Montgomery County Council

Committee: T&E
Committee Review: Completed
Staff: Keith Levchenko, Senior Legislative Analyst
Christine Wellons, Senior Legislative Attorney
Purpose: Final action – vote expected
Keywords: #WaterQualityProtectionCharge

AGENDA ITEM #3
April 26, 2022
Action

SUBJECT

- **Action:** Executive Regulation 18-21: Water Quality Protection Charge, Definition of Treatment

EXPECTED ATTENDEES

- None

DESCRIPTION OF ISSUE AND COMMITTEE RECOMMENDATION

- Whether to approve Executive Regulation 18-21, which has been promulgated as a Method (1) regulation.
- The T&E Committee met on February 18, 2022 and recommended approval of Regulation 18-21.
- As described below, the Committee received additional public input after its worksession.
- In response to the public input, Council staff has obtained clarifications regarding the effects of the regulation and, as described below and in the staff memorandum, Council staff recommends immediate Council approval of the regulation.

SUMMARY/DISCUSSION POINTS

- On January 21, the Council received Executive Regulation 18-21 – Water Quality Protection Charge, Definition of Treatment.
- The purpose of the regulation is to clarify the terms stormwater "treatment" and "treat", as those terms are currently interpreted by the Department of Environmental Protection, for purposes of Water Quality Protection Charge credits.
- The regulation is necessary to eliminate confusion over which properties – *going forward, after the effective date of the regulation* – may qualify for credits.
- At the T&E Committee worksession, the Committee voted to recommend the approval of Regulation 18-21. Regarding concerns raised more generally about the Water Quality Protection Charge and credits, Council Staff suggested that the T&E Committee schedule a more general discussion of the issue at a later date.
- After the T&E Committee worksession, the Council received comments from the Stormwater Partners Network supportive of the regulation, and a letter from the Pels Law Firm, LLC (which represents 33 litigants) opposing the regulation.
- At its planned consent action on March 15, the Council received another letter from the Pels Law Firm, LLC (attached) seeking further discussion of this item. Consent action was deferred.
- On April 7, Council staff met with an attorney of the Pels Law Firm, Ms. Olsen, to thoroughly understand her clients' concerns. Subsequently, Ms. Olsen and one of the firm's clients submitted additional written testimony (attached) in opposition to the regulation.

- **Council staff recommends approval of the regulation and notes**: (1) the regulation is necessary to clarify, as soon as possible, eligibility for future WQPC credits; (2) the regulation, unequivocally, is prospective and does not affect applications that have been held in abeyance pending current litigation; and (3) if the Council wishes to further explore changes to the WQPC credits, this should be done as part of a more global T&E Committee discussion including all involved stakeholders.

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AGENDA ITEM #3
April 26, 2022
Worksession

M E M O R A N D U M

April 21, 2022

TO: County Council

FROM: Keith Levchenko, Senior Legislative Analyst
Christine Wellons, Senior Legislative Attorney

SUBJECT: Executive Regulation 18-21

PURPOSE: Action – hand vote required

The purpose of this staff memorandum is to describe information received by the Council subsequent to the T&E Committee worksession, and to explain why Council staff recommends the immediate approval of Regulation 18-21.

For a more thorough discussion of proposed Executive Regulation 18-21, please see the enclosed T&E Committee Staff Report (also available at 20220218_TE1.pdf (montgomerycountymd.gov)).

Supplemental Information – Received After the T&E Worksession

The Water Quality Protection Charge (WQPC) is the subject of pending litigation. The Pels Law Firm, which represents 33 litigants against the County, therefore expressed concern to the Council that Regulation 18-21, which affects the WQPC, might adversely affect the litigants. The litigants state that they had not been aware of Regulation 18-21 during its public comment period before the Executive.

As explained in the enclosed written testimony of the Pels firm and one of its clients, the litigants strongly assert that the WQPC has been inappropriately applied to them, and that Regulation 18-21 would be unfair and unjust. They also contend that Regulation 18-21 might be used inappropriately to decide numerous pending WQPC credit applications, which are currently held in abeyance due to the pending litigation.

Council Staff Analysis

Council staff has reviewed the supplemental information provided by the litigants, and has met with Pels Law Firm attorney, Ms. Olsen. The litigants have fundamental policy and legal concerns with the County's approach to stormwater management, and with the approach to WQPC credits in particular. Without opining on the merits of the underlying concerns, which are the subject of litigation, Council staff

nonetheless recommends immediate approval of the regulation as an important clarifying measure that will not affect the litigation.

First, as noted by the Department of Environmental Protection (DEP), the regulation is important in order to clarify all future applicants' eligibility for WQPC credits. The pending litigation concerns how the regulation has been applied *in the past* and whether it was applied correctly, but the County needs clarity regarding how to apply the regulation to future scenarios. Until the terminology used under the WQPC regulations is clarified, there will be uncertainty hanging over how the credits should be applied going forward. This uncertainty is unhelpful to the efficient administration of the credits, unhelpful to property owners, and unhelpful to stormwater management in general.

Council staff understands the concern of the litigants that their pending credit applications – which have been held in abeyance due to the litigation – might be affected by Regulation 18-21. However, Council staff has confirmed repeatedly with DEP and the County Attorney's Office (OCA) that the applications held in abeyance will be decided – and must be decided – by existing law as interpreted by the courts, not by Regulation 18-21. (See ©37). Even if OCA and DEP had not provided these assurances, it should be noted that, as a matter of law, regulations apply prospectively unless they expressly state otherwise. Moreover, the County will be bound by any final resolutions of the underlying litigations; it has no choice but to decide the applications held in abeyance consistent with any applicable court rulings interpreting the statutory and regulatory language as it existed at the time of application.

Council staff also acknowledges that the litigants, as well as other property owners and advocates, might wish to recommend improvements to the WQPC and the related credit. If the Council wishes to explore changes to the WQPC credits more globally in the future, the T&E Committee could study the program, as a whole, with the Executive and other stakeholders. In the meantime, Regulation 18-21 is important in order to clarify, as soon as possible, how the WQPC credits should be granted going forward.

NEXT STEP: Hand vote on whether to adopt the resolution approving Executive Regulation 18-21.

This packet contains:	**Circle #**
Draft Approval Resolution	©A
T&E Committee Staff Report	1-©25
Comments from the Stormwater Partners Network	©26
Letter from the Pels Law Firm LLC dated February 25, 2022	©27-35
Letter from the Pels Law Firm LLC dated March 15, 2022	©36
Executive Branch Response to the Pels Law Firm Concerns	©37-38
Written Testimony of the Pels Law Firm dated 4/20/22	©39
Written Testimony of Mr. Porto dated 4/20/22	©52

Resolution No.: _____
Introduced: _____
Adopted: _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

SUBJECT: Executive Regulation 18-21, Water Quality Protection Charge, Definition of Treatment

Background

1. Section 19-35 of the County Code requires the County Executive to adopt regulations for the purpose of implementing the County's Water Quality Protection Charge under Chapter 19.

2. On January 21, 2022, the County Council received Executive Regulation 18-21, Water Quality Protection Charge, Definition of Treatment from the County Executive. This regulation adds a definition of stormwater treatment to clarify how the Department of Environmental Protection determines the eligibility of properties for Water Quality Protection Charge credits.

Action

The County Council for Montgomery County, Maryland approves Executive Regulation 18-21.

This is a correct copy of Council action.

_____
Selena Mendy Singleton, Esq.
Clerk of the Council

T&E COMMITTEE #1
February 18, 2022

M E M O R A N D U M

February 15, 2022

TO: Transportation & Environment Committee

FROM: Keith Levchenko, Senior Legislative Analyst

SUBJECT: Executive Regulation 18-21: Water Quality Protection Charge, Definition of Treatment

Council Staff Recommendation: Approve Executive Regulation 18-21

Attachments to this Memorandum
- County Executive Transmittal Memorandum (©1)
- Executive Regulation 16-14 (Method 1)[1] with markup (©2-13)
- Executive Regulation 16-14 (Method 1) (©14-25)

Expected Participants
- Patty Bubar, Deputy Director, Department of Environmental Protection (DEP)
- Frank Dawson, Chief, Watershed Restoration Division, DEP
- Vicky Wan, Chief, Strategic Services Division, DEP
- Jim Ogorzalek, Office of the County Attorney
- Rich Harris, Fiscal and Policy Analyst, Office of Management and Budget

Background

On January 21, the Council received Executive Regulation 18-21 – Water Quality Protection Charge, Definition of Treatment. This regulation is intended to clarify the terms "treatment" and "treat" as they are currently utilized by the Department of Environmental Protection in determining the eligibility of properties for Water Quality Protection Charge credits.

A Water Quality Protection Charge credit process was established in 2013 via Bill 34-12 and implemented through Executive Regulation 17-12AM and revised in 2014 via Executive Regulation 8-14AM. Credits are available for properties which contain a stormwater management system maintained exclusively by the property owner. If environmental site design (ESD) methods are used to the

[1] As a Method 1 regulation, Regulation 18-21 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.

maximum extent practicable, then the maximum credit is 80 percent. Otherwise, properties can get credits up to 60 percent of their Water Quality Protection Charge for stormwater treated on-site.

A property which does not have a storm water management system is also eligible for credits if that property drains to a stormwater management system on another property under the same ownership.

Non-residential and multi-family properties with stormwater management systems which treat stormwater from other properties are eligible to receive a credit of up to 100 percent of their Water Quality Protection Charge.

Executive Regulation 18-21

As noted in the transmittal memorandum (see ©1), Executive Regulation 18-21 in Section **19.35.01.02 Definitions** would add a definition for "Treatment" or "Treat." The new language is copied below:

> Treatment or Treat means: (1) the improvement of stormwater runoff quality; (2) the reduction of runoff volume: (3) the reduction of peak flow; or (4) any combination thereof using Best Management Practices, Environmental Site Design, Stormwater Management Facilities. or any other practice providing measurable pollutant reduction. runoff volume reduction, or peak flow reduction. Treatment measures must be designed in accordance with the Department of Permitting Services design specifications and the 2000 Maryland Stormwater Design Manual and any subsequent revisions thereto. Treatment as defined and applied herein and Chapter 19, Article II of the Montgomery County Code is separate and distinct from the measures used to prevent erosion and provide for sediment control as set forth in Chapter 19.. Article l of the Montgomery County Code.

Rationale

The Executive transmittal notes that this language is needed to eliminate confusion over which properties may qualify for credits. Multiple litigants are seeking credits for measures which do not treat stormwater runoff and which were not contemplated by the County to be eligible for credits under the current program.

Executive staff provided additional elaboration on this concern as copied below:

> *Although the regulation is intended to be purely clarifying, and the County's position is that the definition set forth in this proposed regulation is already captured in the County's and State's statutory and regulatory schemes—especially in the State's stormwater management design manual, which is expressly incorporated into the County's Code and Regulations. But because the statutory and regulatory schemes are complex, the County runs the risk of residents and, importantly, courts being confused and interpreting the law to mandate credits for certain infrastructure that do not, in fact, treat stormwater. Specific examples of such infrastructure include piping and hardscaping that merely conveys water or designs that hold water but do not achieve any of the other requirements for treatment. If courts determine that the current language mandates credits to every property owner that conveys stormwater rather than the existing language that a property owner must own and treat the stormwater that it generates, which is the intent of the credit and the County's obligations under the MS4 Permit, then the County runs the risk of every property qualifying for credits, thereby losing all Water Quality Protection Charge revenues that is the main funding source for stormwater and stream restoration and flooding*

prevention activities. Additionally, from an operational standpoint, this regulation is particularly important in administering the Water Quality Protection Charge because the method of assessing the WQPC and any applicable credits are expressly and necessarily tied to the property, itself. Absent this regulation, the potential misinterpretation, which blurs property lines, makes the Charge and Credits nearly impossible to calculate and defend.

Council Staff Recommendation

Council Staff recommends approval of Regulation 18-21 since it clarifies the County's current policies and practices regarding Water Quality Protection Charge credits.

Attachment

OFFICE OF THE COUNTY EXECUTIVE

Marc Elrich
County Executive

MEMORANDUM

December 21, 2021

TO: Gabe Albornoz, President
Montgomery County Council

FROM: Marc Elrich, County Executive

SUBJECT: Executive Regulation 18-21 – Water Quality Protection Charge, Definition of Treatment

I am writing to request that the Council approve the enclosed regulation, which clarifies requirements already set forth in the County Code and Regulations for County property owners to receive a credit against the Water Quality Protection Charge. Specifically, the enclosed regulation adds an express definition of "treatment" and "treat," which are used throughout County law provisions related to stormwater management and the Water Quality Protection Charge to ensure that the credits are provided for practices that improve water quality and provide measurable pollutant reduction. The enclosed regulation clarifies the requirements already set forth in the County Code and Regulations for County property owners to receive a credit against the Water Quality Protection Charge.

This regulation is necessary to prevent further confusion regarding the Water Quality Protection Charge credit program, which has led to multiple litigants seeking credits under the Water Quality Protection Charge for measures that do not treat stormwater runoff and which were plainly not contemplated as meriting a credit under the current statutory and regulatory scheme.

The proposed regulation was published in the November 2021 Register, with no comments received.

If you have any questions, please contact Vicky Wan, Water Quality Protection Charge Manager at 240-777-7722.

ME:ah

Enclosures
1. ER 18-21 (blacklined version)
2. ER 18-21 (clean version)

cc: Adriana Hochberg, Director, Department of Environmental Protection
Patty Bubar, Deputy Director, Department of Environmental Protection
Vicky Wan, Manager, Water Quality Protection Charge

MONTGOMERY COUNTY EXECUTIVE REGULATION

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

Subject	Number
Water Quality Protection Charge	18-21
Originating Department Department of Environmental Protection	Effective Date

Montgomery County Regulation on:

WATER QUALITY PROTECTION CHARGE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Issued by: County Executive
Regulation No. 18-21
COMCOR No. 19.35.01

Authority: Code Section 19-35(b)
Supersedes: Executive Regulation 4-18
Council Review: Method 1 under Code Section 2A-15
Register Vol. 38 No. 11
Comment Deadline: November 30, 2021
Effective Date: _____
Sunset Date: None

Summary: This regulation clarifies the definition of "treatment" and "treat" in the context of credits for the Water Quality Protection Charge, as already set forth in the County Code, Regulations, and other incorporated materials.

