the applicable Single Family Residential Tier.

19.35.01.05. Credits

- A. The Director must award a maximum credit of 50 percent, based on the volume of water treated by a combination of environmental site design and other stormwater management systems, or a maximum of 80 percent, based on the volume of water completely treated by environmental site design practices alone, as specified in the application provided to a nonresidential or multifamily residential property owner if the property contains a County approved stormwater management system and the system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection. A property must be credited for treatment of off-site drainage from other properties located within the same drainage area as that property. A property that does not contain a stormwater management system must be credited if located within the same drainage area as another property that contains a stormwater management system if both properties have the same owner. However, a property owner must not receive a credit based on a calculation that exceeds the total impervious area on the property for which the credit is issued.
- B. The Director must award a maximum credit of 80 percent based on the volume of water treated as specified in the application provided by the Department to the owner of a single family residential property if the property contains a County approved stormwater management system and the system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection.
- C. Application Schedule
- (1) To receive the credit, the property owner must apply to the Director of Environmental Protection in a form prescribed by the Director not later than [October 31] September 30 of the year [before] that payment of the Charge is due.
 - (2) Once approved, the credit is valid for three years. To renew the credit, the [Property] property owner must reapply to the Director in a form prescribed by the Director not later than [October 31] September 30 of the year [before] that payment of the Charge is due.
- D. Appeals
- (1) If the Director denies the credit, the property owner may seek reconsideration of the



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Director's decision by submitting a written request for reconsideration with supporting reasons to the Director within 10 days after the date of the Director's written decision.

- (2) If the Director does not approve the request for reconsideration, the property owner may appeal the Director's final decision within 10 days after the Director issues that decision as provided in Chapter 2A, Article I, of the County Code.

19.35.01.06. Billing and Payment

- A. The Director must prepare and forward to the Director of Finance the necessary data for collecting the Water Quality Protection Charge from owners of property subject to the Charge. The data must identify every parcel to be charged and include the amount of the Charge. If requested by the owner using the review and adjustment process outlined in Section 7, the Director may consolidate under a single parcel any contiguous parcels owned by the same legal owner. If the Director combines two or more parcels consisting individually of at least one residential parcel and at least one nonresidential parcel, the Director must, for purposes of calculating the Water Quality Protection Charge, treat the consolidated parcel as nonresidential property.
- B. The Director of Finance must include the Charge as a separate line item on the real estate tax bill for each property subject to the Charge.
- C. The Director of Finance must deposit all payments collected under this Section into a County stormwater management fund.
- D. Interest on any overdue payment accrues according to the same schedule and at the same rate charged for delinquent real property taxes until the owner has remitted the outstanding payment and interest. An unpaid Charge is subject to all penalties and remedies that apply to unpaid real property taxes. Any delinquent Charge is a lien against the property. The lien has the same priority as a lien imposed for nonpayment of real property taxes. The Charge must be collected in the same manner as real property taxes.

19.35.01.07. Requests for Adjustment; Appeals

- A. A property owner may request a review and adjustment of the Charge by petitioning the Director in writing, not later than September 30 of the year that payment of the Charge is due if the property owner believes that the Charge has been assigned or calculated incorrectly.



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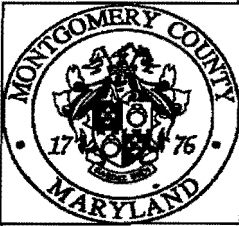
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- B. When submitting a petition for review of the Charge, the property owner must include a detailed statement of the basis for the petition and documents supporting the property owner's assertion that the property should be assigned to a different classification, the impervious area measurements used to calculate the ERUs for the property are incorrect, or the property is not subject to the Charge under applicable law.
- C. Within 60 days after receiving the petition, the Director must review the Charge assigned to the property and make a written determination of whether the property owner's request for an adjustment of the Charge should be granted or denied. The Director may request additional information from the property owner that the Director reasonably believes will help the Director decide whether the property owner is entitled to an adjustment.
- D. If the Director concludes that the Charge was levied by mistake or resulted from an inaccurate computation, the Director must submit the corrected data to the Department of Finance with a request for an adjustment to the property owner's bill. After receiving the Director's request, the Director of Finance must make an appropriate adjustment based on the new data submitted by the Director and refund any overpayment to the property owner.
- E. If the Director concludes that some or all of the requested adjustment should be denied, the property owner may seek reconsideration of the Director's conclusion by submitting a written request for reconsideration with supporting reasons to the Director within 10 days after the date of the Director's written decision.
- F. If the Director does not approve the request for reconsideration, the property owner may appeal the Director's final decision within 10 days after the Director issues that decision as provided in Chapter 2A, Article I, of the County Code.
- G. The County Board of Appeals is the designated authority charged with hearing and deciding all appeals taken from the Director's final decision to deny any relief requested under this regulation.

