

**ARTICLE V. WATER QUALITY REVIEW IN SPECIAL
PROTECTION AREAS.**

Sec. 19-60. Findings and purpose.

(a) The County Council finds that streams, rivers, wetlands, and other sensitive environmental features in Montgomery County constitute an important natural resource. Protecting, maintaining, and restoring the biological, physical, and chemical integrity of the waters in the County will protect the public health and general welfare, provide for a varied aquatic life, appropriate recreational uses, and other water uses, and serve the purposes of applicable federal and state laws and regulations. Protection of fragile watershed areas will help restore and maintain the integrity of the Anacostia River, Potomac River, and Patuxent River within Montgomery County and the Chesapeake Bay.

(b) The purposes of this Article are to:

(1) implement monitoring programs in special protection areas to help attain the goals of the County's water quality laws and regulations;

(2) establish coordinated procedures, performance goals, criteria, and requirements for development in special protection areas that will mitigate adverse impacts on water resource areas during and after construction or other land disturbing activities;

(3) ensure no net wetland loss as a result of development;

(4) authorize a fee to administer and enforce this Article, including monitoring development impacts on streams in special protection areas; and

(5) provide a focused and coordinated approach for County water quality protection and monitoring in special protection areas. (1994 L.M.C., ch. 32, § 1.)

Sec. 19-61. Definitions.

In this Article, the following words and phrases have the following meanings:

(a) *Best Management Practices* means techniques that are most effective in eliminating or reducing the amount of pollution or other detrimental impact to a watershed or wetland.

(b) *Best Management Practices Monitoring Plan* means a statement prepared by an applicant describing how the applicant will monitor and assess the effectiveness of its best management practices.

(c) Department or DPS means the Department of Permitting Services.

(d) Director or DPS Director means the Director of the Department of Permitting Services or the Director's designee.

(e) *Erosion and Sediment Control Concept Plan* means a statement or drawing or both describing how erosion and sediment, resulting from a development, will be controlled or managed to minimize the discharge of pollutants into surface waters.

(f) *Land Use Plan* means the County's General Plan ("On Wedges and Corridors") and all amendments or additions, including master plans, sector plans, and functional plans, adopted by the District Council.

(g) *Planning Director* means the Director of the Montgomery County Planning Department or the Director's designee.

(h) *Special Protection Area* means a geographic area where:

(1) existing water resources, or other environmental features directly relating to those water resources, are of high quality or unusually sensitive; and

(2) proposed land uses would threaten the quality or preservation of those resources or features in the absence of special water quality protection measures which are closely coordinated with appropriate land use controls.

(i) *Stormwater Management Concept Plan* means a statement or drawing or both describing how water quality impacts and stormwater, resulting from a development, will be controlled or managed to minimize the discharge of pollutants into surface waters.

(j) *Stormwater Management Plan* is defined in Section 19-21.

(k) *Stream Monitoring Plan* means a statement prepared by the Department of Environmental Protection describing the location of monitoring stations and the nature, form, and frequency of monitoring to be conducted to evaluate the impacts of development on water resources in a special protection area. A plan must also describe what will be monitored with regard to faunal groups, streams and riparian habitat features, biological features, and physical and chemical properties.

(l) *Stream Monitoring Program* means activities conducted by the Department of Environmental Protection to carry out a stream monitoring plan for property in a special protection area, including:

(1) an inventory and evaluation of water resources to measure baseline conditions; and

(2) an assessment of any impairment of the biological, chemical, and physical integrity of the stream over time related to development impacts in any special protection area.

(m) *Technical Manual* means a detailed guidance document prepared jointly by the Departments of Environmental Protection and Permitting Services, in consultation with the Planning Board, and used to implement this Article.

(n) *Water Quality Certification* means State authorization required under Section 401 of the Clean Water Act for any Federally permitted activity impacting jurisdictional waters of the United States, certifying that the activity complies with Maryland's water quality standards. (1994 L.M.C., ch. 32, § 1.; 1996 L.M.C., ch. 20, § 1.)

Editor's note-Section 5 of 1996 L.M.C., ch. 20, states:

"Sunset. On July 1, 1998, any function transferred by this Act to the Department of Permitting Services reverts to the Department which administered that function before August 1, 1996."

Sec. 19-62. Applicability.

(a) *Designation*. The Council may designate a geographic area as a special protection area by identifying the area in:

- (1) a land use plan;
- (2) the Comprehensive Water Supply and Sewer System Plan;
- (3) a watershed plan; or
- (4) a resolution adopted after at least 15 days notice and a public hearing.

