

April 26, 2002

**MEMORANDUM:**

TO: Montgomery County Planning Board

FROM: Jeff Zyontz, Chief  
County-wide Planning Division

Mike Riley, Acting Chief  
Park Development Division

SUBJECT: Planning Board policy toward storm water management facilities in  
the Paint Branch Special Protection Area - in light of legislative changes

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**Recommendations**

1. Make homeowners associations responsible for the non-structural maintenance of storm water facilities serving residential developments and rely upon the Department of Environmental Protection (DEP) to inspect and perform capital maintenance when required as provided by the Montgomery County Code Chapter 19.
2. Have homeowner associations be the property owners of storm water facilities with DEP holding easements and covenants that distinguishes maintenance responsibilities.
3. Apply this approach to all prior approvals of the Planning Board to the maximum extent possible. This would remove conditions of approval for dedication and funding for storm water management for four approved but unrecorded subdivisions and replaces them with a requirement for recording easements and home owner association obligations.
4. Return collected funds (approximately \$6,000), to the home owners association subdivision that has made payments to M-NCPPC, should they agree to accept maintenance responsibility and easements for DEP.

Staff believes that the newly passed storm water legislation should fundamentally change our approach to storm water management in the Paint Branch Special Protection Area (SPA). An aggressive inspection program by DEP will point out deficiencies to normal maintenance practices. Those who are non-compliant will be cited and follow up inspections will be scheduled. Secondly, the ordinance establishes a tax to be paid by each single-family house. This tax, which does not exempt the Paint Branch SPA, will fund capital maintenance in addition to inspections. Staff sees no environmental risk to changing policy. Staff does see economies of scale in DEP's county-wide program that are not present with our administration of storm water responsibilities from single-family development.

The Board's present policy of placing the responsibility of storm water management facilities within the park system as a fee-based program, has created burdens, not fully presented to the Board as the policy has been implemented. Even if the Board does not change its policy, all of the payments calculated to date, would have to be recalculated, to avoid double "taxing" home owners for the capital maintenance of storm water facilities. The current process forces staff to calculate the present value, of a commitment unlimited in time. The assumptions in that process are subject to challenge no matter how it is done. Even if all costs are truly known, inflation rates and interest rates are subject to best guess estimates. Even though the most efficient collection approach would be a single payment, the development community, who would like to pass this obligation to the homebuyer, presses for annual payments by home owners associations. This creates more administrative costs to collection. The burdens of under-calculating the funds required, may place future stress on Park operating funds. To date, there has been no proposal in our budget to translate revenue received for storm water maintenance into staff resources needed to oversee a fee-based program.

As the Board's present policy was an out growth of a recommendation from a Technical Working group, staff has contacted those members in light of this recommendation. Only one working group member from an outside agency indicated that they still believe that the existing policy should be retained. The argument for a continuation of our policy is based upon the proposition that public ownership would ensure the highest level of protection for the environment. When the Board's present policy was adopted, there was only one inspector performing maintenance inspections in the county maintenance inspection program and some home owner associations were neglecting their obligations for capital maintenance.

Montgomery County DEP agrees with the policy change being recommended by staff. They do not see any danger to the Paint Branch environment by making this change. If we kept our current policy, they do see a problem with double taxing these new subdivisions for structural maintenance.

The following material is supplied as background for the Board's convenience.

## BACKGROUND

The 7-agency work group was formed by the Montgomery County Planning Board in 1995 in response to significant concerns that the high quality aquatic resource that includes the brown trout fishery was moving towards irreversible degradation if changes to the 1981 Master Plan land use recommendations and to environmental regulations and guidelines at the time were not made. After analysis of data on the resource, the work group formulated a series of recommendations for managing the land uses and activities in upper Paint Branch to preserve the resource. The observations, conclusions, and recommendations of the work group are set forth in the "Upper Paint Branch Watershed Planning Study, Technical Report" (M-NCPPC, Oct. 1995).