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

Vicky Wan
Chief, Strategic Services Division
Department of Environmental Protection
2425 Reedie Drive, 4th Floor
Wheaton, MD 20902

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

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, 2014, 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 501(c)(3) nonprofit organization that is listed with the Maryland Department of Assessments and Taxation as 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.

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.

Treatment or Treat means: (1) the improvement of stormwater runoff quality; (2) the reduction of runoff volume; (3) the reduction of peak flow; or (4) any combination thereof using Best Management Practices, Environmental Site Design, Stormwater Management Facilities, or any other practice providing measurable pollutant reduction, runoff volume reduction, or peak flow reduction. Treatment measures must be designed in accordance with the Department of Permitting Services design specifications and the 2000 Maryland Stormwater Design Manual and any subsequent revisions thereto. Treatment as defined and applied herein and Chapter 19, Article II of the Montgomery County Code is separate and distinct from the measures used to prevent erosion and provide for sediment control as set forth in Chapter 19, Article 1 of the Montgomery County Code.

Water Quality Protection Charge or Charge means an excise tax 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 greater than 0 square feet and 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 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, 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 eligible nonprofit property 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 eligible nonprofit property 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.

L. Nonprofit Tier 3 (NP3): For eligible nonprofit property 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 and is assessed in accordance with the Single Family Residential Tier classification.

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:

(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: Except for eligible nonprofit property subject to nonprofit tier classifications under subsection D, 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.

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. Eligibility. If a property contains a stormwater management system, the system must be maintained by the property owner exclusively and in accordance with the maintenance requirements of Section 19-28 of the Code for the property owner to be eligible to receive a credit against the Water Quality Protection Charge unless the system was built as part of a County-approved stormwater management participation project.

B. Credit Awards.

(1) The Director must award a credit, not to exceed 60 percent, based on the proportion of the total volume of water treatment provided by the stormwater management system relative to the environmental site design storage volume required under State law as specified in the Water Quality Protection Charge Credit Procedures Manual published by the Director and incorporated by reference as if fully set forth. The volume of treatment required will be based on the environmental site design volume (ESDv) requirements specified in the 2000 Maryland Stormwater Design Manual, as amended.

(2) A nonresidential property or a multifamily residential property must be credited for treatment of off-site drainage from other properties located within the same drainage area as that property, not to exceed 100 percent of the Charge billed to the property owner, if the stormwater management system located on the nonresidential property or multifamily residential property treats the required on-site environmental site design storage volume while at the same time providing additional storage volume for off-site drainage. The total credit will be determined by applying the percent credit of off-site property to the impervious area of that off-site property and then adding that computation to the credit for the on-site impervious area, not to exceed 100 percent of the total Charge billed to the property owner as specified in the Water Quality Protection Charge Credit Procedures Manual.

(3) The owner of a property that does not contain a stormwater management system must be credited if that property is located within the same drainage area as another property that contains a stormwater management system for which the County does not perform structural maintenance or the stormwater management system was built as part of the County-approved stormwater management participation project and 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.

(4) The Director must award a credit, not to exceed 80 percent, if the total volume of water treatment is provided by a stormwater management system that implements environmental site design to the maximum extent practicable.

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

(2) Once approved, the credit is valid for three years. To renew the credit, the property owner must reapply to the Director in a form prescribed by the Director not later than September 30 of the year that payment of the Charge is due.

D. Credit Revocation.

(1) The Director of Environmental Protection may revoke a credit granted under this Section if the property owner does not continue to take the measures needed to assure that the stormwater management system remains in proper working condition by correcting any deficiencies discovered by the Director during a maintenance inspection.

(2) The Director must not reinstate a revoked credit until the property owner has sufficiently corrected the deficiencies to fully satisfy the property owner's maintenance obligations under Section 19-28 of the Code.

E. Appeals.

(1) If the Director denies or revokes the credit, the property owner may seek review of the Director's decision by submitting a written request for review with supporting reasons to the Director of Finance within 30 days after the date of the Director's written decision.

(2) After reviewing the decision of the Director of Environmental Protection, the Director of Finance must notify the property owner in writing of the decision to affirm or reverse the decision of the Director of Environmental Protection. The property owner may appeal the decision of the Director of Finance to the Maryland Tax Court. The appeal must be filed within 30 days after the date of the decision of the Director of Finance.

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 19.35.01.07, 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.

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 review of the Director's conclusion by submitting a written request for review with supporting reasons to the Director of Finance within 30 days after the date of the Director's written decision.

F. After reviewing the decision of the Director of Environmental Protection, the Director of Finance must notify the property owner in writing of the decision to affirm or reverse the decision of the Director of Environmental Protection. The property owner may appeal the decision of the Director of Finance to the Maryland Tax Court. The appeal must be filed within 30 days after the date of the decision of the Director of Finance.

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

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 appeal the Director's decision to the Maryland Tax Court. The appeal must be filed within 30 days after the date of the Director's written decision.

19.35.01.09 Requests for Grants

An owner of an improved aircraft landing area that is exempt from County property taxes under Maryland Code, Tax-Property Art., §8-302, as amended, may apply for a grant to offset all or part of the cost of the Charge by submitting a written application to the Director not later than September 30 of the year that payment of the Charge is due.

19.35.01.10 Severability

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

Marc Elrich
County Executive

1/21/22
Date

MONTGOMERY COUNTY EXECUTIVE REGULATION

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

Subject	Number
Water Quality Protection Charge	18-21
Originating Department	**Effective Date**
Department of Environmental Protection	

Approved as to form and legality:

James Ogorzalek
Associate County Attorney

Date: October 13, 2021

MONTGOMERY COUNTY EXECUTIVE REGULATION

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

Subject	Number
Water Quality Protection Charge	18-21
Originating Department	**Effective Date**
Department of Environmental Protection	

Montgomery County Regulation on:

WATER QUALITY PROTECTION CHARGE

DEPARTMENT OF ENVIRONMENTAL PROTECTION

Issued by: County Executive
Regulation No. 18-21
COMCOR No. 19.35.01

Authority: Code Section 19-35(b)
Supersedes: Executive Regulation 4-18
Council Review: Method 1 under Code Section 2A-15
Register Vol. 38 No. 11
Comment Deadline: November 30, 2021
Effective Date: _____
Sunset Date: None

Summary: This regulation clarifies the definition of "treatment" and "treat" in the context of credits for the Water Quality Protection Charge, as already set forth in the County Code, Regulations, and other incorporated materials.

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

Vicky Wan
Chief, Strategic Services Division
Department of Environmental Protection
2425 Reedie Drive, 4th Floor
Wheaton, MD 20902

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

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, 2014, 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 501(c)(3) nonprofit organization that is listed with the Maryland Department of Assessments and Taxation as 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.

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.

Treatment or Treat means: (1) the improvement of stormwater runoff quality; (2) the reduction of runoff volume; (3) the reduction of peak flow; or (4) any combination thereof using Best Management Practices, Environmental Site Design, Stormwater Management Facilities, or any other practice providing measurable pollutant reduction, runoff volume reduction, or peak flow reduction. Treatment measures must be designed in accordance with the Department of Permitting Services design specifications and the 2000 Maryland Stormwater Design Manual and any subsequent revisions thereto. Treatment as defined and applied herein and Chapter 19, Article II of the Montgomery County Code is separate and distinct from the measures used to prevent erosion and provide for sediment control as set forth in Chapter 19, Article 1 of the Montgomery County Code.

Water Quality Protection Charge or Charge means an excise tax 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 greater than 0 square feet and 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 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, 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 eligible nonprofit property 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 eligible nonprofit property 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.

L. Nonprofit Tier 3 (NP3): For eligible nonprofit property 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 and is assessed in accordance with the Single Family Residential Tier classification.

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:

(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: Except for eligible nonprofit property subject to nonprofit tier classifications under subsection D, 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.

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. Eligibility. If a property contains a stormwater management system, the system must be maintained by the property owner exclusively and in accordance with the maintenance requirements of Section 19-28 of the Code for the property owner to be eligible to receive a credit against the Water Quality Protection Charge unless the system was built as part of a County-approved stormwater management participation project.

B. Credit Awards.

(1) The Director must award a credit, not to exceed 60 percent, based on the proportion of the total volume of water treatment provided by the stormwater management system relative to the environmental site design storage volume required under State law as specified in the Water Quality Protection Charge Credit Procedures Manual published by the Director and incorporated by reference as if fully set forth. The volume of treatment required will be based on the environmental site design volume (ESDv) requirements specified in the 2000 Maryland Stormwater Design Manual, as amended.

(2) A nonresidential property or a multifamily residential property must be credited for treatment of off-site drainage from other properties located within the same drainage area as that property, not to exceed 100 percent of the Charge billed to the property owner, if the stormwater management system located on the nonresidential property or multifamily residential property treats the required on-site environmental site design storage volume while at the same time providing additional storage volume for off-site drainage. The total credit will be determined by applying the percent credit of off-site property to the impervious area of that off-site property and then adding that computation to the credit for the on-site impervious area, not to exceed 100 percent of the total Charge billed to the property owner as specified in the Water Quality Protection Charge Credit Procedures Manual.

(3) The owner of a property that does not contain a stormwater management system must be credited if that property is located within the same drainage area as another property that contains a stormwater management system for which the County does not perform structural maintenance or the stormwater management system was built as part of the County-approved stormwater management participation project and 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.

(4) The Director must award a credit, not to exceed 80 percent, if the total volume of water treatment is provided by a stormwater management system that implements environmental site design to the maximum extent practicable.

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

(2) Once approved, the credit is valid for three years. To renew the credit, the property owner must reapply to the Director in a form prescribed by the Director not later than September 30 of the year that payment of the Charge is due.

D. Credit Revocation.

(1) The Director of Environmental Protection may revoke a credit granted under this Section if the property owner does not continue to take the measures needed to assure that the stormwater management system remains in proper working condition by correcting any deficiencies discovered by the Director during a maintenance inspection.

(2) The Director must not reinstate a revoked credit until the property owner has sufficiently corrected the deficiencies to fully satisfy the property owner's maintenance obligations under Section 19-28 of the Code.

E. Appeals.

(1) If the Director denies or revokes the credit, the property owner may seek review of the Director's decision by submitting a written request for review with supporting reasons to the Director of Finance within 30 days after the date of the Director's written decision.

(2) After reviewing the decision of the Director of Environmental Protection, the Director of Finance must notify the property owner in writing of the decision to affirm or reverse the decision of the Director of Environmental Protection. The property owner may appeal the decision of the Director of Finance to the Maryland Tax Court. The appeal must be filed within 30 days after the date of the decision of the Director of Finance.

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 19.35.01.07, 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.

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 review of the Director's conclusion by submitting a written request for review with supporting reasons to the Director of Finance within 30 days after the date of the Director's written decision.

F. After reviewing the decision of the Director of Environmental Protection, the Director of Finance must notify the property owner in writing of the decision to affirm or reverse the decision of the Director of Environmental Protection. The property owner may appeal the decision of the Director of Finance to the Maryland Tax Court. The appeal must be filed within 30 days after the date of the decision of the Director of Finance.

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

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 appeal the Director's decision to the Maryland Tax Court. The appeal must be filed within 30 days after the date of the Director's written decision.

19.35.01.09 Requests for Grants

An owner of an improved aircraft landing area that is exempt from County property taxes under Maryland Code, Tax-Property Art., §8-302, as amended, may apply for a grant to offset all or part of the cost of the Charge by submitting a written application to the Director not later than September 30 of the year that payment of the Charge is due.

19.35.01.10 Severability

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

Marc Elrich
County Executive

1/21/2022
Date

MONTGOMERY COUNTY EXECUTIVE REGULATION

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

Subject	Number
Water Quality Protection Charge	18-21
Originating Department	**Effective Date**
Department of Environmental Protection	

Approved as to form and legality:

James Ogorzalek
Associate County Attorney

Date: October 13, 2021

From: Jeanne Braha
Sent: Friday, February 18, 2022 3:24 PM
To: Levchenko, Keith
Cc: Dawson, Frank; Eliza Cava
Subject: Stormwater Partners Network comments on executive regulation 18-21

[EXTERNAL EMAIL]

Hello, Keith,

Thanks for the opportunity to weigh in on executive regulation 18-21. The Stormwater Partners Network supports the regulation to close a loophole in the administration of the water quality protection charge.

In general, we agree that the intent of the WQPC is to recognize and incentivize stormwater infiltration onsite. We do think that, as the County becomes more and more developed, it would be helpful to have clear guidance on how stormwater might be managed across property lines, but this would be a longer-term effort, and clarity is needed now as County landowners are making decisions.

In addition, we have said many times that we believe increases in the WQPC would benefit the health of the County and its watersheds. We're in pretty dire straits with increased flooding and severe storms. The process of doing stormwater projects needs more than incremental increase.

Please let us know if you have any additional questions. Thanks for the work that you, the technical staff at DEP, and many others do to protect our watersheds!

Best,
Jeanne and Eliza
Co-chairs, Stormwater Partners Network

--
Jeanne Braha
Executive Director
pronouns: she, her, hers
jbraha@rockcreekconservancy.org
301-579-3105

ROCK CREEK CONSERVANCY

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February 25, 2022

VIA EMAIL AND FIRST CLASS MAIL

Councilmember Evan Glass
Councilmember Tom Hucker
Councilmember Hans Riemer
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

RE: The Transportation & Environment Committee's February 18, 2022 Hearing on Proposed Executive Regulation 18-21: The Water Quality Protection Charge (aka the "Rain Tax"), Definition of Treatment

Dear Councilmembers:

I listened with frustration and outrage to the recording of the Transportation & Environment Committee's hearing on February 18, 2022, regarding a proposed regulation that purportedly would clarify the terms "treat" and "treatment" used by the Department of Environmental Protection ("DEP") in determining the eligibility of properties for Water Quality Protection Charge ("WQPC" or "rain tax") credits. Although I had testified, as did two of our firm's clients, about proposed WQPC changes in the past, we were not informed of this proposed regulation or hearing. In fact, we are engaged in multiple years-long litigation against the DEP about the very issue of what constitutes treatment of stormwater. Yet our opposing County counsel, DEP and legislative counsel failed to give us the courtesy of informing us that they are attempting to change the law yet again during the pendency of two cases against the County by businesses who are deserving of WQPC credit, according to the Maryland Tax Court.

