



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

**MEMORANDUM**

December 13, 1999

TO: James Caldwell, Director  
Department of Environmental Protection

VIA: Marc Hansen, Chief *Marc Hansen*  
General Counsel Division

FROM: Walter Wilson *Walter Wilson*  
Assistant County Attorney

RE: Enforcement of maintenance obligations for  
storm water management facilities built before 1985

**QUESTION**

You have requested an opinion from this office concerning whether the Department of Environmental Protection ("DEP" or "Department") is required to inspect storm water management facilities that were built before 1985, whether current owners are obligated to maintain them, and if so, what documentation and procedures would be necessary to enforce those obligations.

**SHORT ANSWER**

Under County law, Montgomery County has the *authority* to inspect facilities built earlier than 1985, but not the *obligation* to do so. The current owners of storm water management facilities are obligated to maintain them in proper working condition and the County can compel them to satisfy that obligation through an abatement procedure after establishing record ownership of the facility through a title report on the property.

**BACKGROUND**

Pursuant to its authority under the federal Clean Water Act, the Maryland Department of the Environment issued a NPDES [National Pollutant Discharge Elimination Systems] permit to Montgomery County in 1996. The permit requires the County to ensure that all storm water

management facilities permitted under the County's jurisdiction since 1985 are inspected and maintained on a designated schedule. Otherwise, the County is subject to stipulated penalties under both state and federal law. According to data provided by DEP, at least 900 of the storm water management structures in the County were built before 1985. Your belief is that unlike the facilities built after 1985, many of the pre-1985 facilities do not have written covenants or easements relating to maintenance. The only useful documentation available to DEP for some of the pre-1985 facilities are expired sediment control permit plans that the Department has on file containing acknowledgments of owners' maintenance responsibilities for storm water facilities.

### DISCUSSION

County law has provided a regular means for DEP to ensure that the owners of storm water management facilities maintain those facilities in proper working condition since June 2, 1980, the effective date for Bill No. 89-79. That legislation added Article II (Sections 19-20 to 19-35) on storm water management to the County Code's then-existing Chapter 19 on erosion and sediment control.<sup>1</sup> The newly added Section 19-25 made the approval of a storm water management plan by the Montgomery County Soil Conservation District (the "District") and the Department of Environmental Protection a prerequisite for a getting a subdivision application approved. New Section 19-30 imposed the now familiar requirement that the applicant for a building permit that has on-site storm water facilities as one of the requirements for the permit execute an inspection and maintenance agreement with the County, expressed in the form of recorded easements and covenants. In 1984, Bill No. 45-84 amended Chapter 19 to remove the Soil Conservation District from the approval process. On August 2, 1990, Executive Regulation 5-90, adopted under Section 19-31(Regulations, interagency agreements), went into effect. Section 6 of Executive Regulation 5-90 states that "[a]ll stormwater management structures must be maintained in proper working condition by the owner of that facility."

Storm water management structures permitted earlier than June 2, 1980 are not subject to the inspection and maintenance provisions established under Article II of Chapter 19. However, there are other provisions of Chapter 19 outside of Article II under which the owner of a storm water management facility could be cited and required to maintain the facility in proper working condition despite the absence of written covenants and easements. Though they allow for a less direct enforcement approach than requiring inspection and maintenance agreements from property owners up front, these provisions can still be used very effectively to meet DEP's enforcement objectives concerning the County's older storm water facilities.

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<sup>1</sup>Chapter 19 was previously amended when bill 57-74 became effective in 1976. However, prior to enactment of bill 89-79 in 1980, Chapter 19 did not contain language requiring the owners of storm water management facilities to provide for their upkeep. What was required was the submission of an erosion and sediment control plan. Montgomery County, Md., Code 19-3 (a) (1978).

A good example are some of the provisions found in Article I of Chapter 19, which focuses on the permitting process associated with erosion and sediment control measures. Even though the erosion and sediment control permits issued under Chapter 19 are of limited duration, the same is not necessarily true when it comes to enforcing the conditions under which such permits may have been granted. Section 19-13 (a) of Article I contains very explicit language requiring the permittee, owner, or person in charge of any property on which work has been done pursuant to a permit granted under Chapter 19 to repair, restore, and otherwise maintain all “grade surfaces, walls, drains, dams and structures, plantings, vegetation, erosion and sediment control measures, and other protective devices” in good and effective condition. Chapter 19 defines “erosion” and “storm water management” in such a way that a storm water management facility could reasonably be considered an erosion and sediment control measure for purposes of applying Section 19-13 (a) to storm water management structures that pre-date the enactment of Article II. See Montgomery County, Md., Code § 19-21 (Definitions). There are likely to be several instances where this would allow the County to cite for noncompliance the owner of a storm water management facility who fails to maintain it in proper working condition regardless of when the facility was built and despite the expiration of the required erosion and sediment control permits. The primary limitation on the scope of Section 19-13 (a) is that it does not allow the County to pursue the owners of any facilities that existed before the County enacted permitting procedures under Chapter 19 in the absence of a chapter amendment explicitly covering all storm water management facilities.