(b) *Privately owned property*. Except as otherwise expressly provided in this Chapter, the requirements for a water quality inventory and a preliminary and final water quality plan apply in any area designated as a special protection area to a person proposing a land disturbing activity on privately owned property:

- (1) who is required by law to obtain approval of a development plan, diagrammatic plan, schematic development plan, project plan, special exception, preliminary plan of subdivision, or site plan; or
- (2) who is seeking approval of an amendment to an approved development plan, diagrammatic plan, schematic development plan, project plan, special exception, preliminary plan of subdivision, or site plan.

(c) *Publicly owned property.* Before engaging in any land disturbing activity on publicly owned property in an area designated as a special protection area, the applying agency or department should prepare a combined preliminary and final water quality plan.

(d) *Recorded plats.* This Article does not apply to any project on property which would otherwise be subject to the requirements of this Section that has a valid, approved record plat for the entirety of the project and for which no amendment is required to accommodate the project on or before October 31, 1994. (1994 L.M.C., ch. 32, § 1.)

Sec. 19-63. Exemptions.

(a) Any applicant covered by Section 19-62 whose property is in a special protection area must submit a water quality inventory.

(b) An applicant who submits a water quality inventory under Section 19-64(a) and whose development does not exceed the following limits need not submit a water quality plan, unless the applicant is specifically required to submit a water quality plan in a land use plan, watershed plan, Comprehensive Water Supply and Sewer System Plan, or Council resolution designating a special protection area, if:

(1) a project on property zoned for agricultural, residential, or mixed use contains:

(A) a proposed impervious area of less than 8% of the total land area covered by the development approval application; or

(B) a cumulative land area of 10 acres or less, and a proposed impervious area of less than 15% of the total land area covered by the development approval application;

(2) a project on property zoned for industrial or commercial use consists of a cumulative land area of 2 acres or less covered by the development approval application.

(c) An applicant must not avoid the application of this Article by submitting piecemeal applications for property under common or related ownership.

(d) If an application for new or additional development approval is submitted for property that was either:

(1) previously approved for development, and exempt under subsection (b); or

(2) part of a larger tract of land located in a special protection area that was:

(A) approved for development under this Article; and
(B) under common or related ownership when it was approved for development;

the Department or Planning Board, as applicable, in reviewing an application under this Article must assess the cumulative impact of all previously approved development. (1994 L.M.C., ch. 32, § 1; 1995 L.M.C., ch. 22, § 1; 1996 L.M.C., ch. 20, § 1.)

Editor's note-Section 5 of 1996 L.M.C., ch. 20, states:

"Sunset. On July 1, 1998, any function transferred by this Act to the Department of Permitting Services reverts to the Department which administered that function before August 1, 1996."

Sec. 19-64. Water Quality Inventory Submittal; Water Quality Plans.

(a) *Water quality inventory submittal.* A person who is required under Section 19-62 to comply with this Article must submit the following documents as part of a proposed development plan, diagrammatic plan, schematic development plan, project plan, preliminary plan of subdivision, site plan, or special exception, whichever is first required. Each submission must be reviewed by the receiving agency as part of the plan or permit application, as provided by law.

(1) Stormwater management concept plan;

(2) Erosion and sediment control concept plan;

(3) Documentation showing avoidance or minimization of impacts on environmentally sensitive areas and priority forest conservation areas as specified in the Planning Board's Environmental Guidelines, and an analysis of available alternatives;

(4) Preliminary plan describing the proposed development which minimizes impervious area and, if applicable, meets imperviousness limits for the project as are required in a land use plan, watershed plan, or Comprehensive Water Supply and Sewer System Plan; and

(5) Any other information required in the technical manual.

(b) *Preliminary water quality plan submission.* Except where exempt under this Article, a person must submit the following, in

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addition to any information required for a water quality inventory, as part of a complete application for development approval as provided in Section 19-65(b):

(1) Description of the development proposal and all submissions normally required by law or regulation;

(2) Documentation of application for state or federal wetland permit;

(3) Description of any other mitigation techniques proposed by the applicant or required by applicable guidelines, law, or regulations;

(4) Documentation of anticipated performance on water quality of each proposed measure, individually and together; and

(5) Proposed best management practices monitoring plan, including:

(A) Location, nature, form, and frequency of the monitoring to be conducted; and

(B) Dates of report submissions and monitoring milestones.