As Councilmember Hucker stated during the Committee hearing, "It is always good practice to invite…any key stakeholders" to hearings on proposed legislation. Yet the County failed to do so, perhaps because they are attempting to undermine two recent Maryland Tax Court decisions decided in favor of Montgomery County taxpayers.

In response to the DEP Deputy Director's comment at the hearing that they hoped "to win" any litigation, Councilmember Hucker stated that the hope is to avoid any litigation. The DEP

Deputy Director's comment exhibits a mentality of outspending and outlasting Montgomery County businesses who attempt to enforce their rights in court. In fact, DEP is wasting thousands of taxpayer dollars fighting two Montgomery County non-residential property owners who are attempting in court to obtain and protect WQPC credits duly owed them. The Maryland Tax Court agreed with the litigants in both cases, and the County has appealed the cases to the Circuit Court, despite the fact that the Circuit Court already pointed out the absurdity of the County's position in one of the cases.

There are **only two pending cases** that involve the WQPC. One is by the 32 property owners in a Gaithersburg business park known as Lindbergh Park.[1] These property owners have been fighting the County for WQPC credits since 2015. Although all of the Park's stormwater drains into one of three stormwater ponds, and the owners pay for maintenance of the ponds and are each liable for tax liens if the ponds are not properly maintained, the County denied the credits because the development's ponds for handling runoff were not located on each property owners' individual properties. The Montgomery County Circuit Court reversed the County Board of Appeals and remanded the case in 2017, **finding that the County made an erroneous conclusion of law in denying credits to the Lindbergh Park property owners.** The owners were forced to appeal again to the Maryland Tax Court when the County changed the appeals rules.[2] The Maryland Tax Court's chief judge ruled that the County unlawfully denied stormwater management tax credits to the owners, and stated that Judge Rubin of the Circuit Court was correct when he first ruled on the matter. Chief Judge Martz lambasted the County's ludicrous position that, even though all the property owners convey their own stormwater to the development's stormwater ponds within the development so that no stormwater leaves the development, the County denied credits because they deemed the stormwater not treated "on site" for every single property owner.

The County Attorney's office has lost this case twice, but will not respect the two court's decisions and has appealed the case again. They also are trying to change the rules again via proposed regulation 18-21. **The appeal is a colossal waste of taxpayer funds, which could be used more effectively for actual clean water efforts. The Lindbergh Park property owners hired engineers to design their commercial property park with grading and piping so that all stormwater from the entire development, as well as from adjacent County roads, would flow into one of three stormwater ponds in the development that treat their stormwater.** Yet the County wants to deny the property owners credits if the stormwater pond is not physically located on the property of each Lindbergh Park property applicant, thereby only allowing credit

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[1] *Battley, et al., v. Montgomery County,* Maryland Tax Court Case No. 19-MI-OO-0429.

[2] The Lindbergh Park property owners first appealed to the DEP for WQPC credits in 2015, which were denied. They appealed the denial of credits to the County Board of Appeals, which affirmed DEP's decision on summary judgment. The Montgomery County Circuit Court reversed the County Board of Appeals and remanded the Lindbergh Park property owners' case in 2017 back to the Board for a hearing consistent with the Court's Order, finding that the County had made an erroneous conclusion of law in denying WQPC credits to the Lindbergh Park property owners, the owners were forced to appeal again to the County Finance Director and to the Maryland Tax Court, after the County changed the appeals rules. *Battley, et al., v. Montgomery County,* Mont. Co. Cir. Ct. Case No. 426602-V (Order of Judge Rubin, dated April 25, 2017); ; Mont. Co. Council Expedited Bill 01-18 (April 5, 2018) (requiring all WQPC appeals from DEP decisions to be heard by the Finance Director and then to the Maryland Tax Court, if necessary); *Battley, et al., v. Montgomery County,* Maryland Tax Court Case No. 19-MI-OO-0429 (June 2, 2021 Order granting WQPC credits to the Lindbergh Park property owners).

for five of the 32 owners. Both Judge Rubin of the Montgomery County Circuit Court and Chief Judge Martz of the Maryland Tax Court chastised the County for this illogical position, yet the County continues to appeal the case and is now seeking to bolster their position against the Lindbergh Park property owners via this proposed regulation.[3]

The County should spend its time on property owners who do not even attempt to treat their stormwater, not on property owners who do so and are then denied credit due to semantic-driven positions that the DEP is attempting to reinforce via proposed regulation 18-21. Attached is an article published in the *Maryland Daily Record* about this case.

The Council Staff Memorandum to the Transportation & Environment Committee, dated February 15, 2022 ("Council Staff Memorandum"), disingenuously states: "If courts determine that the current language mandates credits to every property owner that conveys stormwater rather than the existing language **that a property owner must own and treat the stormwater that it generates**, which is the intent of the credit and the County's obligations under the MS4 Permit, then the County runs the risk of every property qualifying for credits, thereby losing all Water Quality Protection Charge revenues that is the main funding source for stormwater and stream restoration and prevention activities." DEP has argued in the Lindbergh Park case that, even though all of the Lindbergh Park property owners treat their stormwater, because it is not "treated" directly on each property owner's property, but **instead is channeled into the stormwater ponds within Lindbergh Park**,[4] that the property owners do not deserve WQPC credits. The proposed language is not a benign clarification. It is intended to **deny the Lindbergh Park property owners WQPC credits even though they treat all of their own stormwater**. There is no real risk of "every property qualifying for credits."

The proposed regulation's language is also intended to affect the only other case in which a taxpayer is fighting the County for the WQPC credits it deserves. Ben Porto & Son, Ltd./Tri-State Stone & Building Supply Inc. ("Porto") is the only remaining minor stone quarry in Montgomery County.[5] At the Maryland Tax Court trial in March, the chief judge found persuasive Porto's expert engineer's uncontroverted testimony that **all of Porto's stormwater is treated** and that its stormwater management measures are to the maximum extent practicable. The engineer and his firm worked with Porto for years helping them design their effective stormwater management system. The enormous excavated quarry pit with two wet ponds, swales, culverts, berms, filtered traps and areas that act like dry ponds all comprise Porto's stormwater management

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[3] When Mr. Elrich was on the Council, he spoke to Mr. Devin Battley, the Lindbergh Park Property Owners Association ("LPOA") president, after Mr. Battley testified at a WQPC hearing and said he agreed with the LPOA's position and would do what he could to assist. It does not appear that Mr. Elrich has been fully apprised of exactly what DEP is trying to do via this proposed regulation.

[4] DEP argues that the entire stormwater management process must take place on the property owner's land in order for a property owner to get credit. Even though the Tax Court found that the statutory definitions do not support this position, DEP stubbornly refuses to agree. The Lindbergh Park owners treat all of the Park's stormwater within Lindbergh Park and each of them is liable for a tax lien if the stormwater ponds are not properly maintained. Judge Rubin of the Montgomery County Circuit Court questioned the DEP's flawed logic, asking DEP if they would require every owner in Lindbergh Park to construct a stormwater pond on their own property in the industrial park instead of channeling it into one of the three they each paid to have constructed.

[5] As a highly regulated mine, Porto should be exempted from the WQPC. MCC § 19-31; Md. Env. Code § 4-202.1(e)(2)(ii)2. The court instead granted WQPC credits to Porto. *Porto et. al. v. Montgomery County,* Maryland Tax Court Case No.: 18-MI-00-0911 (1-3), Order, dated Aug. 23, 2021.

system, pursuant to the statutory definitions. Porto's large berm was built to prevent flooding and erosion. Porto's expert also explained the Porto property's treatment of stormwater from 17 square miles of upstream land, in addition to its own. The large berm Porto constructed also reduces accelerated stream channel erosion. Porto uses Environmental Site Design measures on their property, as well. The expert described Porto's sediment control permit requirements that constituted stormwater management and how compliance was confirmed and extensively regulated by the State. He also testified about Porto's treatment of stormwater from offsite adjacent properties.

The State highly regulates quarries and mines, and Porto has a State permit to mine the entire property. The land development taking part on the property is always in flux because of the nature of mining. The Maryland Design Manual's recommendations could not apply to a mining property, from an engineering standpoint. They would not make sense for any mine because a mine's development is never complete. The WQPC is based on the amount of impervious surface on a property, but there is never a final impervious area associated with a mine. Porto's expert witness testified that Porto had taken all reasonable stormwater management measures, some of which were achieved with equivalencies to the Design Manual's recommendations. Porto is complying with best management practices, but its property is unique, in that it is constantly developing. **The DEP seeks the "clarifying" language in the regulation to eliminate from the WQPC credit the steps Porto undertakes to meet its mining permit, its mining license, its environmental 15MM permit,[6] as well as the significant sediment control Porto performs and the Court recognized as part of its stormwater management system, to prevent them from obtaining a WQPC credit in the future.** The sediment control Porto performs is part of stormwater management and prevents pollutants from entering the Chesapeake Bay tributaries,[7] but the DEP is trying to say via this proposed regulation that, despite the fact that it helps prevent pollution and manages stormwater runoff, they do not want to give credit for it.

The Council Staff Memorandum disingenuously states that "multiple litigants are seeking credits for measures which do not treat stormwater runoff and which were not contemplated by the County to be eligible for credits under the current program." Battley/Lindbergh Park and Porto

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[6] The DEP admitted that they did not consider whether the quarry's current 15MM permit met or exceeded what was required under the County's MS4 permit, which it does.

[7] Porto's sediment control prevents pollutants entirely on portions of its property, and within the bounds of its permits, licenses, best management practices, and to the maximum extent practicable on the remaining portions of its property, all of which is at significant time and expense to maintain, because Porto's property is constantly changing during the mining process, under a sediment control permit instead of a finished development permit. DEP is trying to force a square peg into a round hole here, by attempting to apply standards that cannot apply to an extractive use like a mine that is in a continual state of change, as it mines the natural resource on different parts of the property. Porto is doing everything it can to the maximum extent practicable, which is the proper legal standard, per the law and the County's MS4 permit. "Maximum extent practicable" means designing stormwater management systems so that all reasonable opportunities for using environmental site design planning techniques and treatment practices are exhausted and, only where absolutely necessary, a structural best management practice is implemented. MCC §19-21; § COMAR 26.17.02.02. Moreover, the MS4 permit directs the use of the Maryland Office of Planning Land Use codes, which separates "Extractive Use" from "Commercial" and "Industrial." The County continues to ignore this distinction when levying the WQPC against the only remaining minor quarry in Montgomery County. Finally, Porto's property should be counted towards the County's own MS4 permit's stormwater treatment requirements, because of Porto's stormwater management practices, its large quarry floor with two wet ponds and other areas that function like a dry pond, its 15MM Permit, and its large berm that treats stormwater from a 17 square mile upstream area.

are the only litigants fighting for WQPC credits for the stormwater they treat. The proposed regulation is designed to end run the two court cases and WQPC credits that Battley/Lindbergh Park and Porto have been litigating against the County to preserve for more than five years. **Legislative counsel stated at the hearing that the proposed clarification would not affect pending litigation because the cases were filed "under the old rules." So the proposed regulation is indeed a rule change and not just a simple clarification. DEP continues to appeal the cases the taxpayers won and undoubtedly will attempt to use this "clarification" to bolster their argument that the Maryland Tax Court was wrong in granting relief to Lindbergh Park property owner and to Porto for the measures the property owners took to treat their stormwater.** The County's appeal in the Lindbergh Park case is scheduled to be heard by the Circuit Court on March 3, 2022. No date has been set yet in the Porto case.

Maryland is the only state that charges a stormwater remediation fee as an excise tax. No other State has implemented their stormwater remediation fees (all of which emanate from the federal Clean Water Act) as an excise tax because they are not truly excise taxes.[8] The excise tax label is a fiction. Prince Georges, Anne Arundel and Howard Counties all implemented the charge as a fee. Other jurisdictions make the stormwater remediation fee part of the property tax. **The County seeks to tax people who already put impervious surface on their property.** It is illegal to retroactively tax a vested right. This is likely why no other state has stormwater remediation charges as excise taxes.[9] The County designated the WQPC as an excise tax because another taxpayer successfully challenged the rain tax in the *Chod* case,[10] in which the court found that the WQPC was required by the State authorizing statute to bear a relation to services provided by the County, and a property tax would have to be based on the value of the property or it would be unconstitutional under the Maryland Constitution. **The County's WQPC does neither. It is an invalid excise tax. The County Attorney advised the Council in 2001 of the advantages and disadvantages of structuring that WQPC as an excise tax or a property tax, and warned them of the likelihood of litigation if the excise tax option were chosen.** [11]

Montgomery County's WQPC was deemed invalid by the Circuit Court in 2015 because it did not properly bear relation to stormwater services the County provided the taxpayers,[12] as required by state law. The County amended the WQPC in an emergency bill, designating it an excise tax. Excise taxes, however, cannot be retroactively applied to vested rights, such as the impervious property Porto and Lindbergh Park already had on its property at the time the excise tax was promulgated. Impervious surfaces that the County is taxing via the WQPC already has

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[8] Impervious surfaces, like buildings and driveways, are improvements to land. And excise taxes are "not directly imposed on property," MCC § 52-2l(a)(l)a, unlike the WQPC, which is imposed on the property, *i.e.*, the impervious surface property of the taxpayer. *See* Md. Code, Tax-Property § 1-101(gg)(l) ("'Real property' means any land or improvements to land.").

[9] https://www.nacwa.org/docs/default-source/news-publications/White-Papers/2016-11-04stormwaterwhitepaper.pdf.

[10] In *Paul N. Chod v. Board of Appeals for Montgomery County* (Civil No. 398704-V, entered July 23, 2015) the Circuit Court for Montgomery County opined that the Water Quality Protection Charge "is invalid per se because this charge need not reasonably relate to the stormwater management services provided by the County."

[11] "If the County is primarily interested in minimizing any questionability about its actions in a legal challenge, then an ad valorem property tax would seem the most reasonable approach to pursue since the County's authority to fund its stormwater management program through an ad valorem tax is clear." http://www.amlegal.com/pdffiles/MCMD/06-01-2001.pdf at page 8.