19.35.01.08. Requests for Exemption

- A. Before paying the Charge, the owner of residential property that is owner-occupied, or a nonprofit organization that owns property subject to the Charge, may apply for a financial hardship exemption from the Charge by submitting a written request to the Director of Finance in a form prescribed by the Director not later than [April 1] September 30 of the year when payment of the Charge is due.



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- B. (1) To qualify for the exemption, the request submitted by an owner-occupant of residential property must be accompanied by a copy of the owner-occupant's income tax returns indicating that the property owner's gross household income did not exceed 170 percent of the poverty guidelines published by the United States Department of Health and Human Services for the year before payment of the Charge is due or verification that the property owner meets eligibility criteria for receiving benefits under the Maryland Energy Assistance Program for the year that payment of the Charge is due.
- (2) The request submitted by a nonprofit organization must be accompanied by the organization's most recent federal tax return or other verification of total revenues derived from the property for which the exemption is sought, as required by the Director of Finance. To qualify for a partial exemption: (i) the amount of the Charge must exceed 0.2% of the organization's total revenues from the property for which the exemption is sought for the year before payment of the Charge is due; and (ii) the property for which the exemption is sought must be exempt from real property *ad valorem* taxation under State law. The amount of the partial exemption is the amount of the Charge that exceeds 0.2 percent of the nonprofit's total revenues derived from the property.
- C. The Director of Finance must issue a written decision to grant or deny the exemption within 30 days after receiving the request.
- D. Any exemption granted under this Section is only valid for the year that payment of the Charge is due.
- E. If the Director of Finance denies the exemption, the property owner may seek reconsideration of the Director's decision by submitting a written request for reconsideration with supporting reasons to the Director within 10 days after the date of the Director's written decision.
- F. If the Director of Finance does not approve the request for reconsideration, the property owner may appeal the Director's final decision within 10 days after the Director issues that decision as provided in Chapter 2A, Article I, of the County Code.

19.35.01.09. Requests for Grants

A homeowners' association may apply for a grant to offset all or part of the cost of the Charge for any private maintenance road, as defined in Section 24B.00.02.02 of the Code of Montgomery County Regulations, which is eligible for State highway user revenues, not including any parking lot, by submitting a written application to the Director in a form prescribed by the Director not later than



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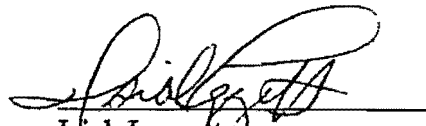
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September 30 of the year that payment of the Charge is due.

Section 10. Severability

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


Isiah Leggett
County Executive

Approved as to Form and Legality
Office of County Attorney

By 
Date 11/20/14




OFFICE OF THE INSPECTOR GENERAL

MEMORANDUM

February 10, 2015

TO: Hon. George Leventhal, President, County Council
Hon. Isiah Leggett, County Executive

FROM: Edward L. Blansitt, Inspector General 

SUBJECT: Preliminary Inquiry Memorandum: Water Quality Protection Charge

Enclosed is a memorandum that we provided to the County Chief Administrative Officer (CAO) regarding complaints made to our office concerning the Department of Environmental Protection Water Quality Protection Charge. Attached to the memorandum is the CAO's response. This memorandum is being provided to you, confidentially, in advance of our intended public issuance of the memorandum on February 13, 2015.

A preliminary inquiry is the first phase of each project the OIG performs in reaction to a complaint. A Preliminary Inquiry Memorandum (PIM) is appropriate in situations that do not warrant full inspections, investigations, or audits but in which we have gathered and assessed sufficient information for us to draw limited conclusions related to the specific complaint. We do not 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.

