



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

AGENDA ITEM #5N  
March 15, 2022  
**Action**

## SUBJECT

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

## DESCRIPTION/ISSUE

- On January 21, the Council received Executive Regulation 18-21 – Water Quality Protection Charge, Definition of Treatment
- 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, Council Staff received comments from the Stormwater Partners Network supportive of the regulation and a letter from the Pels Law Firm, LLC (which represents two litigants) opposing the regulation. This information was shared with T&E Committee member offices. Council staff has confirmed that the regulation applies prospectively and will not affect pending litigation.

## T&E COMMITTEE RECOMMENDATION

- The T&E Committee met on February 18, 2022 and recommended approval of Regulation 18-21.

### This report contains:

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Draft Approval Resolution	©A
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Comments from the Stormwater Partners Network	©26
Letter from the Pels Law Firm LLC	©27-35

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Resolution No.: \_\_\_\_\_  
Introduced: \_\_\_\_\_  
Adopted: \_\_\_\_\_

**COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND**

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By: County Council

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**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.

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Selena Mendy Singleton, Esq.  
Clerk of the Council

## MEMORANDUM

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)<sup>1</sup> 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

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<sup>1</sup> 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 I 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 *Marc Elrich*

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 Water Quality Protection Charge	Number 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 Reddie 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.



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### 19.35.01.01 General Provisions

A. Authority. In accordance with the authority conferred under Chapter 19, Section 19-35, of the Montgomery County Code, 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.





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

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

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



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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.



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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.



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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.



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(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



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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**



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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



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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





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

Approved as to form and legality:

A handwritten signature in black ink, appearing to read "J. Ogorzalek", written over a horizontal line.

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 Water Quality Protection Charge	Number 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.



# MONTGOMERY COUNTY EXECUTIVE REGULATION

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

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

### 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.



# MONTGOMERY COUNTY EXECUTIVE REGULATION

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

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

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



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

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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.



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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.



# MONTGOMERY COUNTY EXECUTIVE REGULATION

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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.





# MONTGOMERY COUNTY EXECUTIVE REGULATION

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(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



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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



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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



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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



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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

11/21/2012

Date



# MONTGOMERY COUNTY EXECUTIVE REGULATION

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

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

Approved as to form and legality:

A handwritten signature in black ink, appearing to read "J. Ogorzalek", written over a horizontal line.

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*  
[jbaha@rockcreekconservancy.org](mailto:jbaha@rockcreekconservancy.org)  
301-579-3105



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**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.<sup>1</sup> 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.<sup>2</sup> 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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<sup>1</sup> *Battley, et al., v. Montgomery County*, Maryland Tax Court Case No. 19-MI-OO-0429.

<sup>2</sup> 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.<sup>3</sup>

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**,<sup>4</sup> 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.<sup>5</sup> 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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<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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,<sup>6</sup> 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,<sup>7</sup> 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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<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> The County designated the WQPC as an excise tax because another taxpayer successfully challenged the rain tax in the *Chod* case,<sup>10</sup> 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.**<sup>11</sup>

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,<sup>12</sup> 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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<sup>8</sup> Impervious surfaces, like buildings and driveways, are improvements to land. And excise taxes are "not directly imposed on property," MCC § 52-21(a)(1)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)(1) ("Real property" means any land or improvements to land.).

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

<sup>10</sup> 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.”

<sup>11</sup> “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.

<sup>12</sup> *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,<sup>13</sup> it was invalidly assessed on impervious surface that predated the promulgation of the WQPC as an excise tax.<sup>14</sup> 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.<sup>15</sup> **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.**<sup>16</sup>

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.<sup>17</sup>

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<sup>13</sup> 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.

<sup>14</sup> This issue with respect to the WQPC has yet to be decided by the courts.

<sup>15</sup> Md. Code, Nat. Resources § 1-302(f).

<sup>16</sup> 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.

<sup>17</sup> 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.

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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.