[12] *Paul N. Chod v. Board of Appeals for Montgomery County* (Civil No. 398704-V, entered July 23, 2015).

been taxed via property taxes. Assuming that the WQPC is an excise tax,[13] it was invalidly assessed on impervious surface that predated the promulgation of the WQPC as an excise tax.[14] And, from an equity standpoint, the WQPC bears no relation to services the County provides Porto, which the Circuit Court deemed invalid in the *Chod* case under the State authorizing statute.

The Council also should consider the economic impact of the WQPC and this particular proposed regulation on businesses in the County, as required by State law. Maryland natural resources law requires a balance between economic development and a healthful environment.[15] **It is hard to believe that the Council meant to treat property owners whose stormwater does not tax the County's system the same way or worse than property owners that do absolutely nothing to control their stormwater. The DEP's actions in denying credits to the Lindbergh Park property owners and Porto, and trying to bolster the law against credits to these businesses who are trying to do the right thing is contrary to State law and common sense.**[16]

The County is seeking to deny WQPC credits to environmental citizens who took all reasonable steps to treat their stormwater by stealthily proposing "clarifying" language to stymie these property owners' attempts to protect their WQPC credits. They did not inform the litigants of this surreptitious effort because it is wrong. There **is no reasonable relation to any possible stormwater pollution** by Lindbergh Park property owners or what is practicable for Porto's extractive use because these citizens actually treat their stormwater, while other property owners do nothing at all to treat their stormwater. The WQPC credits were designed to incentivize property owners to treat their own stormwater and these property owners do exactly that. **If the County truly wants to incentivize its property owners to provide stormwater management, like Lindbergh Park and Porto do, it is killing that incentive via maneuvers like this.** Taxpayer funds would be better spent going after people who are attempting to evade taxes or who do nothing to treat their stormwater to the maximum extent practicable for the type of property they own. **This regulation is wrong, it is aimed at the only two pending WQPC cases, and it is a backhanded attempt to take WQPC credits away from property owners who were incentivized to treat their own stormwater and do the environmentally right thing.** There is no avalanche of potential revenue losses if the County gives WQPC credit to the Lindbergh Park owners and Porto, who treat their own stormwater on site.[17]

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[13] The WQPC is not a validly enacted excise tax. The WQPC is an unconstitutional property tax because it is not uniformly applied, or an invalid fee because it does not bear relation to services provided by the County. Maryland Constitution, Art. 15; Md. Code, Env. § 4-204.

[14] This issue with respect to the WQPC has yet to be decided by the courts.

[15] Md. Code, Nat. Resources § 1-302(f).

16 Moreover, the County recommended that Porto's quarry and property be considered an Area of Critical Concern in recognition of its uniqueness and importance to Montgomery County. 1977 MNCPPC Critical Area Recommendation. The County adopted the Recommendation through Resolution 8-1261 (1977). See Ruth Hepner, Bridge Halted Halfway Because of Rare Mica-Schist - Quarry Has County in a Quandary," Montgomery County Journal (March 7, 1980). The County has the opportunity to live up to its resolution by doing the fair and equitable thing and not simply hammer another nail in the coffin of the last remaining minor quarry in the County, which supports the masonry and hardscape industries which, in turn, helps the people it employs, and their families.

[17] The linchpin of DEP's argument against Lindbergh Park is that the stormwater is not treated "on site" because it is treated within the Park via grading and channeling into the three stormwater ponds the owners constructed and maintain, but there is not a pond on each individual property in the Park, a position rejected by the Circuit Court and the Maryland Tax Court. Yet DEP continues to appeal. There is unlikely to be another case with similar circumstances. If stormwater is simply channeled off of a property owner's land, the WQPC statute would not

We welcome the opportunity to discuss this matter with you and will testify at the full Council hearing. Thank you.

Sincerely,

Jon D. Pels, Esq.
Maria L. Olsen, Esq.
THE PELS LAW FIRM, L.L.C.

CC: Marc Elrich, County Executive, Marc.Elrich@montgomerycountymd.gov
Claire Iseli, Special Assistant to the County Executive,
Claire.Iseli@montgomerycountymd.gov
Keith Levchenko, Senior Legislative Analyst, Montgomery County Council,
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support a credit. The Lindbergh Park owners do more than that. They paid for stormwater ponds to be constructed within their industrial park and for all of the Park's stormwater to be channeled into the ponds for treatment. They pay for maintenance of the stormwater ponds and are subject to tax liens, via a covenant with the County, if the ponds are not properly maintained. It is unlikely that any other taxpayers will have a similar situation. If they do, they deserve WQPC credit.

https://thedailyrecord.com/2021/05/20/montgomery-county-owes-stormwater-tax-credits-judge-rules/

Montgomery County owes stormwater tax credits, judge rules

By: Steve Lash Daily Record Legal Affairs Writer May 20, 2021

Montgomery County unlawfully denied stormwater management tax credits to property owners in a Gaithersburg business park because the development's ponds for handling runoff were not located on their individual properties, the Maryland Tax Court's chief judge ruled Wednesday.

Walter C. "Clay" Martz II said the county code's environmental tax credit is not so limited and applies to all members of the Lindbergh Park Owners Association, who paid for upkeep of the stormwater management ponds and have drains on their properties to ensure runoff flows into them for the protection of the Chesapeake Bay.

Of LPOA's 32 owners, just five received any credit from the county because the ponds were on their property, their counsel said.

Under Martz's summary judgment ruling, all 32 will receive credits they had been denied for the tax years 2015, 2016 and 2017, counsel added.

The county owes a total of about $113,000 in refunds to the owners, who were denied annual credits ranging from $200 to $5,000 dollars, according to counsel.

The owners argued in court that poor drafting and narrow construction of Montgomery County's Water Quality Protection Charge — which critics call the "rain tax" — had unintended consequences in Lindbergh Park. The owners said their efforts toward stormwater management were not rewarded with credits for good environmental practices, as county law requires.

"I think it is ridiculous for the county to deny credits to property owners who actually treat their own stormwater," said the owners' attorney Maria L. Olsen, of the Pels Law Firm in Bethesda.

"The WQPC credits were designed to incentivize property owners to treat their own stormwater and these property owners do exactly that," Olsen added Thursday. "Taxpayer funds would be better used going after people who are attempting to evade taxes."

Montgomery County issued a statement Thursday that it is "considering its options, which include appealing."

The owners' legal odyssey began with the Montgomery County Department of Environmental Protection's denial of the tax credits. The Board of Appeals agreed with the department. but Montgomery County Circuit Judge Ronald B. Rubin remanded the case for further consideration in 2017.

The county appealed Rubin's decision to the Court of Special Appeals, which ruled the owners had to exhaust their administrative remedies by appealing to the county's finance director and, if necessary, the state tax court. When the finance director ruled for the county, the owners sought review by the tax court.

Olsen said she hopes for its taxpayers' sake that Montgomery County does not seek what she believes would be its unsuccessful appeal of the tax court's decision to circuit court.

"This is a colossal waste of taxpayer funds," she said. "Why don't we put all that money that goes into litigation to actually clean up the bay?"

The Maryland Tax Court rendered its decision in *Devin Battley, et al., v. Montgomery County, Maryland*, No. 19-MI-OO-0429.

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Virginia Office
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March 15, 2022

VIA HAND DELIVERY

Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

RE: Request for a Hearing on Proposed Executive Regulation 18-21: The Water Quality Protection Charge (WQPC, aka the "Rain Tax"), Definition of Treatment, Scheduled for the Consent Calendar Today

Dear Councilmembers:

- At the February 18, 2022 Transportation & Environment Commit Tom Hucker stressed the importance of "inviting key stakeholder: proposed legislation.
- Executive Regulation 18-21 directly targets two pending cases in the Montgomery County Circuit Court, which the Maryland Tax Court decided in our clients' favor.
- We were not informed of the T&E hearing on the Regulation and now it is on the consent calendar for vote today at noon.
- We ask for a full hearing on proposed Executive Regulation 18-21.
- While the Council report claims that it "will not affect pending litigation," it will affect WQPC tax credits for all tax years not at issue in the pending litigation (2018, forward) because those years' determinations have been stayed by the County pending all of the County's continuing appeals of our clients' successful decisions in the Maryland Tax Court.
- **It is just and equitable for these taxpayers who have been fully adjudged by the Maryland Tax Court to treat their stormwater and be entitled to maximum WQPC credit to have an opportunity to be heard prior to a Council vote on Executive Regulation 18-21. The United States Constitution and the Maryland State Constitution mandate that due process be afforded to individuals who are directly targeted by legislation. Please remove this Regulation from today's consent calendar.**

Maria L. Olsen, Esq.
THE PELS LAW FIRM, L.L.C.

From: Hochberg, Adriana
Sent: Thursday, March 3, 2022 4:02 PM
To: Levchenko, Keith
Cc: Wan, Vicky; Ogorzalek, Jim; Bubar, Patrice
Subject: Response to WQPC letter

Keith,

As requested, please find below a point by point response to the WQPC letter.

Adriana

1. **Ms. Olsen claims that the County "failed to give [Ms. Olsen and her clients] the courtesy of informing [them] that [the County is] attempting to change the law," implying without support that the County engaged in some sort of subterfuge in the promulgation of Executive Regulation 18-21.**

   Contrary to this unsubstantiated allegation, as required by law, the County Executive published Executive Regulation 18-21 in the County's Register for the requisite period, providing notice to all residents of Montgomery County or other interested parties, including Ms. Olsen and her clients. Moreover, it is the County Executive's understanding that Council staff similarly complied with all applicable notice requirements prior to the Transportation & Environment Committee's worksession on February 18, 2022.

2. **Ms. Olsen's letter states that the County is attempting to "bolster their position" in, and otherwise "undermine", pending litigation against Ms. Olsen's clients via Executive Regulation 18-21.**

   This is plainly false. Like any enacted law, an executive regulation may only have prospective effect. As such, should Council act to adopt Executive Regulation 18-21, it would only be effective beginning the date of its enactment (or such other date, as the Council may identify). Thus, the Executive Regulation would have effect on subsequent tax levy years only, not the years that are at issue in the pending litigation. Adoption of the Regulation, therefore, will have no effect upon the subject litigation.

3. **Ms. Olsen's letter includes a lengthy argument against the very imposition and broader implementation of the WQPC, generally, and specifically against her clients. Ms. Olsen does not connect this issue to the proposed regulatory amendment.**

   Ms. Olsen's true criticism involves the very existence of the WQPC, and its application in the County. Indeed, Ms. Olsen goes so far as to claim that the entire tax, itself, is "unconstitutional." Such testimony is entirely irrelevant to the question of whether the Regulation should be adopted, however. To the extent that this is a valuable line of inquiry, which the County maintains it is not, it is more appropriate as part of a broader review of the entire WQPC statutory scheme. At least one member of the Transportation & Environment Committee has suggested such a review might be beneficial following passage of Executive Regulation 18-21.

In contrast to the broad existential issues raised by Ms. Olsen, Executive Regulation 18-21, as stated in the County Executive's transmittal package, is intended to achieve the following objectives: (1) clarify the County's present understanding of the WQPC statutory scheme; (2) correct any ambiguity so that the County may continue to implement the law as it always has; and (3) ensure that the WQPC continues to serve as a reliable revenue source for multiple critical County priorities.

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Stan M. Doerrer, Esq. (MD, DC, VA)

Written Testimony to the Montgomery County Council
Regarding Proposed Executive Regulation 18-21,
Water Quality Protection Charge, Definition of Treatment

By Maria Olsen, Esq.

County Council Building, Rockville, Maryland, Third Floor Hearing Room

April 26, 2022

Dear Members of the County Council:

The Pels Law Firm represents 33 Montgomery County property owners who are opposed to proposed Executive Regulation 18-21, a purported clarification to the definition of "treatment" under the Water Quality Protection Charge ("WQPC") statute. Executive Regulation 18-21 directly targets 33 litigants in two pending cases on appeal by the County to the Montgomery County Circuit Court, which the Maryland Tax Court decided in our clients' favor after years of WQPC appeals in various tribunals. The 33 property owners are Ben Porto & Son/Tri-State Stone & Building Supply,[1] the County's only remaining minor quarry and source of building stone in the County (located at the corner of River Road and Seven Locks, in Bethesda), and the 32 commercial property owners in the Lindbergh Park development, in Gaithersburg, situated southwest of Muncaster Manor Park, and east of Montgomery County Airpark.

The WQPC statute's legislative history indicates that the WQPC was designed to incentivize property owners to treat their own stormwater. These 33 property owners did just that. The chief judge of the Maryland Tax Court, after six years of litigation over DEP's denial of full WQPC credits, determined that all 33 of these property owners, who hired engineers to help them design effective stormwater management systems and are individually liable for tax liens if they do not properly maintain the stormwater management facilities (in Lindbergh Park, the stormwater ponds in the development that DEP conceded collect 100% of the stormwater), treat their stormwater to the maximum extent practicable and are entitled to the maximum

[1] Porto owns the real property. Tri-State Stone & Building Supply, Inc., operates the quarry and building supply. For ease of reference, both entities are referred to herein as "Porto."