We appreciate the efforts and assistance provided by the employees of the Department of Environmental Protection during our inquiry. If you have any questions, please contact me at (240) 777-8241.

cc: County Council Members
Timothy L. Firestine, Chief Administrative Officer
Steve Farber, Council Administrator




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 987² 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;

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;

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

Agricultural property,⁹ whose impervious area contains only the house on the property.

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 instances¹⁰ (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.

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.

Chart 1: Observations of Sampled Properties

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

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 property¹¹. 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.

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 organization¹⁷ 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 bonâ 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 tract²⁰ 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 section²² 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.

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.”



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

GEORGE LEVENTHAL
COUNCILMEMBER
AT-LARGE

MEMORANDUM

TO: Roger Berliner, Chair – Transportation and Environment Committee
Nancy Navarro, Chair – Government Operations Committee

FROM: George Leventhal – Vice President, Montgomery County Council

DATE: November 12, 2014

SUBJECT: Erroneous Water Quality Protection Charges

George Leventhal

On April 16, 2013, the Council enacted Bill 34-12, Stormwater Management – Water Quality Protection Charge. That Bill included a number of major changes to the existing Water Quality Protection Charge (WQPC). On June 17, 2014, the Council approved Executive Regulation 8-14AM which increased the maximum credits available to properties for on-site stormwater management up to 80% of the assessed charge.

Specifically, one of the key components of the new charge is that property assessments are based on actual impervious area for each property based on Geographic Information System (GIS) mapping data. While this approach is far more equitable than the previous approach of charging properties based on an average imperviousness calculation, the calculation of imperviousness with GIS data is not perfect, and some errors in calculations were expected. The Bill and the implementing regulations include a process by which property owners can appeal their assessments.

It has come to my attention that some irregularities exist related to the assessment of the water quality protection tax. Constituents have contacted my office with water quality charges higher than what is required by law. It seems that some of the excessive charges can be attributed to the program being moved from flat rates, to rate tiers based on actual imperviousness.

The WQPC irregularities mirror the issues regarding parking lot districts. Councilmembers Floreen and Berliner introduced Expedited Bill 43-14. As with the parking lot districts bill, some taxpayers are paying amounts they do not owe. The onus should not be on County residents to appeal their tax bill. The principle should be that residents may be confident that the tax bill they receive accurately reflects the amount they owe.

To date, very few property owners have appealed their assessments. According to DEP staff, of the approximately 330,000 bills sent out in the last cycle, only 87 were appealed. The low number of appeals could mean the GIS data is highly accurate, but it is also possible that the appeals process itself may be underutilized by property owners and the appeals process itself should be reviewed to ensure it is working as intended.

The new charge has now been in place for two collection cycles (2013 and 2014). Given that the charge was changed dramatically, I believe, a general update from the Department of Environment Protection (DEP) to the Transportation, Infrastructure, Energy and Environment Committee is appropriate.

I look forward to working with you on this issue.

MEMORANDUM

TO: Members of the Montgomery County Council & Staff

**FROM: James L. Thompson & Diane E. Feuerherd of Miller, Miller & Canby
On behalf of Paul N. Chod and Minkoff Development Corporation**

**RE: Recommendations to Review and Amend Montgomery County's
Water Quality Protection Charge (WQPC)**

DATE: January 23, 2015

I. Background

According to the Department of Environmental Protection (DEP), the Water Quality Protection Charge (WQPC) is an annual fee that is “calculated based on the potential for a property to contribute stormwater pollution,” in order to “raise[] funds to support the County’s clean water initiatives to improve stream and water quality and prevent stormwater pollution.”¹ Yet, the Charge, as assessed against commercial, non-residential property owners who have installed and maintained private stormwater management facilities on their properties, fails to take into consideration how these private initiatives prevent, without County assistance, pollution from draining into local streams and rivers.