(c) *Final water quality plan submission.* A final water quality plan must be submitted as provided in Section 19-65 and must include the following:

(1) Stormwater management concept plan, revised as required by the Director, that identifies all proposed mitigation techniques and an analysis of how these measures will meet applicable performance criteria;

(2) Erosion and sediment control concept plan, revised as required by the Director;

(3) Proposed compliance program, revised as required by the Director, that describes the installation, inspection, and monitoring schedule of best management practices monitoring plan, including detailed instructions concerning how the facilities operate and should be maintained;

(4) Draft maintenance agreements and easements covering routine maintenance, long-term repair or replacement of any stormwater management facility or other facilities required by the water quality plan, and an assurance of access to the facilities for inspection;

(5) Copy of valid water quality certification approved by state and federal agencies or, if not available, a report on the status of the certification review and a copy of any revisions made to the certification application;

(6) Terms, conditions, and requirements as established in the approved preliminary water quality plan, or in the case of a preliminary water quality plan in conjunction with a development approval before the District Council, the terms, conditions, and requirements as required to be revised by the Planning Board or DPS Director to conform to the District Council action on the development plan, schematic plan, or diagrammatic plan;

(7) Any other information required in the technical manual. (1994 L.M.C., ch. 32, § 1; 1996 L.M.C., ch. 29., § 1.)

Editor's note-Section 5 of 1996 L.M.C., ch. 20, states:

"Sunset. On July 1, 1998, any function transferred by this Act to the Department of Permitting Services reverts to the Department which administered that function before August 1, 1996."

Sec. 19-65. Application, review, and approval procedures.

(a) *General.*

(1) *Coordinated with project review.* Water quality review, including submittal and review of the preliminary and final water quality plans, where required, must be done in conjunction with the review process for a development plan, diagrammatic plan, schematic development plan, project plan, preliminary plan of subdivision, site plan, or special exception in accordance with this Section. The Planning Director must coordinate review of the water quality plan with the DPS Director.

(2) *Division of approval responsibilities.* To avoid duplication of effort, responsibilities for review and approval of water quality plans are divided as follows:

(A) In acting on a preliminary or final water quality plan, the Planning Board has lead agency responsibility for:

(i) Conformity with all policies in the Planning Board's Environmental Guidelines which apply to special protection areas;

(ii) Conformity with any policy or requirement for special protection areas, including limits on impervious area, in a land use plan, watershed plan, or the Comprehensive Water Supply and Sewer System Plan; and

(iii) Any other element of the plan in which the Planning Board has primary lead agency design, review, and approval responsibility.

(B) In acting on a preliminary or final water quality plan, the Planning Board's approval must conform to the approval of the DPS Director on any element for which the DPS Director has lead agency responsibility. Those elements include:

- (i) Performance goals or criteria for the approved best management practices;
- (ii) Best management practices monitoring plan;
- (iii) Stormwater management concept plan;
- (iv) Erosion and sediment control concept plan; and
- (v) Any other element of the plan for which the Department has primary lead agency design, review, and approval responsibility.

(C) The Department of Environmental Protection has the lead agency responsibility for the stream monitoring program, including the stream monitoring plan.

(3) *Amendments and minor modifications to an approved plan.*

(A) *Significant amendment.* Any written request to amend a development approval which involves any significant alteration to a water quality plan must undergo review as described in subsection (b), except as otherwise modified by regulation.

(B) *Minor modification.* The Planning Director or the DPS Director may approve a modification to an approved water quality plan, for any element in their respective jurisdictions, which is consistent with this Chapter if:

- (i) inspections or design evaluations reveal minor inadequacies in the plan; or
- (ii) the modification is required by permit conditions and does not significantly affect site layout.

(C) *Emergency situation.* The Planning Director or the DPS Director may approve a modification or exception to an approved water quality plan for any element in their respective jurisdictions where necessary in an emergency situation.

(b) *Application.*

(1) The applicant must submit to the Planning Director a preliminary water quality plan as part of a complete application for a development plan, diagrammatic plan, schematic plan, project plan, preliminary plan of subdivision, or site plan, whichever is first required. For a special exception that is subject to this Chapter, the applicant must submit a preliminary water quality

plan as part of the special exception application to the Board of Appeals. For a project on publicly owned property, the agency or department should submit the water quality plan in conjunction with the mandatory referral process.

(2) If the development proposal requires more than one of the approvals listed in paragraph (1), the applicant must submit a preliminary water quality plan to the Planning Director in conjunction with the first approval and a final water quality plan in conjunction with the last approval.

(3) If only one approval listed in paragraph (1) is required, an applicant, with the approval of the Planning Board, must submit a combined preliminary and final water quality plan.