WQPC credits. The Montgomery County Circuit Court made the same determination in the Lindbergh Park case—pointing out the absurdity of the County's position in denying all the property owners WQPC credits--and remanded the Lindbergh Park case for further proceedings consistent with its ruling. [2]

Proposed Executive Regulation 18-21 seeks to prevent these very taxpayers from obtaining credits for their stormwater management systems. While the Council report claims that it "will not affect pending litigation," it will affect these 33 property owners' WQPC tax credits for all tax years not directly being considered in the pending lawsuits (2018 to 2021) because DEP and the Finance Director stayed those years' WQPC credit determinations pending the County's continuing appeals of our clients' successful decisions in the Maryland Tax Court. In addition, these property owners' WQPC credits for 2022 and beyond are jeopardized by this proposed regulation. The two cases pending by these 33 commercial property owners **are the only WQPC appeals that have been filed in the Maryland Tax Court since the County repromulgated the WQPC as an excise tax via emergency legislation in 2016[3] and changed the WQPC appeals law in 2018**. Special legislation that targets individuals is prohibited by the Maryland Constitution.[4]

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[2] The Montgomery County Circuit Court issued its ruling on April 25, 2017, remanding the case to the Montgomery County Board of Appeals for a full hearing consistent with its Order. *Devin Battley and the Lindbergh Park Owners Asso., Inc., Petitioners, for Judicial Review of the Decision of the Board of Appeals for Montgomery County, In the Case of Devin Battley, et al.,* Case No. 426602-V. The County appealed this ruling to the Maryland Court of Special Appeals, which ruled in 2018, when the County changed the WQPC appeals rules (Expedited Bill 01-18), that the Lindbergh Park property owners essentially had to start their case over by appealing the Department of Environmental Protection's ("DEP," the decision maker in this environmental matter) decision to the Finance Director. The Finance Director confirmed DEP's decision grant of partial credits to five property owners and denying credits to 27 others, so the property owners appealed that decision to the Maryland Tax Court in 2019. The Maryland Tax Court rendered its Lindbergh Park decision in *Devin Battley, et al., v. Montgomery County, Maryland*, No. 19-MI-OO-0429 (June 2, 2021), confirming the Circuit Court's decision in 2017 that all 32 property owners deserved the maximum credits available for proving that all Lindbergh Park property owners treat 100% of the stormwater in the development, including stormwater from adjacent County roads, via the three stormwater ponds they paid their engineers to design and construct, into which all of the stormwater from Lindbergh Park flows. The County has appealed the case to the same Circuit Court, which hears administrative appeals. Oral argument was held on March 2, 2022 in the Circuit Court, but no decision has been issued. If the County loses again in the Circuit Court, the County Attorney will likely appeal to the Maryland Court of Special Appeals, out of misguided fear that hundreds of property owners will seek WQPC credits and **go to the trouble to prove to the Maryland Tax Court that they treat 100% of their stormwater.** The Lindbergh Park property owners have been fighting DEP for full WQPC credits since 2015. If any other property owner is able to spend the thousands of dollars to fight DEP through years of litigation to prove with expert evidence to the Maryland Tax Court that they treat their stormwater, it would be equitable for such property owner to receive the credit awarded by the Court.

[3] In *Paul N. Chod v. Board of Appeals for Montgomery County* (Civil No. 398704-V, entered July 23, 2015), the Montgomery County Circuit Court struck down the WQPC as invalid because it did not follow State Environmental law requiring a reasonable relation to the stormwater services provided by the County. So the County **reauthorized the WQPC statute as authorized alternatively by the general taxing authority granted by the State or the environmental law granting the County the right to assess a stormwater remediation fee, and designating the WQPC as an excise tax.** *See* Md. Code, Env. § 4-204(d)(4) and (e)(1); Md. Code, Env. § 4-202.1(e)(3)(i) and (f)(1); M.C.C. § 19-35(a) (and Editor's Note re 2015 L.M.C., ch. 54 re curative effect, authority and retroactivity of Expedited Bill 45-15); https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/bill/2015/20151117_45-15A.pdf.

[4] The State, pursuant to the federal Clean Water Act, granted the power to the counties and municipalities to levy stormwater remediation fees. The State enabling statute required the fees to bear a reasonable relation to the stormwater services provided by the County. Md. Code, Env. § 4-204(d)(4) and (e)(1); Md. Code, Env. § 4-

There are **only two pending cases** that involve the WQPC. Very few property owners have the financial wherewithal or stomach for litigation to combat unfair legislation, like proposed Executive Regulation 18-21. One is by the 32 property owners in a Gaithersburg business park known as Lindbergh Park.[5] These property owners have been fighting the County for WQPC credits since 2015. Although all of the development's stormwater drains into one of three stormwater ponds, and the owners pay for maintenance of the ponds and are subject to individual tax liens if they do not properly maintain the ponds, the County denied the credits because the development's ponds for handling runoff were not located **on each property owners' individual properties**. So DEP argued that the stormwater was treated "off site" for 27 of the property owners and therefore undeserving of credit. The owners' legal odyssey began with the DEP's denial of the WQPC credits applied for by the property owners in 2015. The Montgomery County Circuit Court reversed the County Board of Appeals and remanded the case in 2017, finding that the County made an erroneous conclusion of law in denying credits to the Lindbergh Park property owners. The owners were forced to appeal again to the Maryland Tax Court when the County changed the appeals rules in 2018. The Maryland Tax Court's chief judge ruled on May 19, 2021 that the County unlawfully denied stormwater management tax credits to the owners, and stated that Judge Rubin of the Circuit Court was correct when he first ruled on the matter.[6] Chief Judge Martz lambasted the County's ludicrous position that, even though all the property owners convey their own stormwater to the development's stormwater ponds within the development so that no stormwater leaves the development, the County denied credits because they deemed the stormwater not treated "on site" for every single property owner.

The County Attorney's office has lost the Lindbergh Park case twice, but will not respect the two court's decisions and has appealed the case again. They also are trying to change the rules again via proposed regulation 18-21. **The appeal is a colossal waste of taxpayer funds, which could be used more effectively for actual clean water efforts. The Lindbergh Park property owners hired engineers to design their commercial property park with grading and piping so that all stormwater from the entire development, as well as from adjacent County roads, would flow into one of three stormwater ponds in the development that treat their stormwater.** Yet the County wants to deny the property owners credits if the stormwater pond is not physically located on the property of the applicant, thereby only allowing credit for five of the 32 owners. Both Judge Rubin of the Montgomery County Circuit Court and Chief Judge Martz of the Maryland Tax Court chastised the County for this position, yet the County

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202.1(e)(3)(i) and (f)(1). Montgomery County has attempted to override this State mandate by reissuing the WQPC as being authorized **either by the state environmental law** "or" their general taxing authority. M.C.C. § 19-35(a) (and Editor's Note re 2015 L.M.C., ch. 54 re curative effect, authority and retroactivity of Expedited Bill 45-15). Executive Regulation 18-21, targeted to defeat the credits awarded to these 33 property owners, is in further conflict with the State enabling statute and is impermissibly targeting the 33 property owners. *See Maryland Dept. of Env. v. Days Cove Reclamation Co., Inc.,* 27 A.3d 565, 200 Md. App. 256 (purpose of constitution's section governing special laws is to prevent privileges by special legislation in conflict with previously enacted general legislation covering the same subject matter); *City of Crisfield v. Chesapeake & Potomac Rel Co. of Baltimore City*, 102 A. 751, 131 Md. 444 (1917) (city charter empowering the city to regulate charges of telephone companies held invalid as a special law under Const. art. 3 § 33, such power having been already vested in the Public Service Commission).

[5] *Battley, et al., v. Montgomery County,* Maryland Tax Court Case No. 19-MI-OO-0429, Order, dated June 2, 2021.

[6] Transcript available upon request.

continues to appeal the case and is now seeking to bolster their position against the Lindbergh Park property owners via this proposed regulation.[7]

> DEP provided additional elaboration on the reason for the "clarification" regulation:
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> Although the regulation is intended to be purely clarifying, and the County's position is that the definition set forth in this proposed regulation is already captured in the County's and State's statutory and regulatory schemes—especially in the State's stormwater management design manual, which is expressly incorporated into the County's Code and Regulations. But because the statutory and regulatory schemes are complex, the County runs the risk of residents and, importantly, courts being confused and interpreting the law to mandate credits for certain infrastructure that do not, in fact, treat stormwater. Specific examples of such infrastructure include piping and hardscaping that **merely** conveys water or designs that hold water but do not achieve any of the other requirements for treatment. **If courts determine that the current language mandates credits to every property owner that conveys stormwater** rather than the existing language that a property owner **must own** and treat the stormwater that it generates, which is the intent of the credit and the County's obligations under the MS4 Permit, **then the County runs the risk of every property qualifying for credits, thereby losing all Water Quality Protection Charge revenues** that is the main funding source for stormwater and stream restoration and flooding prevention activities. Additionally, from an operational standpoint, this regulation is particularly important in administering the Water Quality Protection Charge because the method of assessing the WQPC and any applicable credits are expressly and necessarily tied to the property, itself. Absent this regulation, the potential misinterpretation, which blurs property lines, makes the Charge and Credits nearly impossible to calculate and defend.

Council Staff Report at pages 2-3 (emphasis added). This is inaccurate. The County Attorney has repeatedly argued in the Lindbergh Park case that only the five property owners on whose properties the stormwater management ponds are located can receive the WQPC credits, even though they stipulated that all of the stormwater from Lindbergh Park flows into the engineer-designed stormwater ponds. DEP denied credits to the 27 other property owners, who paid engineers to design a stormwater management system for the development, which all of the Lindbergh Park property owners pay to maintain, so that all of the Lindbergh Park stormwater drained into the stormwater management ponds. **The County disingenuously used the statute's "property owner" words to argue that if the pond did not sit on the property owner's land, they received no credit, because that was tantamount to merely conveying the property owner's stormwater offsite.** The Montgomery County Circuit Court and the Maryland Tax Court held that the County was wrong, that the County's position was contrary to the statutory language, and that this argument was absurd. Now DEP is seeking to bolster their position via proposed Executive Regulation 18-21.

[7] When Mr. Elrich was on the Council, he spoke to Mr. Devin Battley, the Lindbergh Park Property Owners Association ("LPOA") president, after Mr. Battley testified at a WQPC hearing and Mr. Elrich said he agreed with the LPOA's position and would do what he could to assist. That has not happened, however.

In the Lindbergh Park case, the County stipulated that the entire Lindbergh Park development managed all of its own stormwater runoff, in addition to runoff from adjacent County roads. Expensive stormwater retention ponds and infrastructure to channel stormwater runoff to the ponds were constructed by the developer, and assigned to the Lindbergh Park Owners Association ("LPOA"). The LPOA members paid for the stormwater management facilities when they purchased their properties. The LPOA members continue to pay for upkeep and maintenance of these stormwater management ponds. The stormwater management system includes three stormwater management ponds, and necessary stormwater management infrastructure located on each of the individual Lindbergh Park commercial properties. While the stormwater management ponds are physically located on five of the LPOA member properties, they are used, financed and necessary for the treatment of stormwater runoff for all LPOA members' properties. **LPOA members receive no compensation for this stormwater management provided to the County, and each property owner has to pay for the stormwater ponds' upkeep or the County may assess a lien against each property.**

Against the expressed intent of the enabling legislation, the County sought to tax LPOA members for stormwater that already has been treated by the LPOA's three stormwater treatment ponds. The County charged these property owners the same WQPC as landowners who do not pay for nor have any stormwater management for their properties. This is patently unfair, a misapplication of the WQPC legislation,[8] and an arbitrary and capricious action on the part of DEP.

Montgomery County Code section 19-21 defines on-site stormwater management as: "The design and construction of stormwater practices to control stormwater runoff *in a development*." A "stormwater management system" is defined in Montgomery County Code section 19-21 as:

> *Stormwater management system:* Natural areas, environmental site design practices, stormwater management measures, **and any structure through which stormwater flows, infiltrates, or discharges from a site.**

Executive Regulation 18-21 is contrary to the Montgomery County Code section 19-21. The Executive Staff's comments above exhibit that they are trying to undermine the Battley/Lindbergh Park case, as well as the Montgomery County Code. If a property owner can demonstrate that they use piping and grading to channel all of their stormwater into a

[8] **Article II. Storm Water Management.** [Note]

Sec. 19-20. Purpose of article; scope.

The purpose of this Article is to protect, maintain and enhance the public health, safety, and general welfare by establishing minimum requirements and procedures to control the adverse impacts associated with increased stormwater runoff from developed and developing lands. The primary goal of the County is to maintain after development, as nearly as possible, the pre-development runoff characteristics, and to reduce stream channel erosion, pollution, siltation and sedimentation, and local flooding by implementing environmental site design **to the maximum extent practicable** and using appropriate structural best management practices only when necessary. The 2000 Maryland Stormwater Design Manual and any later revisions are incorporated by reference as if fully contained in this Article. (1980 L.M.C., ch. 60, § 3; 1985 L.M.C., ch. 27, § 1; 2001 L.M.C., ch. 27, § 1; 2002 L.M.C., ch. 3, § 1; 2010 L.M.C., ch. 34, § 1.) (emphasis added).

stormwater treatment pond, they should receive a credit, even if the pond is not physically located on their property.

The Montgomery County Circuit Court in 2017 (before the County changed the appeals rules in 2018 and Lindbergh Park had to start their appeals over) reversed the County's ruling that only the property owners on whose property the ponds are located could receive a WQPC credit. Judge Rubin stated that:

> The Board "made an erroneous conclusion of law by conflating the statutory meaning of 'stormwater management system' found in Montgomery County Code section 19-35(e)(1) to equate with only the stormwater management ponds on the properties at issue in this case. The relevant Code section mandates credits for property owners who have **'stormwater management systems' and not the narrower 'stormwater management facilities,' which the Council could have so codified** had that been their intent."
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> Judge Rubin asked, "How does the stormwater get to the ponds from all over the Lindbergh Park development?"[9]

The County admitted "that contain the stormwater that is channeled to one of the ponds from the entire development, and for which the LPOA members pay maintenance fees and are individually liable for tax liens. Yet the DEP continues to attempt—now via this proposed "clarifying" legislation—to deny Lindbergh Park property owners who treat their own stormwater (just not completely on each of the 32 properties, but in a communal way) WQPC credits.

The County should spend its time and resources on property owners who do not even attempt to treat their stormwater, not on property owners who do so and are then denied credit due to semantic-driven positions that the DEP is attempting to reinforce via proposed regulation 18-21.

The Council Staff Memorandum to the Transportation & Environment Committee, dated February 15, 2022 ("Memorandum"), disingenuously states: "If courts determine that the current language mandates credits to every property owner that conveys stormwater rather than the existing language **that a property owner must own and treat the stormwater that it generates**, which is the intent of the credit and the County's obligations under the MS4 Permit, then the County **runs the risk of every property qualifying for credits**, **thereby losing all Water Quality Protection Charge revenues** that is the main funding source for stormwater and stream restoration and prevention activities." DEP has argued in the Lindbergh Park case that, even though all of the Lindbergh Park property owners treat their stormwater, because it is not "treated" on each property owner's property, but instead is channeled into the stormwater ponds within Lindbergh Park, that the property owners do not deserve WQPC credits. **The proposed language is not a benign clarification.** It is intended to **deny the Lindbergh Park property owners WQPC credits even though they treat all of their own stormwater**.

[9] Transcript available on request.