Consider Minkoff Development Corporation (“MDC”), whose stormwater management facilities and practices have been implemented by its president, Paul N. Chod, an engineer by education. Since 1972, MDC has been a staple in the Montgomery County business community, having developed and built over 20 properties in the County. These properties include Shady Grove Development Park, which fronts I-270 between Shady Grove Road and I-370, Seneca Meadows Corporate Center, which fronts I-270 between Germantown Road (Route 118) and Father Hurley Boulevard, and The Shops at Seneca Meadows, the retail development in Germantown anchored by Wegmans Food Market. Each of these properties complied with the County’s site design and stormwater management requirements when the properties were developed at considerable expense, and all of the stormwater generated from these properties is privately treated on-site. Shady Grove Development Park has two regional detention ponds to collect and treat stormwater runoff from MDC properties and its neighbors. The full drainage area of these ponds is actually three-times the size of Shady Grove Development Park properties and includes neighboring businesses and a portion of I-270. The value of the land upon which these ponds were constructed and are maintained is no less than \$950,000. Seneca Meadows Corporate Center has four detention ponds, several baysavers and flow splitter manholes, and one sand filter pond to collect and treat stormwater runoff from MDC properties and some of its neighbors. The value of the land upon which these ponds were constructed and are maintained is no less than several million dollars. The Shops at Seneca Meadows fully comply with the environmental site design (ESD) to the maximum extent practicable standard (MEP), and MDC

¹ Department of Environmental Protection, Montgomery County, MD, *Water Quality Protection Charge* (2015), available at <http://www.montgomerycountymd.gov/dep/water/wqpc.html>.

invested more than \$750,000 of stormwater management facilities, independent of land costs. These are costs that MDC has incurred with the understanding that the private, on-site stormwater management systems were adequate for this purpose, fully compliant with the regulations when installed, and that there would be no further charges related to public stormwater facilities.

II. Review the Water Quality Protection Charge

Because the assessment of the WQPC does not equitably take into account MDC's private stormwater management facilities and expenditures, MDC asks that the Montgomery County Council review the WQPC provision, § 19-35. To do so, MDC has appealed the assessment of the WQPC against its properties and has facially challenged the WQPC in court, but it also believes that the inequity of the Charge should be resolved legislatively, if possible. Below are four areas that necessitate review: (A) the WQPC should follow the state law upon which it was recently amended; (B) the Charge should be based on the County services provided to that property; (C) the credit system should reduce the Charge in relation to the benefits of private stormwater management and the costs thereof associated with each property; and (D) the administration of the WQPC Fund, including the credit, should be user friendly, transparent and accurate.

A. A State law requires that the Water Quality Protection Charge (WQPC) be based on the property's share of stormwater services.

Pursuant to § 4-202.1 of the Environment Article of the Maryland Code, Montgomery County must assess a stormwater remediation fee against nearly-all nongovernmental properties "based on the share of stormwater management services related to the property and provided by the county," § 4-202.1(e)(3)(i), and reduce that fee to "account for the costs of, and the level of treatment provided by, stormwater management facilities that are funded and maintained by a property owner," § 4-202.1(f)(2)(i)(3). In 2013, the Montgomery County Council, specifically relying upon and quoting the language of § 4-202.1(e)(3)(i) and citing the General Assembly's credit requirement, amended the WQPC provision to apply to all nonresidential, commercial property owners, including MDC.²

Yet, according to the former DEP Director, Robert Hoyt, a 20% portion of the Charge does not fund services related to the property but "costs associated with projects on parkland, schools and county facilities, as well as storm drain and street sweeping."³ These are general services, for the equal benefit of all in the County, but paid for to a large extent by MDC and other larger commercial properties on a disproportionate basis. It is not only unfair but also fails to meet the requirements of the state law.

It should be noted that before the Montgomery County Board of Appeals, the DEP argued that the WQPC was not subject to § 4-202.1, which directly contradicts the memorandum

² Bill 34-12 Action Packet (March 19, 2013), at 2, http://montgomerycountymd.granicus.com/DocumentViewer.php?file=montgomerycountymd_68c4b7caaf914b1eb11ecfc01d2fa045.pdf.

³ Letter from Robert G. Hoyt to James L. Thompson and Diane Feuerherd (July 28, 2014).

of the County Executive and the statement of DEP Director Hoyt, both contained in the legislative history of the WQPC provision, § 19-35.⁴

B. Commercial property owners, in addition to the costs of constructing and maintaining their own stormwater management facilities, pay more for services that benefit other properties or generally all in Montgomery County.