The following is from the technical report (page 39):

"The *general strategy* for protecting the upper Paint Branch sub watersheds is to provide the highest level of protection for the most fragile and critical parts within upper Paint Branch, protect sensitive natural features within the less critical parts, apply the most stringent regulatory standards and guidelines for development within the less critical parts of the sub watersheds, and correct existing water resource problems through the strategic and timely implementation of watershed and aquatic habitat management measures and SWM retrofit/stream restoration projects."

The work group's recommendation in 1995 related to new Storm Water Management (SWM) facilities is as follows:

"Ideally, new SWM facilities should be publicly owned and maintained. Historically, privately owned SWM facilities in the County generally have been less intensively maintained than publicly owned structures. A publicly-owned facility affords a greater chance of being properly monitored and maintained than a privately-owned facility."

Based on that recommendation, the Planning Board has reviewed and approved four residential subdivisions that include parkland dedication within stream valley areas and M-NCPPC ownership of the subdivisions' new SWM facilities that is adjacent to these stream valley areas. (Baldi/Briar Cliff Manor West - which is the only subdivision with an on going financial agreement; Peach Orchard and Alnutt - which are both owned by the Maryland Department of Transportation (MDDOT) at this time; Lion's Den/Briar Cliff Manor north - which is awaiting a financial agreement to proceed with construction, the Hunt property - which will go before the Board for subdivision approval would also be effected by this policy) These approvals also include a requirement for developers of these subdivisions to pay into a fund for M-NCPPC use for long-term inspection and maintenance needs. Only the Baldi subdivision has proceeded sufficiently far in the development process to actually pay funds to M-NCPPC. None of the others have proceeded far enough to be making payments.

## **Recent Events**

- A fifth residential subdivision will be reviewed shortly by the Planning Board with one SWM facility (adjacent to proposed dedicated parkland) recommended for M-NCPPC ownership and one facility (not adjacent to parkland) recommended to be in HOA ownership.
- Staff estimates that there may be six or seven properties that could potentially subdivide with park dedication areas and proposed SWM facilities that are located next to these dedication areas.
- For the four approved residential subdivisions, Parks staff has used different factors to estimate the amounts that the developer has to pay for the inspection and maintenance funds. These estimates range from \$90,000 to \$486,000.
- One of these subdivision has been writing annual checks to the Park system as provided for by these agreements
- County Council has recently passed two bills that substantially revise the County's storm water management program: Bill 28-00 (enacted Nov., 2001) and Bill 45-00 (enacted March, 2002). As part of the SWM law changes, Co. DEP will be required to provide monitoring and structural maintenance for new residential SWM facilities. The residential landowner continues to be responsible for non-structural maintenance. The county will impose a water quality protection charge to residential properties to cover these new county responsibilities.
- During the review of the proposed law changes, M-NCPPC has indicated that it may want to set up a Memorandum of Understanding with DEP and DPS to address concerns related to SWM facilities on parkland throughout the county. M-NCPPC wants to consider such issues as transferring maintenance of SWM facilities in parkland to DEP and M-NCPPC receiving monies from the County to maintain any SWM facilities on parkland which receive offsite residential drainage and which continue to be maintained by M-NCPPC.

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### **Members of the 1995 Paint Branch Technical Work Group --**

***M-NCPPC*** -- Nazir Baig, Bill Barron, Wendy Bratzel\*, Candy Bunnag, Cathy Conlon, Mary Dolan, John Hench, Tom Kennedy\*

***Montgomery County Department of Environmental Protection, Division of Water Resources Management (now DEP and DPS)*** -- Rick Brush, Debbie Gier\*, Keith Van Ness, Cameron Wiegand, Stan Wong

**Montgomery County Office of Planning and Implementation (now in the County Executive's Office) -- Elizabeth Davison\*, Christy Huddle**

**Maryland Department of Natural Resources, Freshwater Fisheries Division -- Charlie Gougeon**

**Maryland Department of the Environment -- Andy Der\* (Wetlands and Waterways Program), Ken Pensyl (Nonpoint Source Control Program)**

**Metropolitan Washington Council of Governments, Department of Environmental Programs -- John Galli**

**Interstate Commission on the Potomac River Basin -- Jim Cummins**

- Individual no longer with the agency

JZ:cmd

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