The proposed regulation's language is also intended to affect the only other case in which a taxpayer has been fighting the County for years to obtain the WQPC credits it deserves. Ben Porto & Son, Ltd./Tri-State Stone & Building Supply Inc. is the only remaining minor stone quarry in Montgomery County.[10] At the Maryland Tax Court trial in March, the chief judge found persuasive **Porto's expert engineer's uncontroverted testimony that all of Porto's stormwater is treated and that its stormwater management measures are to the maximum extent practicable**. The engineer and his firm worked with Porto for years helping them design their effective stormwater management system. The enormous excavated quarry pit with two wet ponds, swales, culverts, berms, filtered traps and areas that act like dry ponds and wet ponds all comprise Porto's stormwater management system, pursuant to the statutory definitions. Porto's large berm was built to prevent flooding and erosion. Porto's expert also explained the Porto property's treatment of stormwater from 17 square miles of upstream land, in addition to its own. The large berm Porto constructed also reduces accelerated stream channel erosion. Porto uses Environmental Site Design measures on their property, as well. The expert described Porto's sediment control permit requirements that constituted stormwater management and how compliance was confirmed and extensively regulated by the State. He also testified about Porto's treatment of stormwater from offsite adjacent properties.

The State highly regulates quarries and mines, and **Porto has a State permit to mine the entire property. The land development taking part on the property is always in flux because of the nature of mining.** Following the Maryland Design Manual's recommendations—which proposed Executive Regulation 18-21 attempts to make the only way for a property to obtain WQPC credits--could not apply to a mining property, from an engineering standpoint, as Porto's engineer testified. **They would not make sense for any mine because a mine's development is never complete. There is never a final impervious area associated with a mine. Porto's expert witness testified that Porto had taken all reasonable stormwater management measures, some of which were achieved with equivalencies to the Design Manual's recommendations.** Porto is complying with best management practices, but its property is unique, in that it is constantly developing. The DEP seeks the "clarifying" language in the regulation to eliminate from the WQPC credit the steps Porto undertakes to meet its mining permit, its mining license, its environmental 15MM permit,[11] as well as the significant sediment control Porto performs and the Court recognized as part of its stormwater management system, **to prevent Porto from obtaining a WQPC credit in the future**. The sediment control Porto performs is part of stormwater management and prevents pollutants from entering the Chesapeake Bay tributaries,[12] but **DEP is trying to say via this proposed regulation** that,

[10] Porto has served Montgomery County, The National Park Service, The District of Columbia, and residents and property owners in the Washington metropolitan area **for nearly a century**. This Montgomery County business mines a rare stone, which is the area's only indigenous quartzite stone. Porto's unique Carderock stone is matched in only three or four other places in the world. Porto's quarry provides historic stone matches at The White House, Arlington National Cemetery and Clara Barton Parkway. Arlington National Cemetery, Walter Reed, the National Institute of Health, Nationals Stadium, The National Zoo and Georgetown University have used Porto's material for new construction or historic matches, as has Wheaton's Brookside Gardens, Potomac's Glenstone Museum, and numerous County private schools, businesses and residences.

[11] The DEP admitted that they did not consider whether the quarry's current 15MM permit met or exceeded what was required under the County's MS4 permit, which it does. DEP deposition testimony is available on request.

[12] Porto's sediment control prevents pollutants entirely on portions of its property, and within the bounds of its permits, licenses, best management practices, and to the maximum extent practicable on the remaining portions of its property, all of which is at significant time and expense to maintain, because Porto's property is constantly

despite the fact that it helps prevent pollution and manages stormwater runoff, they do not want to give any credit for it.

As a highly regulated mine, Porto should be exempted from the WQPC.[13] Stormwater runoff regulation of quarries/mines is regulated under Title 15 of the Environmental Code. Despite the fact mines are one of the most regulated entities in the State (and State law in this regard preempts County law), that for years Porto has had stormwater control on its property that has been a prerequisite to its State and County quarry/mining permits/licenses, and that Porto has had a Mineral Mines Permit under the State's General NPDES permit,[14] the County has failed to exempt it or grant acceptable credits to it in the County's implementation of the WQPC.

Montgomery County has misclassified mineral extractive uses, contravening its MS4 permit.[15] This error has contributed to DEP's failure to give WQPC exemptions or acceptable credits to the last remaining minor quarry in Montgomery County.

Following the law and proper classifications would inure to the County's benefit. For instance, **Porto's entire 21.49-acre property could be counted towards County's MS4 permit requirements and should not be included in the County's impervious surface calculation.** Mines and quarries are in an almost constant state of flux. The quarry pit moves as the natural resource is mined. Compacted dirt roads are changed to facilitate this process, as well as other changes. Quarries, like agricultural property, that are exempt from stormwater management, should be excluded from the County's total impervious surface calculation for purposes of the MS4 permit. DEP likely fails to do this because then they would have to exempt Porto's property from the WQPC.

Furthermore, the 2014 Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated Guidance Document allows the County to exclude from its impervious

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changing during the mining process, under a sediment control permit instead of a finished development permit. DEP is trying to force a square peg into a round hole here, by attempting to apply standards that cannot apply to an extractive use like a mine that is in a continual state of change, as it mines the natural resource on different parts of the property. Porto is doing everything it can to the maximum extent practicable, which is the proper legal standard, per the law and the County's MS4 permit. "Maximum extent practicable" means designing stormwater management systems so that all reasonable opportunities for using environmental site design planning techniques and treatment practices are exhausted and, only where absolutely necessary, a structural best management practice is implemented. MCC §19-21; § COMAR 26.17.02.02. Moreover, the MS4 permit directs the use of the Maryland Office of Planning Land Use codes, which separates "Extractive Use" from "Commercial" and "Industrial." The County continues to ignore this distinction when levying the WQPC against the only remaining minor quarry in Montgomery County. Finally, Porto's property should be counted towards the County's own MS4 permit's stormwater treatment requirements, because of Porto's stormwater management practices, its large quarry floor with two wet ponds and other areas that function like a dry pond, its State Mineral Mines Permit, and it large berm that treats stormwater from a 17 square mile upstream area.

[13] MCC § 19-31; Md. Code Env. § 4-202.1(e)(2)(ii)2. The Tax Court instead granted WQPC credits to Porto. *Porto et. al. v. Montgomery County*, Maryland Tax Court Case No.: 18-MI-00-0911 (1-3), Order, dated Aug. 23, 2021. Porto is appealing that portion of the Court's order.

[14] Md. Code, Env. § 4-202.1(e)(2)(ii)2 ("A county or municipality may not charge a stormwater remediation fee to property specifically covered by a current national pollutant discharge elimination system Phase I municipal separate storm sewer system permit or industrial stormwater permit held by the State or a unit of State government.").

[15] *See* State Planning Land Use Guide, attached to the County's MS4 permit.

surface calculation the land area of properties with NPDES permits under the State's general NPDES permit. Yet, the County has been using a stormwater remediation fee that does not give any meaningful credits to properties that have such "controlled impervious surfaces." The result is that Montgomery County likely did not deduct the impervious surface area of properties that are exempt from stormwater management because they are regulated elsewhere under State law. It has likely only deducted the impervious area of Agricultural Property under DEP's interpretation. This means that the County may have reported to the State an artificially high impervious surface calculation of which it was required to "restore" 20 percent. The County likely also neglected to deduct all properties that had their own NPDES permit or a permit under the State's General NPDES permit. This further erroneously increases the area of impervious surfaces reported to Maryland Department of the Environment (MDE). Thus, **Montgomery County could have met its true MS4 requirement prior to December 31, 2018.** In fact, it may have met its requirement within the actual time allotted by the State under the MS4 permit. If this is the case, Montgomery County may not have been required to enter a consent decree which cost county taxpayers an addition $300,000.00 over and above the WQPC, interest payment on bonds, and any additional sources of funds that are attributable to the taxation of citizens, property owners and businesses necessary to meet its MS4 requirements.

The Council staff's transmittal Memorandum inaccurately states (likely due to misinformation from DEP) that "multiple litigants are seeking credits for measures which do not treat stormwater runoff and which were not contemplated by the County to be eligible for credits under the current program." **Battley/Lindbergh Park and Porto are the only litigants fighting for WQPC credits for the stormwater they treat. The proposed regulation is designed to end run the two court cases and WQPC credits that Battley/Lindbergh Park and Porto have been litigating against the County to preserve for more than five years.** The Maryland Tax Court determined, based on expert engineer testimony and evidence, that these 33 property owners indeed fully treat their stormwater to the maximum extent practicable, as required by the WQPC statute.

Maryland is the only state that charges a stormwater remediation fee as an excise tax. The County Attorney warned the Council that charging the stormwater remediation fee as an excise tax was likely to draw litigation and recommended the stormwater fee be issued as a property tax.[16] Property taxes have to be equally assessed and are based on property value, under the Maryland Constitution. Fees are based on services provided. **Montgomery County's WQPC is not reasonably related to actual contribution to stormwater pollution, as required by the State's environmental mandate and the federal Clean Water Act.**

Under the State environmental legislation passed pursuant to the federal Clean Water Act, the stormwater remediation fee was supposed to bear some relation to the stormwater services provided by the Counties to the property owners. **No other State has implemented their stormwater remediation fees (all of which emanate from the federal Clean Water Act) an excise tax because they are not excise taxes.**[17] Prince Georges, Anne Arundel and Howard

[16] Memorandum to Isiah Leggett from the County Attorney, dated June 1, 2001, Re: Stormwater Management Charges (copy available on request).

[17] Impervious surfaces, like buildings and driveways, are improvements to land. And excise taxes are "not directly imposed on property," MCC § 52-2l(a)(l)a, unlike the WQPC, which is imposed on the property, *i.e.*,

Counties all implemented the charge as a fee. Other jurisdictions make the stormwater remediation fee part of the property tax. **The County seeks to tax people who already put impervious surface on their property. It is illegal to retroactively tax a vested right.** This is likely why no other state has stormwater remediation charges as excise taxes.[18] The County implemented the WQPC as an excise tax because the *Chod* case[19] required the fee to bear relation to services provided by the County, and a property tax would have to be based on the value of the property or be deemed unconstitutional under the Maryland Constitution. The County's WQPC does neither. **It is an invalid excise tax.**

Montgomery County's WQPC was deemed invalid by the Circuit Court in 2015, in the *Chod* case, because it did not properly bear relation to stormwater services the County provided the taxpayers, **as required by State law.[20]** The County amended the WQPC in an emergency bill, designating it an excise tax. **Excise taxes, however, cannot be retroactively applied to vested rights, such as the impervious property Porto and Lindbergh Park already had on its property at the time the excise tax was promulgated.** Impervious surfaces that the County is taxing via the WQPC already has been taxed via property taxes. Assuming that the WQPC is an excise tax,[21] it was invalidly assessed on impervious surface that predated the promulgation of the WQPC as an excise tax.[22] **And, from an equity standpoint, the WQPC bears no relation to services the County provides Porto, which the Circuit Court deemed invalid in the *Chod* case under the State authorizing statute.**

Montgomery County should return to utilizing the more equitable storm drain tax assessment on the real property tax schedule instead of continuing to consider the WQPC an excise tax on the "privilege of maintaining impervious surfaces on one's property." The County was collecting a Storm Drain tax on property until the 2017 tax year, including an overlap for all years that the County collected a WQPC.[23] The Council's emergency legislation that deprived its citizens of real property rights and that contains multiple additional defects currently is being challenged in court.[24]

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the impervious surface property of the taxpayer. *See* Md. Code, Tax-Property § 1-101(gg)(l) ("'Real property' means any land or improvements to land.").

[18] https://www.nacwa.org/docs/default-source/news-publications/White-Papers/2016-11-04stormwaterwhitepaper.pdf.

[19] In *Paul N. Chod v. Board of Appeals for Montgomery County* (Civil No. 398704-V, entered July 23, 2015) the Circuit Court for Montgomery County opined that the County's Water Quality Protection Charge "is invalid per se because this charge need not reasonably relate to the stormwater management services provided by the County."

[20] See footnotes 2-4.

[21] The WQPC is not a validly enacted excise tax. The WQPC is an unconstitutional property tax because it is not uniformly applied, or an invalid fee because it does not bear relation to services provided by the County. Maryland Constitution, Art. 15; Md. Code, Env. § 4-204.

[22] This issue with respect to the WQPC has yet to be decided by the courts, and is on appeal in the Porto case.

[23] Montgomery County still has a Storm Drain Tax on its property Tax Rate Schedule for 2018 that was not reduced to zero until the 2017 tax year, evidencing that Montgomery County as late as 2016 was utilizing property tax funds for stormwater water related issues. There is no record in the legislative history where this substantial change in Montgomery County taxing law was debated in any public hearing.

[24] The Montgomery County Circuit Court will decide in the Porto case whether a tax for the right to maintain impervious surfaces on one's property is actually a property tax because it encroaches so greatly on land use law and established property rights; it is collected as a property tax with the same penalties for lack of payment, including loss of property at tax sale; it acts as a property tax in that it is not assessed on a durable good like gasoline or for evidencing the sale of a car, boat or real property with the State, but on impervious surfaces which are generally

The County is unreasonably and unjustly assessing the WQPC. Montgomery County zoning laws, including masterplans, zoning classifications, zoning variances, grandfathering, setback requirements, density, site plan approval, the requirements of greenspace and parking requirements in non-urban areas, which differ for urban development and redevelopment in areas of Bethesda, Wheaton, Silver Spring, Gaithersburg and Rockville, so distort each broad class of land use, as utilized by the County, that properties within the same use classification are treated differently within the class. Property owners and residents in urban cores are essentially "free riders" with regard to the WQPC. Montgomery County zoning regulations on setbacks, height restrictions, density, lot coverages allowances, and public investments in garages, real estate development, tax deals to keep business in or attract businesses to the county have all primarily benefitted property owners in the urban cores of our County, making their property value per acre the highest in the County.[25] The County also leases and or sells property for high density development and requires forest conservation for virtually all development outside the urban core, yet gives no WQPC credit for greenspace or forested areas. A property owner in the urban core can build a 17-story buildings with zero setbacks on a postage stamp-sized lot and is only responsible for the stormwater runoff on their postage stamp-sized lot even though they are associated with parts of the County that have no real shot at any meaningful stormwater restoration of all or even a portion of the streets, sidewalks, public parking lots, etc., in the urban cores of the County.