As you know, the WQPC is assessed against nearly all non-government properties in the County based on the amount of impervious surface area as well as their classification (as a residential, nonresidential, non-profit or agricultural property).⁵ For nonresidential properties, the Charge equates to \$88.40 per Equivalent Residential Unit (“ERU” or 2,406 square feet of impervious surface).⁶ MDC pays this Charge, in addition to its own costs to build and maintain their private stormwater management facilities. For Shady Grove Development Park, the original WQPC based on impervious area was \$44,796.45; after a 50% credit reduction for on-site stormwater management, the new full amount is \$22,398.23. The annual costs for MDC to maintain the ponds are about \$3,500; the WQPC phase-in amounts will be \$7,466.08 for 2013, \$14,932.15 for 2014, and \$22,398.23 for 2015.

The DEP utilizes Charge funds for initiatives unrelated to the MDC properties, and for the benefit of other property owners or the County generally. First, as referenced in Section (A), 20% of the Charge funds general services costs that MDC, due to the size of its properties (not the stormwater pollution it contributes), pays significantly for services benefitting all in the County, without regard to impervious surface area it has treated. When these costs on MDC are considered together with MDC’s own maintenance costs for their ponds and their construction and capital costs, the inequity is clear – if everyone is benefiting, everyone should similarly pay for these services, perhaps in the form of a flat fee.

Second, the Charge funds the RainScapes Rewards Rebate Program, which provides a rebate to fund the installation of a stormwater management program, such as a rain garden.⁷ The rain garden, in turn, qualifies the property owner for an 80% credit. MDC is not eligible for RainScapes, but the Charge it pays funds the stormwater management programs of other property owners to enable them to avoid payment of the very same Charge. This is unfair – MDC is funding the stormwater management on its private property, as well as the private property of others directly and indirectly. Also, after MDC pays for its own storm water management and helps to pay for the rebate program for others, these beneficiaries get an 80% credit which, ironically, is being denied to MDC.

⁴ Testimony of Bob Hoyt, Director of the Department of Environmental Protection, January 15, 2013 and Memorandum from Isiah Leggett, County Executive, to Roger Berliner, County Council President (October 25, 2012), in Bill 34-12 Action Packet (April 16, 2013), in Bill 34-12 Action Packet (April 16, 2013).

⁵ Montgomery County Code, § 19-35 (b); COMCOR, §19.35.01.03.

⁶ Montgomery County Council, Resolution No. 17-1090 (May 14, 2014); see also § 19-35(d) of the Montgomery County Code. The impervious surface area, 2,406 square feet, is also known as the equivalent residential unit (“ERU”).

⁷ “The RainScapes Rewards Rebate Program offers rebates to property owners who install RainScapes techniques such as rain gardens, rain barrels, conservation landscaping and other approved projects that help control stormwater. . . .The RainScapes Program is funded by the County’s Water Quality Protection Charge.” *RainScapes Rewards Rebates*, <http://www.montgomerycountymd.gov/DEP/water/rainscapes-rebates.html>.

C. The WQPC credit should reduce the Charge in recognition of the impact and cost of the property owner's stormwater management practices.

For commercial properties, regardless of whether they take any private stormwater management initiatives or not, the WQPC is the same. The WQPC may be reduced by a maximum of 80%, "based on the volume of water completely treated by environmental site design practices alone," or by a maximum of 50%, "based on the volume of water completely treated by a combination of environmental site design and other stormwater management systems."⁸ In reality, this credit structure is limited and poses significant and cost-prohibitive prerequisites:

(1) The credit, limited to 80% or 50%, does not account for the value of private stormwater management – i.e., the cost of the facilities to the property owner or the benefit of the facilities to the County. In 2013, a 50% credit was ultimately awarded to MDC for the Shady Grove Development Park's regional ponds, reducing the Charge from \$14,902.18 to \$7,466.09. This credit, especially when considering that the Charge will only increase in the future (with the three-year phase in), pales in comparison to the costs that MDC has and will incur for these ponds, which is no less than \$950,000 (the current cost of land).