Another example of alternative enforcement remedies can be taken from Article IV of Chapter 19. For instance, if contaminating discharges into County streams and waterways can be traced to a specific pre-1980 storm water management facility that the responsible owner has failed to maintain in proper working condition, then that owner could conceivably be cited for violating Section 19-50 (Prohibition of water pollution).

If inspection of a storm water facility not covered by Section 19-30 reveals that the owner is not in compliance with Section 19-13 (a), then a DEP inspector could issue a notice of violation (NOV) explaining all remedial measures that must be taken to fully comply with the requirements of Section 19-13. A notice of violation would also allow DEP to set a deadline for compliance before issuing a citation. It should be noted, however, that NOV's are appealable to the County Board of Appeals, which could significantly delay the enforcement process. See, e.g., Montgomery Code § 26-14 (b). Issuing an NOV rather than a civil citation is mandatory only for violations of Chapter 8 (Buildings) and Chapter 26 (Housing and Building Maintenance Standards) of the County Code. Therefore, DEP has the option to issue a civil citation leading directly to court intervention without first issuing an NOV if the Department deems that to be the most appropriate measure under the circumstances.

Of course, if DEP wishes to be responsible for inspecting a facility for which the County lacks appropriate easements and covenants under Section 19-30, the Department would need the

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owner's consent to go onto areas of the property not considered open to the public and conduct the inspection unless its inspector has obtained an administrative search warrant. See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29 (1967); see also Montgomery Code, § 19-53 (a).

Before issuing a citation, a DEP inspector should photograph the violations and obtain a title report on the property to establish ownership and thus pinpoint the responsibility for correcting the violations. The inspector involved should also indicate by checking the appropriate box on the citation form that DEP is seeking abatement of the violations. The inspector should provide the photographs, evidence of ownership, maps and any other relevant information to the County Attorney's Office. The County Attorney's Office can then follow up by preparing an abatement order to be presented in court against the violator. An abatement order enables the court to set a deadline for compliance with all code and regulatory provisions under which the violator has been cited, authorize county officials to enter the violator's property and take any necessary corrective action after the deadline to bring the facility into full compliance has passed, and order the violator to reimburse the County.

You have also asked whether the County is obligated to inspect facilities constructed before 1985. Our interpretation of Chapter 19 and Executive Regulation 5-90 is that County law anticipates and provides for, but does not *require*, County inspection of storm water management facilities built before 1985. However, State law requires the County to inspect storm water management facilities permitted after July 1, 1984 at least once every three years. Md. Regs. Code §§ 26.17.02.05; 26.17.02.10. See also, Md. Code Ann., Envir. § 4-204. Inspecting facilities dating back to 1984 should not pose a problem for DEP because, as earlier noted, the owners of on-site storm water management facilities have been required by County law to execute inspection and maintenance agreements with the County as a condition of obtaining building permits ever since, but not prior to, 1980.

### CONCLUSION

Based on the foregoing analysis, we conclude that DEP is only required to inspect storm water management facilities permitted in the County since July 1, 1984. However, DEP can compel the current owners of facilities built before June 2, 1980 to maintain them in proper working condition by applying Section 19-13 to those owners since they are not subject to the inspection and maintenance agreements described in Section 19-30 of the County Code. Additionally, DEP can take any remedial measures authorized by the inspection and maintenance agreements that have been required under County law since June 2, 1980. In either case, DEP will need to accurately assign responsibility for maintenance by obtaining a title report on the property to establish ownership and the existence of any maintenance agreements that have been executed and recorded. If DEP's efforts to obtain voluntary compliance are unsuccessful, then

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the Department should issue a citation and pursue an abatement procedure through the County Attorney's Office. Any questions concerning abatement or code enforcement in general should be directed to Sherry Leichman, principal counsel for code enforcement (Ext. 6754).

I trust that this memorandum has been fully responsive to your concerns. Please let me know if I may provide any additional information or be of further assistance.

cc: Ellen Scavia  
Boyd Church