The County used an inequitable approach to determine a way for property owners to pay their "fair share." The County taxes property owners for the privilege of having roads, driveway, and walkways for property owners to cross their property. The County severely restricted Montgomery County citizens' rights by the County Council's passage of emergency legislation reclassifying the WQPC as a retroactive excise tax for any property owner's impervious surfaces.[26] Montgomery County has shifted the burden of this tax onto property owners that are not in the urban core. By so doing, it gave one of the largest tax breaks to the wealthiest property owners, as it relates to land value per acre and improvement value, while punishing property owners in less dense zones throughout the County. Zones where vital commercial, industrial, and extractive uses are located and where residential property owners have already been saddled with less dense zones with larger setbacks have not been accounted for in assessing the WQPC. Montgomery County has abandoned years of zoning, land use law, variances and grandfathering by ignoring the disparity zoning created between like property owners as it relates to taxing impervious surfaces.

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improvements to real property; it is not taxed on an actual quantity of a durable good or even the actual quantity of stormwater (or actual quantity of a pollutant in the stormwater) that runs over impervious surfaces and enters Montgomery County Stormwater Facilities, but rather the area of improvements to real property or compressed soil and gravel, taxing a property owner's right to passage across their property by foot, carriage or automobile.

[25] Montgomery County's investment in urban areas, including public parking garages and other public investments, such as sale or lease of Montgomery County land in urban areas for high density development, tax benefits and other incentives for corporations who locate or remain in the County, where little if any stormwater management is in place, so distort each broad class of land use, as utilized by the County, that properties within the same use classification are treated differently within the class to the point that Montgomery County is unreasonably and unjustly assessing the WQPC.

[26] To save the WQPC, the County passed this emergency legislation following a successful court challenge to the validity of the WQPC. *Chod v. Board of Appeals for Montgomery County*, Circuit Court Civ. Action No. 398704-V (July 22, 2015 Order).

It is an oversimplification to lump all "non-residential' properties together when attempting to tax impervious surfaces on various different properties with different uses, zoning, and different permitting, licensing and regulating schemes as an excise tax, as it would be for not considering zoning classifications in residential zones. All non-agricultural property, as determined by DEP, that was previously developed in the County should be able to go through a variance process if the WQPC is going to remain an excise tax rather than a property tax, as these properties are not only grandfathered in, but there are valid reasons why "restoration of impervious surface may not be practicable." In cases where there is a preexisting residential portion on Agricultural Property, a variance process should also be available. **DEP bases their WQPC calculations on aerial photos taken every three years. If vehicles happen to be parked on a part of the quarry land on that day, the land underneath the vehicles is deemed impervious by DEP and taxed, under the current system. On a continually developed property like a quarry/mine, this does not make sense.**

Returning to the storm drain tax on the property tax schedule, which is based on land and improvement assessed value, would solve the inequities and unintended consequences of the emergency legislation that determined that the WQPC was an excise tax for the privilege of maintaining impervious surfaces on one's property. The emergency legislation impaired County property owners' right to maintain impervious surfaces on their property. **If the County were to implement a storm drain tax rate, to raise the same amount of revenue, that was the same across all properties, as property taxes are required to be, most residential property owners would actually have a reduction in the WQPC as it relates to paying for the costs associated with meeting the County's MS4 permit requirements. Even if this were not the case, it would eliminate the punitive taxation of properties outside the urban cores of the County and the unconstitutional disparate treatment of properties within the same use class.**

The WQPC as enacted by Montgomery County was a major shift in that the majority of the taxing burden was moved away from property owners with the highest appraised value properties and improvements (the urban cores of our County) to everyone else, giving those property owners a free ride as it relates to stormwater remediation in Montgomery County. Returning to a property tax also would remove the unfortunate taxation of religious institutions that the WQPC allows. **Properties of these type are exempt from property taxation, but not this tax that was reclassified by emergency legislation into an excise tax.**

The Council also should consider the economic impact of the WQPC and this particular proposed regulation on businesses in the County, as required by State law. Maryland natural resources law requires a balance between economic development and a healthful environment.[27] **It is hard to believe that the Council meant to treat property owners whose stormwater does not tax the County's system the same way or worse than property owners that do absolutely nothing to control their stormwater. DEP's actions in denying credits to the Lindbergh Park property owners and Porto, and trying to bolster the law against credits to**

[27] Md. Code, Nat. Resources § 1-302(f).

these businesses who are trying to do the right thing is contrary to State law and common sense.[28]

The County is seeking to deny WQPC credits to environmental citizens who took all reasonable steps to treat their stormwater by stealthily proposing "clarifying" language to stymie these property owners' attempts to protect their WQPC credits. They did not inform the litigants of this surreptitious effort because it is wrong. There is no reasonable relation to any possible stormwater pollution by Lindbergh Park property owners or what is practicable for Porto's extractive use because these citizens actually treat their stormwater, while other property owners do nothing at all to treat their stormwater. The WQPC credits were designed to incentivize property owners to treat their own stormwater and these property owners do exactly that. **If the County truly wants to incentivize its property owners to provide stormwater management, like Lindbergh Park and Porto do, it is killing that incentive via maneuvers like this.** Taxpayer funds would be better spent going after people who are attempting to evade taxes or who do nothing to treat their stormwater to the maximum extent practicable for the type of property they own. **This regulation is wrong, it is aimed at the only two pending WQPC cases, and it is a backhanded attempt to take WQPC credits away from property owners who were incentivized to treat their own stormwater and do the environmentally right thing.**

We urge you to reject proposed Executive Regulation 18-21 as antithetical to the purpose of the WQPC credit program. These property owners did exactly what the WQPC credit program was designed to incentivize, hiring engineers to help them design effective stormwater management systems, and the regulation is aimed at preventing them from obtaining WQPC credits. Thank you.

28 Moreover, the County recommended that Porto's quarry and property be considered an Area of Critical Concern in recognition of its uniqueness and importance to Montgomery County. 1977 MNCPPC Critical Area Recommendation. The County adopted the Recommendation through Resolution 8-1261 (1977). See Ruth Hepner, Bridge Halted Halfway Because of Rare Mica-Schist - Quarry Has County in a Quandary," Montgomery County Journal (March 7, 1980). The County has the opportunity to live up to its resolution by doing the fair and equitable thing and not simply hammer another nail in the coffin of the last remaining minor quarry in the County, which supports the masonry and hardscape industries which, in turn, helps the people it employs, and their families, many of whom are first generation immigrants.

Written Testimony to the Montgomery County Council

Regarding Proposed Executive Regulation 18-21,
Water Quality Protection Charge, Definition of Treatment

By Brian Porto, County Resident, Business and Property Owner

County Council Building, Rockville, Maryland, Third Floor Hearing Room

April 26, 2022

Dear Members of the County Council:

As a long-time Montgomery County resident, property owner and business owner, I vehemently oppose proposed Executive Regulation 18-21, a purported clarification to the definition of "treatment" under the Water Quality Protection Charge ("WQPC") statute and regulation. This proposed regulation is misguided and directly targets my businesses, Ben Porto & Son LTD, and Tri-State Stone & Building Supply Inc. (referred to herein jointly as "Porto"), as well as those of 32 other property owners who successfully challenged in the Maryland Tax Court the County's denial of WQPC credits. It also puts these 33 property owners' WQPC credits for tax years beyond those in the appeal (for Porto, that would be for tax years 2019 to 2021) in jeopardy, because the County has agreed to stay its decision on these tax years' WQPC credits, pending the resolution of the appeal involving tax years 2016 to 2018. Based on our engineer's testimony and evidence, the Maryland Tax Court ruled that Porto fully treated its stormwater to the maximum extent practicable and granted Porto 100% WQPC credits for tax years 2016, 2017 and 2018. The regulation also will affect future WQPC credits for Porto and other property owners who treat their own stormwater, as the WQPC credit program was designed to incentivize.

According to the Council Staff Report, dated March 15, 2022:

- The regulation is intended to clarify the terms stormwater "treatment" and "treat" as they are currently utilized by the Department of Environmental Protection in determining the eligibility of properties for Water Quality Protection Charge credits.
- The Executive transmittal states that this regulation is needed to eliminate confusion over which properties may qualify for credits given that litigants are seeking credits for measures which do not treat stormwater runoff, and which were not contemplated by the County to be eligible for credits under the current program.
- At the T&E Committee worksession, Council Staff recommended approval of the regulation since it clarifies existing practice by DEP. Regarding concerns raised more generally about the Water Quality Protection Charge and credits, Council Staff suggested that the T&E Committee schedule a more general discussion of the issue at a later date.

• After the T&E Committee worksession… and a letter from the Pels Law Firm, LLC (which represents two litigants) opposing the regulation…. Council staff has confirmed that the regulation applies prospectively and will not affect pending litigation.

All of the underlined statements are inaccurate.

Porto has been battling with the County for seven years to obtain an exemption and appropriate credits. At the Maryland Tax Court trial last March, the chief judge found persuasive Porto's expert engineer's uncontroverted testimony that **all of Porto's stormwater is treated** and that its stormwater management measures are to the maximum extent practicable. The engineer and his firm worked with Porto for years helping them design their effective stormwater management system. The enormous excavated quarry pit with two wet ponds, swales, culverts, berms, filtered traps and areas that act like dry ponds and wet ponds all comprise Porto's stormwater management system, pursuant to the statutory definitions and in compliance with the federal Clean Water Act. Porto's large berm was built to prevent flooding and erosion. Porto's expert also explained the Porto property's treatment of stormwater from 17-square miles of upstream land, in addition to its own. Our engineer also testified about Porto's treatment of stormwater from offsite adjacent properties. The large berm Porto constructed also reduces accelerated stream channel erosion. Porto uses Environmental Site Design measures on their property, as well. The expert described Porto's Sediment Control Permit requirements that constituted stormwater management and how compliance was confirmed and extensively regulated by the State. This extensive regulation by the State actually preempts County law against measures, like the WQPC, that attempt to regulate mines like Porto's. The insanity of Porto's seven-year long litigation demonstrates why the State held the stormwater runoff of mines for their own oversight and did not allow Counties to regulate mines. Montgomery County is attempting an end run around the State's extensive oversight of mines like Porto's.

Because Porto treats its own stormwater, the County does not provide measurable stormwater services to Porto. Most other municipalities tie their stormwater management fees to the amount of stormwater services provided to the entity being charged. The *Chod* case[1] in 2015 caused the County to repromulgate the WQPC as an "excise tax," because the Montgomery County Circuit Court ruled that the County was violating the State enabling statute mandating that stormwater fees had to be connected to stormwater services provided by the County. The County's excise tax, however, violates the Maryland Constitution in attempting to tax a vested right, *i.e.*, impervious surface that was already in place as part of the properties and was already taxed via the property tax. We are appealing this illegality. The WQPC is not currently being implemented in a manner that reasonably relates to a property owner's contribution to stormwater pollution.

Few Montgomery County property owners are likely aware of their ability to obtain WQPC credits, or many perceive that credits are too difficult to get. Credits are being made even more difficult to obtain via this proposed regulation. Few property owners have the resources or stamina to battle the County when their rights to such credits are denied, or know

[1] In *Paul N. Chod v. Board of Appeals for Montgomery County* (Civil No. 398704-V, entered July 23, 2015) the Circuit Court for Montgomery County opined that the Water Quality Protection Charge "is invalid per se because this charge need not reasonably relate to the stormwater management services provided by the County."

that NPDES[2] holders, like Porto, are technically exempt from the WQPC. The County continues to fight Porto in Porto's attempt to get the County to recognize the exemption.

I assume that DEP is attempting to stave off property owners' ability to receive WQPC credits in fear that an avalanche of property owners will seek credits if the County is unsuccessful at overturning Porto's and another case (discussed below) on appeal. If a property owner can prove to the Maryland Tax Court that it is treating its stormwater to the maximum extent practicable, shouldn't it receive WQPC credit? The Council put the WQPC credit program in place to incentivize property owners to treat their own stormwater. DEP is attempting to close off that ability in all but the smallest amounts, for things like rain barrels and rain gardens for which property owners can receive a small credit.

The attitude of DEP in denying property owners credits was on display at the Transportation & Environment Committee's February 18, 2022 hearing proposed Executive Regulation 18-21. The DEP Deputy Director commented at the hearing that they hoped "to win" any litigation. Councilmember Hucker rightly stated that the hope is to avoid any litigation, and that all of the stakeholders should have been notified of the hearing and the regulation. We were not notified, and our attorneys were able to bring that to the attention of the Council before the vote was taken at the full Council level. The DEP Deputy Director's comment exhibits a mentality of manipulating the system and outspending and outlasting Montgomery County businesses who attempt to follow the law, be good environmental citizens, and enforce their rights in court. In fact, DEP is wasting thousands of taxpayer dollars fighting 33 Montgomery County non-residential property owners who won in the Maryland Tax Court in seeking to obtain WQPC credits duly owed them. Such funds could be better spent on actually cleaning up the environment.

Porto was found by the Maryland Tax Court to be deserving of 100% WQPC credits. One reason for the Court's ruling was the measures Porto has in place to prevent erosion and provide for sediment control, which are highly regulated by the State. The proposed regulation has language to specifically prevent "measures used to prevent erosion and provide for sediment control" from being considered in granting WQPC credits. If DEP fears that any entity with a Sediment Control Permit might seek WQPC credits, that fear is unfounded. Perhaps the County could include "unless the property is under a current Sediment Control Permit and an NPDES permit or permit under the State's General NPDES Permit." There are very few properties, like Porto's quarry, that have both. Porto is exempt from the WQPC because it is under the State's NPDES permit. The WQPC Program Manager admitted during her deposition in the Porto case that she did not know what an NPDES was at the time she decided Porto did not deserve an exemption. DEP has forced Porto into a ridiculous legal odyssey in which DEP ignored that the County Code and the County's NPDES MS 4 requires DEP to follow the exemptions in its stormwater management law, and not ignore them when determining credits. The County followed the exemption law for agricultural entities, but not for mines, in denying an exemption for Porto.