(c) *Review.* After receiving a preliminary or final water quality plan, the Planning Director must refer the plan to the DPS Director and other reviewing agencies. The DPS Director must transmit to the Planning Director within the time limits for acting on a plan established by law:

(1) Findings on compliance with this Chapter of any:

- (A) stormwater management concept plan;
- (B) erosion and sediment control concept plan;
- (C) best management practices monitoring plan;
- (D) stream monitoring plan as prepared and implemented by the Department of Environmental Protection;
- (E) maintenance agreements and easements; and
- (F) other elements of a plan in which the Department has primary lead agency review and approval responsibility.

(2) Comments, if any, on any element of a plan in which the Planning Board has primary lead agency review and approval responsibility, including any determination of conformance with a land use plan, watershed plan, or the Planning Board's Environmental Guidelines.

(a) *Condition of approval.*

(1) In the case of a water quality plan in conjunction with a development plan, schematic development plan, or diagrammatic plan, Planning Board action on the water quality plan must conform to Section 59-D-1.23, Section 59-D-2.53, and Section 59-D-4.61, respectively.

(2) In the case of a water quality plan in conjunction with a special exception, the Planning Board, after holding a public hearing and finding that the plan meets the standards of this

Article, must approve a water quality plan and forward the approved plan to the Board of Appeals with its recommendation on the special exception in accordance with Section 59-G-1.2.

(3) The final water quality plan, as amended by the Planning Board, must be a condition of approval of the development application and must conform to:

(A) changes made by the DPS Director to elements that are in DPS's jurisdiction under subsection (a)(2);

(B) any requirements and limits of the state water quality certification and wetland permit, as approved or, if not yet approved, as applied for, and other regulatory approvals, not inconsistent with the certification or permit;

(C) any regulations and guidelines, including any policies or requirements in a land use plan, watershed plan, or Comprehensive Water Supply and Sewer System Plan concerning water quality protection in a special protection area;

(D) any bond provisions required under Section 19-10 and 19-32, and to ensure implementation of best management practices monitoring and any element in the water quality plan required by the Planning Board;

(E) provisions to implement the best management practices monitoring plan; and

(F) any other condition necessary to implement this Article.

(4) For a water quality plan for a project on public property, the Planning Board, after public hearing which may be conducted when the Board considers a mandatory referral application, must determine if the plan meets the standards of this Article. The applying agency or department should not engage in land disturbing activities that are inconsistent with the approved combined water quality plan unless the applying agency has found that the water quality protection measures it would otherwise use meet the purposes of this Chapter. (1994 L.M.C., ch. 32, § 1; 1996 L.M.C., ch. 20, § 1.)

Editor's note-Section 5 of 1996 L.M.C., ch. 20, states:

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Sec. 19-66. Enforcement, appeals, waiver.

(a) *Enforcement agreement* Each final water quality plan must contain an enforceable agreement, including an approved

financial security instrument, with the Planning Board and the DPS Director, requiring maintenance of all facilities required by the plan and best management practices monitoring. The financial security instrument may be combined with any other financial security instrument required by this Chapter.

(b) *Transference of responsibility.* Each approved final water quality plan for a residential project must provide that ownership and maintenance of any feature of the water quality plan must not be transferred to a homeowners association or any resident until the DPS Director or the Planning Board, depending on which is the lead agency to review the feature, finds that:

(1) each feature has been installed in accordance with the specifications shown on the approved plan;

(2) each feature has been verified, by inspection, monitoring, or otherwise, to have been operational and functioning as designed for a reasonable period of time after construction of all units and facilities associated with the last phase of the development project. The length of time must not exceed 5 years and must relate to site-specific characteristics and the type and nature of the particular feature; and

(3) homeowners association documents include detailed instructions and a schedule concerning how the facilities and features operate and should be maintained, and assure adequate funding for routine and long term inspections, repair and maintenance of all features shown on the approved plan.

(c) *Appeals.*

(1) An aggrieved person may appeal a final decision by the Planning Board or the DPS Director concerning a final development approval or permit in which the provisions of this Article are applied.

(A) A final decision by the Planning Board occurs when a written opinion concerning a development approval which requires the implementation of a final water quality plan is mailed.

(B) A final decision by the DPS Director occurs when the Department has approved, rejected, issued, modified, or revoked a permit which requires the implementation of a final water quality plan.

(2) An appeal of a final decision by the Planning Board must be filed with the Circuit Court within 30 days after the

written opinion is mailed. The DPS Director may intervene as a party in any appeal involving the implementation of a final water quality plan. The Board of Appeals does not have jurisdiction to hear any appeal arising from a final decision by the Planning Board under this Article.

(3) An administrative appeal of a decision by the DPS Director must be filed with the Board of Appeals within 30 days after the decision is made. The Planning Board may present evidence to the Board of Appeals concerning any element of a final water quality plan that relates to its lead agency authority, if relevant to the appeal.