(2) The Department of Environmental Protection (DEP) refuses to award any credit for the treatment of stormwater pollution from neighboring properties.⁹ Regional ponds can and do treat stormwater runoff from properties owned by others, and therefore benefit the greater community and the County. If the credit is designed to acknowledge stormwater treatment (and thereby incentivize property owners to treat and avoid stormwater pollution), then the size and amount of the credit should coincide with the amount of stormwater treated, including stormwater draining from neighboring lots. MDC's Shady Grove Development Park ponds treat stormwater from a drainage area that is three-times the size of the Park, but the DEP awards a credit to MDC of 50%, based solely on MDC properties. A fair distribution of the credit, which acknowledges the work performed by MDC and the benefit retained by the County and MDC's neighbors, would be to award a credit, based on the all property served, up to, but not to exceed, 100%.

(3) The complete treatment of stormwater should entitle the property owner to the highest-available credit (80%), regardless of whether the facilities are based on Environmental Site Design (ESD) or an older, required strategy. Under the current credit system, only where stormwater is completely treated *by environmental site design (ESD) alone* can the property owner achieve an 80% credit; otherwise, complete treatment of stormwater, by some combination of ESD and older stormwater management directives, will be limited to no more than 50%.

⁸ COMCOR § 19.35.01.05.

⁹ Of note is that the current language of the regulation, COMCOR § 19.35.01.05(A), provides that a credit be awarded for treatment of impervious surfaces of neighboring properties: "A property must be credited for treatment of off-site drainage from other properties located within the same drainage area as that property. . . . A property must be credited for treatment of off-site drainage from other properties located within the same drainage area as that property." The DEP refuses to credit for off-site drainage, unless the properties share the same owner. This is one subject of MDC's present appeal, *Paul N. Chod v. Board of Appeals for Montgomery County*, Circuit Court for Montgomery County, Case No. 398704V.

Because the 80% credit is limited to the new ESD practices *alone*, a property owner having an existing stormwater management facility, which completely treats stormwater as required when the property was developed, would have to *completely abandon* the existing stormwater facility and renovate the parking lots at the property in order to install ESD. This is not only cost-prohibitive, but impossible in most cases. At Shady Grove Development Park, the existing detention ponds cannot, and should not, be removed. Therefore, even if MDC were to install ESD practices onsite (and incur costs of more than \$750,000, as it had done at The Shops at Seneca Meadows), MDC would still be limited to the 50% credit, because the continued presence of these ponds would render the property “completely treated by a *combination of* environmental site design and other stormwater management systems.”¹⁰

It is impossible, therefore, for an existing property owner to achieve the 80% credit, even though he or she fully treats the stormwater and has remained committed to reducing pollution runoff. If stormwater is completely treated, shouldn't the property owner be recognized with the highest available credit for that work? The answer is, and should be, yes. All property owners who fully treat the stormwater on their property, based on the stormwater management requirements imposed by the County at the time of construction, should receive a full 100% credit.

D. The Administration of the WQPC Fund, including the Credit, Should be User Friendly, Transparent and Accurate.

The WQPC, like any other fee or tax, should be imposed according to the governing State and County laws and in a transparent manner, so that Montgomery County citizens know what and why they have paid the Charge. The DEP has not done so, which frustrates the purpose of the Charge and adds another reason to review and amend the WQPC.

There are flaws in the way the program has been implemented. Last year alone, a number of unimproved properties (with zero impervious area) were incorrectly assessed a WQPC; it was only when alerted to the error that DEP removed the charge. In other cases the aerial photography used by DEP caused distorted assessments where driveways of adjoining properties were assessed to the wrong lots and in some cases public streets were assessed to abutting lots. Also the WQPC appeals process is not the appropriate mechanism to test the accuracy of the WQPC and the appeal deadlines are confusing and unrelated to any normal tax assessment process deadlines, although they appear on the real property tax bill. That's not good enough. Rather, we should be able to trust that the Charge is correctly assessed and collected by the DEP. Has the DEP reviewed its assessment of other properties, to be sure that these errors do not happen again? And, if the DEP has difficulty measuring the impervious surface area of properties in Montgomery County, then the solution is that another method of assessment should be used. Perhaps this is why the County has issued an RFP for a consultant's study to evaluate the current system. That evaluation should not only cover the mechanics of the process, but should also address some of the substantive fairness questions and credits we've set forth above.