The proposed regulation seeks to further tie all WQPC credits to the 2000 Maryland Stormwater Design Manual's requirements, which cannot possibly be applied to an ever

[2] Maryland's National Pollutant Discharge Elimination System ("NPDES").

changing quarry property. Porto's permitted mine is exempt from the stormwater management section of the County Code. DEP continues to ignore this fact. Porto has the permit referenced in the Design Manual. As part of that permit, among other things, Porto, like the only other existing mine in the County, is required to have a Pollution Protection Plan. The County does not recognize Porto's entire system, which includes meeting the requirements of all of its permits and licenses. A mine is a continually changing property that cannot fit within the strictures of the Design Manual because the Design Manual is for completed construction, not forever-changing properties. That is why mines are exempt from the stormwater management section of the Code. You cannot put a square peg into a round hole. The State recognizes this, yet the County has forced the last remaining minor quarry in the County to undergo years of litigation to enforce their rights. And it is still not over. If the County loses the appeal in the Montgomery County Circuit Court, it is likely to appeal to the Maryland Court of Special Appeals. Yet Porto's property continues to comply with the Clean Water Act, which is ensured with each Maryland State inspection it passes (the last of which was in March).

Moreover, private property and business owners have been grossly over-charged in the County's attempt to meet its MS4[3] permit mandates, even though, had the County correctly calculated the requirements, the County could have demonstrated to the State that the permit requirements had already been exceeded. And the County could have used Porto's enormous quarry pit, and 22 acres of land permitted as a mine, towards meeting their MS4 permit mandates. The DEP refuses to do so, likely because they would have to willingly grant Porto an exemption or credits.

I also urge the County to reduce the WQPC rate for extractive use properties that already are permitted and licensed by the State, and for the additional compelling reasons set forth below and in my previous testimony. In fact, in light of the financial stress the Coronavirus pandemic has wreaked upon our County's residents and businesses, rising inflation and mortgage rates, I suggest the County not charge, and consider abolishing, the poorly implemented WQPC, and use general fund dollars to meet its MS4 permit funding requirements.

I continue to bring to the County's attention the serious flaws with the WQPC, which has exponentially increased since its inception. My business' WQPC has increased more than 10,000%. The health of the environment is important to me and my family, but so is a healthy economy. Montgomery County's economy and private sector job growth has been anemic for some time. More and more businesses have been, and will continue to be, pushed to other jurisdictions, at the expense of all tax-paying County residents, because of the fees and taxes associated with the County's overzealous environmental program, including both the WQPC and the Solid Waste Charge and the myriad of items that the County has allowed those funds to be used for rather than using general fund dollars (therefore almost continually increasing charges to County property owners), and the County's pervasive penchant for continually raising taxes and fees in general rather than making tough and prudent decisions to allow the County to flourish economically.

[3] NPDES Municipal Separate Storm Sewer System ("MS4") Permits, issued by the Maryland Department of the Environment.

The County's WQPC scheme exempts County, State and Federally-owned roads and property from the payment equation, making private property owners responsible for paying the cost of restoring the required 20% impervious surfaces total in the County, including the exempt properties, so that the County could meet its last MS4 Permit mandates. The County has met its 20% goal, but at a staggering cost to private property owners. The Permit was administratively extended, yet the County continued its blistering pace to continue restoring impervious surfaces under the guise that the next permit would have an additional 5% restoration requirement on the remaining total of impervious surfaces. I say blistering because the County has publicly admitted that it accepted a very aggressive MS4 permit from the State; Montgomery County was also the first Maryland jurisdiction to reach the restoration goal set in any State permit. The State of Maryland, itself, is far ahead of neighboring Pennsylvania in its NPDES efforts. Further, the County did not separate out State and Federal roads and property, or any property that has its own NPDES permit or permit under the State's general NPDES permit from its calculation in determining impervious surfaces covered in its own permit. This has caused properties with their own permits to be double-counted in the WQPC scheme and Montgomery County property owners holding the bag to pay for an inflated impervious surface calculation number for not only these permitted properties but also all State and Federal roads and property. Montgomery County may have already met the additional 5% restoration goal in its current permit if the impervious surface numbers are calculated correctly and submitted to the State. It should also seek a credit under its existing permit to determine what the original 20% restoration goal should have been if State and Federal roads and property and property with other NPDES type properties are excluded. Montgomery County would be far ahead of the 20% for which it was actually responsible, meaning the next 5% in its current permit would be based on a much smaller number as well. These permits are novel and it is patently unjust to Montgomery County property owners, Maryland citizens and the country for Montgomery County and the State of Maryland not to get this right before moving on to the next generation permit. This is a program under the Federal Clean Water Act, and the County has touted its novel WQPC around the country causing other States and jurisdictions to adopt models similar to Montgomery County (though no other jurisdiction but Maryland appears to employ the fiction of an excise tax to collect its stormwater management fee, which we are appealing because it is illegal to tax a vested right in this manner).

In addition, the County charges property owners whose property is located in a development with stormwater management systems treating their stormwater that are not physically located on the property owners' property the full charge. This means that, even though the property is actually "restored" to the State's standard because the stormwater is treated before it can reach waters of the State or the County's stormwater system, if it can at all, the County does not count it and it charges the property owner as though they have no stormwater management.

In *Battley, et. al v. Montgomery County*, the Maryland Tax Court also ruled that these 32 Lindbergh Park property owners all deserved maximum WQPC credits for fully treating their stormwater. The entire development was designed so that all of its stormwater flowed into one of three stormwater ponds in the development, yet the DEP steadfastly denied all but five property owners any credit because the actual stormwater pond was not physically located on 27 of the development's property owners' parcels. This is absurd, as Judge Rubin of the

Montgomery County Circuit Court pointed out in the case, before the County changed the appeals rules and the property owners had to refile their case with the Finance Department. And the County attempted to sneak Executive Regulation 18-21 through the Council without letting Porto or these Lindbergh Park property owners know what they were doing.

Montgomery County also has set a WQPC rate for agriculture at zero, and rightfully so, because agriculture is exempt from County stormwater management and sediment control because the State retained control over the stormwater runoff regulation of this type of property. The same is true for the last two remaining extractive use properties currently operating in the County under State permits and licenses, as it relates to their exemption from County sediment control and stormwater management, because these permitted and licensed properties are also regulated by the State and not the County. Both extractive use properties are required either to have their own NPDES Permit or 15mm Permit under the State's General NPDES Permit. Only certain agricultural properties are required to have NPDES Permits or permits under the State's General NPDES Permit, yet all agriculture properties get the benefit of the exemption from County regulation from both County and State law and regulation with a rate of zero. Thus, extractive use properties under permit and license from the State, like Porto, similarly should have a rate of zero. The County has misclassified mineral extractive uses, contravening its MS4 permit.[4] Properties exempt from County stormwater regulation and properties with their own NPDES permit should be excluded from the impervious surface calculation the County uses for its MS4 Permit and they should have a rate of zero because their stormwater runoff control is regulated and inspected by the State not the County and extractive uses pay license and permit fees to the State directly, which includes payment for permits for stormwater runoff. Adding mines (extractive properties) to the list of agriculture properties that are exempt would only add two properties to the list.

The County also has failed to provide legitimate justification for not using any general fund dollars to cover stormwater management costs for public infrastructure much less a portion, if not all, of the stormwater costs associated with private property as well. Property owners pay property taxes, and improvements to real property (impervious surfaces) are assessed and taxed. It is not just property owners who benefit from the investments in public infrastructure, including stormwater management restoration, street sweeping, litter control, etc. All residents, employers, employees (including government employees), and customers to County businesses and the local government itself benefit. So why wouldn't general tax revenue from income tax be used for all or a portion of stormwater program expenses and solid waste expenses in the County?

Another distressing part of the WQPC as enacted and implemented is the County's misunderstanding of the privilege of maintaining impervious surfaces on one's property. In the State of Maryland, real property is land and improvements to land. Therefore, once an improvement to land is installed, assessed and taxed, the right to maintain impervious surfaces on one's property is granted by paying property tax. There are pending court cases against Montgomery County involving the fight for the property rights of all Montgomery County property owners. Montgomery County has trampled on private property rights and may have violated the "private property" section of its MS4 Permit in the process.

[4] *See* State Planning Land Use Guide, attached to the County's MS4 permit.

The inequity of the County's use of such a small Equivalent Residential Unit ("ERU"), the County's determination of the average impervious surface on property in the County, which is used to calculate other properties' WQPC), regardless of zoning or property use, especially if a non-residential property has its own NPDES Permit or a permit under the State's General NPDES permit is another problem with the WQPC. Properties outside of the urban cores of the County have larger setback requirements and are restricted to heights of 2.5 stories for most residential zoning categories. Zoning in and of itself has created a system whereby property owners must have longer driveways and larger footprint houses in order to maximize the economic development potential of their property. This means properties in Olney, Burtonsville, and other farther out suburbs and rural, non-agricultural property are penalized under the WQPC.

The non-urban core sections of Silver Spring, Wheaton, Rockville, Bethesda, White Flint and Chevy Chase are also unjustly penalized by the current WQPC structure. The urban cores of Bethesda, are able to develop in many cases to zero lot lines and multi-story, multi-unit properties. These urban cores have the least amount of greenspace and therefore no legitimate opportunities for "restoration," yet they have the highest public investments in transportation and other infrastructure. Green roofs have not been perfected to not cause additional sediment pollution into the sewer system and nitrogen and phosphorus can still be found in runoff due to fertilizing the green roofs. County's increased investments in public infrastructure at a higher rate than outside of the urban cores and the County's allowance of higher density within the urban cores has exponentially increased the value of land per acre, making it far exceed the value per acre outside of the urban cores of the County. So you have the most polluted areas of the County paying the least for stormwater management restoration even though these property owners, renters, employers, employees (including government employees) benefit the most from the totality of public infrastructure investment. Adding insult to injury, the County even ignores the amount of greenspace a property outside of the urban cores, giving no credit, and it taxes private roads on properties outside of the urban cores, creating even more inequities. Not all real property is equal, yet the County did not allow for a variance process from all or a portion of the WQPC, except for showing economic need. The restoration of impervious surfaces would be accomplished more fairly if it were not viewed through such a myopic lens. The funding should come primarily from income tax revenue and a smaller portion should be based on assessed value of property, as it was done in the past with the storm drain tax on property tax bills.[5]

I would also like to point out that religious institutions of all faiths have been harmed by the WQPC being assessed on their real property. Many continue to find this extremely repugnant.

The WQPC is just the tip of the iceberg. The anemic economic and private sector job growth described occurred long before the economic devastation that appears to be happening in our County from the COVID-19 outbreak. The County needs to check itself at this time and not continue down a path of increased fees and taxes and an overzealous environmental program. The County's entire environmental program should be reviewed, including the Solid Waste Charge. The County should do the comprehensive review, attempting to find the statutorily-mandated "optimum balance between economic development and environmental quality." MD

[5] That tax was being charged at a rate greater than zero on at least some property tax bills until 2017, thereby indicating that property owners where being charged doubly for stormwater-related issues.

Code, Natural Resources, § 1-302(f) ("The determination of an optimum balance between economic development and environmental quality requires the most thoughtful consideration of ecological, economic, developmental, recreational, historic, architectural, aesthetic, and other values." Legislative findings, policies relating to protection, preservation, and enhancement of environment). The County also appears to have ignored, in the same subtitle, "Interpretation of policies, rules, regulations, and public laws": "The policies, rules, regulations, and public laws of the State shall be interpreted and administered in accordance with the policies set forth in this subtitle." MD Code, Natural Resources, § 1-302(k). Just by Montgomery County issuing a "climate emergency," does not allow the County to ignore State law and the requirements of its State permits. It is as if the County decided that because it declared a "climate emergency," it can pick and choose the State laws and permit requirements it must follow and those that it can ignore. There is very little, if any, evidence of the T&E Committee or the County's Department of Environmental Protection's testimony in front of the T&E Committee, showing any attempt to follow the strictures of the Maryland Natural Resources Code.

Therefore, regarding the County Executive's and DEP's request to further penalize property owners who treat their own stormwater, I strongly urge you to reject proposed Executive Regulation 18-21. I urge you to consider garnering funds necessary for the stormwater program and MS4 permit obligations from general fund dollars, including income tax revenue and a portion of property tax revenue rather than continue the inequitable and illegal WQPC.

Everyone wants a healthful environment, but it must be balanced with a healthy economy. Montgomery County has let the pendulum swing too far to one side and in doing so it appears to have violated State Natural Resources law and its MS4 permit. It is clear to many, not just me, that the WQPC and Solid Waste Charges alone, with no general fund dollars going to finance Montgomery County's version of the "Green New Deal" has not only been detrimental to the local economy, but it has made many in the County lose confidence in the objectiveness of the Council and its ability to effectively run our local government. County residents voted limitations on the Council's ability to raise property taxes and they voted in term limits. Yet many County residents still are unaware of the accounting games the County is playing, the unrestricted ability the County has retained to raise charges outside of property taxes, what it plans to fund with them, and how quickly.

Many, but not all, of the County's strategies for attempting to better the environment are sound. The County has changed the WQPC several times, under the guise of clarification, during the pendency of Porto's litigation against the unjust and illegal implementation of the WQPC.

Proposed Executive Regulation 18-21's misguided attempt to penalize business owners like me who actually treat their stormwater to the maximum extent practicable, as well as the County's choice to ignore the health of the County economy in pursuit of its environmental goals, has created a situation that is driving businesses out of Montgomery County. Porto, the last remaining minor quarry in the County, for one, is being taxed and regulated so much that ultimately, it will become economically unfeasible to continue to do business here, which is in direct conflict with the County's resolution naming our minor quarry an Area of Critical Concern

worthy of special protections. Moreover, if Porto leaves, the masonry and hardscaping industries in the County will be negatively impacted, the carbon footprint caused by people in those industries who will have to travel to different jurisdictions to meet the hole in supply that would be left if Porto leaves the County will be increased, and County, State, and Federal governments will lose their ability to have historic matches for the rare stone provided by Porto and used for generations in the Washington metropolitan area. Porto is the last local source of building stone in the County. When Porto leaves the County, the County will have made the lives of hardworking County residents in the hardscaping and masonry industries harder. Many of those affected are first generation immigrants to this country, a group the County government purports to want to help.

Thank you.

Sincerely,

Brian Porto
5900 Landon Lane
Bethesda, MD 20817