(d) *Event of default.*

(1) Events of default are:

(A) Required stormwater management facilities, erosion and sediment control facilities, or other mitigation techniques have not been installed or maintained in a correct manner.

(B) Monitoring under a best management practices monitoring plan has not been performed or reported as required.

(C) An applicant has not complied with any other requirement of a water quality plan or this Article.

(D) Required fees have not been paid to support a stream monitoring program.

(2) If an event of default occurs, the Planning Board or the DPS Director, as applicable, may, in addition to any other remedy already permitted under this Chapter:

(A) issue an order prohibiting the applicant from performing any further land disturbing activities on any developed or undeveloped phase of the project until the applicant is in compliance, or revoking or suspending a permit under Section 19-9.

(B) issue a citation for a Class A violation. Each day a violation continues is a separate offense.

(C) take any legal action under Section 1-20 or Chapter 50.

(e) *Waiver.*

(1) *Written request.* An applicant may apply for a waiver from this Article or any regulation adopted under it if enforcement would result in undue hardship to the applicant. The application must be directed to either the Planning Board or the DPS Director, as applicable.

(2) *Review and action.* After consulting reviewing agencies and holding a public hearing, the Planning Board or the DPS Director, as applicable, may waive any requirement if the applicant shows by clear and convincing evidence that:

(A) the application of some or all requirements of this Article would result in undue hardship to the applicant because of events or circumstances not caused or facilitated by the applicant;

(B) the applicant would still comply with all applicable federal, state, or county water quality standards; and

(C) the relief sought is the minimum needed to prevent hardship. (1994 L.M.C., ch. 32, § 1; 1996 L.M.C., ch. 20, § 1.)

Editor's note-Section 5 of 1996 L.M.C., ch. 20, states:

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Sec. 19-67. Implementation.

(a) *Stream monitoring program.*

(1) *Program.* The Director of Environmental Protection must design, develop, and implement a stream monitoring program as described in regulations adopted under this Chapter.

(2) *Priorities.* The Director of Environmental Protection must set priorities for monitoring subwatershed areas before development. Priorities must be based on anticipated timing of development within a 2-year period, as indicated by the Planning Director.

(b) *Regulations; technical manual; environmental guide-lines; performance goals and criteria.*

The Departments of Permitting Services and Environmental Protection, after consulting the Planning Board, must jointly adopt regulations, including a technical manual and necessary procedures, under method (2) to administer this Chapter. The Departments and the Board must carry out their functions under this Article in accordance with these regulations. The regulations must include:

(1) procedures and standards for preparing a water quality inventory, preliminary or final water quality plans, and a combined preliminary/final water quality plan;

(2) procedures to enhance coordination between the Department and the applicant where a wetland permit or water quality certification is also required;

(3) supplementary requirements for stormwater management and erosion and sediment control concept plans for special protection areas;

(4) criteria for distinguishing minor and significant amendments or modifications;

(5) standards for water quality protective measures during and after construction, including special restrictions or standards required for special protection areas;

(6) qualifications for persons submitting data under this Article;

(7) procedures and standards for developing and implementing a best management practices monitoring program;

(8) parameters of any generic and site-specific performance goals under a best management practices monitoring program;

(9) model language for an enforcement agreement or a homeowners association maintenance agreement;

(10) performance criteria based on monitoring results that will be used to evaluate water quality plans to ensure compliance with all relevant federal, state, and county laws. Until monitoring results are available, the Department must develop interim performance goals; and

(11) other appropriate program requirements consistent with this Article.

(d) *Annual Report.* The Directors of Environmental Protection and Permitting Services jointly must prepare an annual report, in coordination with the Planning Board, to the County Council that describes the effectiveness of best management practices and the observed impact of development on the biological integrity of streams in special protection areas. The report must also discuss progress made toward the development of best management practices performance-based and in-stream biological enforcement mechanisms. A copy of the report must be sent to the Planning Board and other responsible agencies.

(e) *Fee.*

(1) The Directors of Environmental Protection and Permitting Services may set a fee in an amount not to exceed the reasonable cost of administering and enforcing their respective duties under this Article. The fee, including the time when it

must be paid, must be set by regulation under Method (3). The Planning Board may set a fee under Chapter 50. A person to whom this Article applies must pay the fees.

(2) The fees established under this subsection may be based on the size of a tract or other relevant factor and are intended to offset the cost of:

(A) permit review and enforcement of conditions; and

(B) stream monitoring to determine the impact of a particular development on stream water quality. (1994 L.M.C., ch. 32, § 1; 1996 L.M.C., ch. 20, § 1.)

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