¹⁰ COMCOR § 19.35.01.05(A) (emphasis added).

Other counties, similarly subject to the state's stormwater remediation fee requirement, have done a better job of addressing them.¹¹

Moreover, the appeals process cannot be the quick fix for problems with the WQPC, because the timing and methodology of the appeals process can inhibit or dissuade a property owner from challenging the Charge. At present, the WQPC regulations provide for a bifurcated appeal system. If a property owner seeks a credit application, the owner must complete a DEP credit application form no later than October 31st of the year *before* the payment of the Charge is due, which is before the WQPC assessment is made. The property owner is being required to challenge an assessment that he or she does not even know of yet. Considering the time and expense involved in seeking a credit, the property owner should have the right to know what the Charge is before he or she endeavors to reduce it. The credit application, therefore, should not be required until the property owner learns of the amount of the assessment.

The second procedure in the WQPC bifurcated appeal system is for challenges that the Charge was erroneous or based on inaccurate information. The owner is required to complete a separate DEP appeal form, no later than September 30th on the year that payment of the Charge is due. COMCOR § 19.35.01.07. These separate appeals – for the credit and for erroneous assessments – will always involve the same property and similar legal issues, but this structure requires the property owner to pursue two separate appeals. The cost and time expenditures required will dissuade, if not inhibit, property owners from making these important and meaningful challenges to preserve their property rights. The appeal methodology, therefore, should be streamlined to enable a property owner to pursue an appeal and a credit appeal in the same case.

There are other problems as well. The DEP has introduced new, cost-prohibitive credit requirements on its own. In 2013, the DEP penalized any credit applicant who did not produce engineering computations, in support of the credit sought, with a 50% reduction in the credit. This 50% “no computations” reduction was not authorized by the County Council in the WQPC Code provision, nor in the regulations. It is also an onerous requirement to supply computations for stormwater detention ponds constructed more than 10 years ago. For instance, the ponds at Shady Grove Development Park were constructed in the 1970's and modified in the 1980's, and computations were required to be submitted to the DEP at the time of construction and were delivered to the County then (but the owner and engineer no longer possess them). Yet, the cost to re-perform these calculations today is substantial; a new engineer must survey the area, get aerials of the drainage area, calculate drainage, the impact of changes to I-270 and compute the volumes of water at an estimated cost of \$16,000, which vastly exceeds any benefit to be expected from the credit. MDC successfully challenged the 50% “no computations” reduction before the Montgomery County Board of Appeals, who agreed “that the County lacked the authority to reduce [MDC's] credit by half for failure to submit these calculations.” In addition to this successful outcome, MDC also notes the time and expense required to make this successful challenge, an expense which MDC will make as a matter of principle. Transparency and fairness, to all property owners, require review of the administration of the WQPC.

¹¹ Harford County presently provides a 100% credit, and is considering reducing its property tax assessment in the amount of the stormwater fee. “Maryland Stormwater Fee,” Harford County Government, <http://www.harfordcountymd.gov/Interests/Index.cfm?ID=10>; Adam Bednar, “Counties eye ‘rain tax’ adjustments,” *Maryland Daily Record* (Jan. 21, 2015).

III. Recommendations

In light of the issues raised above, MDC recommends that members of the Montgomery County Council consider amending the WQPC, Section 19-35 of the Montgomery County Code and COMCOR Section 19.35.01.01 *et seq.*

First, the Charge should be assessed fairly and, as intended, based on the property owner's contribution of stormwater pollution. Property owners that invest in their own stormwater management facilities should be exempt from the Charge or awarded a full 100% credit, in recognition of the continued private investment in stormwater management and the reduction of county services related to the property. This includes removal of the distinction between properties treated by ESD practices alone and properties treated by ESD and older stormwater management practices.

Second, to raise funding for general stormwater initiatives, which serve the County as a whole but are not related to one property (such as "costs associated with projects on parkland, schools and county facilities, as well as storm drain and street sweeping"), the Council should consider an equitable fee similarly paid by all property owners.

Third, the method of assessment and the rate of Charge can and should be reviewed, similar to current discussions in other counties (including Harford County, Anne Arundel County and Baltimore County).

Fourth, the timing and methodology of the appeal and credit application processes should be reviewed and amended.