ARLINGTON COUNTY, VIRGINIA

County Board Agenda Item
Meeting of June 12, 2010

DATE: June 3, 2010

SUBJECT: Amendments to the County's Utilities Ordinance, Chapter 26, Subsection 26-5(c) and Section 26-9, and Stormwater Detention Ordinance, Chapter 60, Sections 60-5 and 60-6 of the Arlington County Code.

C. M. RECOMMENDATION:

Adopt the attached amendments to the County's Utilities Ordinance, Chapter 26, Subsection 26-5(c) and Section 26-9, and the Stormwater Detention Ordinance, Chapter 60, Sections 60-5 and 60-6 of the Arlington County Code to provide the County Manager or designee with an enforcement mechanism and schedule of civil penalties for enforcing violations of these sections of County Code and to require periodic certifications of private stormwater detention facilities.

ISSUES: County Board action is needed to adopt civil penalties to enforce violations of the County's Utilities Ordinance and Stormwater Detention Ordinance. No issues have been identified.

SUMMARY: Unauthorized discharges to the storm drainage system and improper maintenance of stormwater detention facilities can result in detrimental impacts to water quality and violate conditions of the County Code and the County's Municipal Separate Storm Sewer System (MS4) permit. The General Assembly passed legislation in 2009 (§10.1-603.14:1) that provides enforcement authority to localities to implement their MS4 permit programs and to utilize existing civil penalty provisions in the State Code to enforce violations of any ordinances necessary to ensure compliance with their MS4 permit. An enforcement mechanism and uniform schedule of civil penalties for actions that violate County Code requirements and adversely affect the County's storm sewer system and water quality in local streams, the Potomac River, and the Chesapeake Bay would significantly strengthen the County's stormwater management program. The proposed ordinance amendments address these needs.

BACKGROUND: Subsection 26-5(c) of the County's Utilities Ordinance was established to comply with conditions of the County's MS4 permit, issued by the Virginia Department of Conservation and Recreation as required by the Federal Clean Water Act. This section provides the County Manager with explicit authority to adopt rules and regulations to reduce adverse impacts to the County's storm sewer system and State waters. Section 26-9 outlines penalties for

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violations of Chapter 26, Article 1. However, neither an enforcement mechanism for issuing such penalties or a schedule of civil penalties for varying degrees of noncompliance or level of water quality impairment resulting from an unauthorized discharge are currently provided in this section of County Code.

The Board approved the County's existing Stormwater Detention Ordinance on September 11, 1976. Amendments were approved by the County Board on October 2, 2004, that replaced the "Department of Public Works" with the "Department of Environmental Services" throughout the ordinance. However, the amendment inadvertently excluded a code requirement that was approved by the County Board in a previous amendment in 2001 to require annual certifications of private stormwater detention facilities. The proposed ordinance amendments add this certification requirement back into the County Code so the County fully complies with the current MS4 permit. The Penalties section (Section 60-6) of the Stormwater Detention Ordinance was last updated in 1976. The proposed changes would also allow violations to be enforced through civil penalties rather than strictly through a criminal proceeding

DISCUSSION: Unauthorized illicit discharges and illegal dumping into the County's storm sewer system (directly or indirectly) present a major threat to water quality in local streams, the Potomac River, and the Chesapeake Bay. Arlington County's MS4 permit requires the County to regulate discharges to its storm sewer system. The permit authorizes discharges of stormwater and a limited list of non-stormwater discharges where the discharge is determined not to be a significant source of pollutants. Pursuant to the conditions of the MS4 permit, County Code Chapter 26, Section 26-5(c), prohibits any discharges that may have an adverse affect on the storm sewer system or surface waters.

Department of Environmental Services (DES) staff responds to and tracks unauthorized discharges / pollution incidents throughout the County. DES staff investigated and/or tracked more than 80 pollution incidents or complaints in FY09 and more than 65 incidents in FY10 to date. Incidents involving the release of hazardous materials to the storm sewer system or surface waters are handled by the Arlington County Fire Department, Hazardous Materials Team and Fire Marshal's Office. Pollution incidents that are less severe in magnitude and are not handled by the Fire Department are investigated and followed up on by DES staff. Based on experience to date, types of discharges and the degree of impact or impairment to the storm sewer system or local waters vary widely on a case by case basis.

Currently, there is no explicit process for effectively and efficiently enforcing violations of Chapter 26, Subsection 26-5(c), and Chapter 60 requires staff to refer the case to the Commonwealth Attorney's Office to pursue criminal sanctions. Enforcement actions are therefore difficult to carry out, and lack of enforcement provides few incentives to prevent or cease unauthorized discharges (direct or indirect) that contribute to water pollution.

The County is also responsible for ensuring that private stormwater detention facility owners maintain their facilities. There are approximately 600 of these private detention facilities located in the County and lack of maintenance on these facilities could cause flooding and blockages in the storm sewer system. By requiring owners to submit certifications (Subsection 60-5(c)) the County can be sure that private owners are maintaining their facilities to protect the public

system and adjacent property owners from flooding. The addition of language requiring private owners to submit certifications allows DES to set the schedule of certification based on MS4 permit requirements to ensure that the County is complying with the permit.

The term "owner" as used in Chapter 60, is not currently defined. Additional language is being added to clarify who is responsible for the maintenance of stormwater detention facilities, be it a Homeowners Association, developer, property manager or other person.

Recently passed State legislation (§10.1-603.14:1) provides enforcement authority to localities with MS4 permits to implement their permit program and utilize existing civil penalty provisions in the State Code to enforce violations of any ordinances adopted pursuant to the conditions of their MS4 permit. The proposed amendments, authorized by this legislation, would establish a uniform schedule of civil penalties (up to $32,500 for each offense as established by the Federal Clean Water Act and State code) and clarify how penalties are to be issued by County staff. Under the proposed ordinance, civil penalties would be issued to a person(s) found violating applicable sections of the County Code during inspections or investigations, or upon failure to comply with any conditions of a previously issued notice of violation.

Currently, violations of Section 60-5 of the Stormwater Detention Ordinance are classified as a Class 1 criminal misdemeanor. The addition of civil penalties allows violations of Chapter 60-5, such as a failure to maintain a detention facility, to be handled by DES staff, rather than engaging the Police or the Commonwealth Attorney. The proposed fine structure for both Chapters 26 and 60 would be similar, with each offense increasing in value the fine charged and each day of violation constituting a separate offense. Under the proposed changes for the Utilities Ordinance, an unauthorized discharge under Chapter 26 could be considered either serious or moderate in nature. A serious discharge is one that is an immediate threat to the environment, public health, or safety of the County's storm sewer system or state waters. All other discharges would be considered moderate. The fines are structured differently depending on the severity of the violation.

The imposition of civil penalties would be assessed to a violator by DES staff and the violator instructed to pay the penalty (fine) to the County Treasurer. If the violator failed to pay the civil penalty, the County could then file a petition and summons with the Arlington County Circuit Court to order the violator to appear in court and pay the penalty. All fines collected would be used for the purpose of minimizing, preventing, managing, or mitigating pollution of the waters. Having this type of enforcement mechanism would greatly improve County staff's ability to enforce the County Code and to protect water quality. Issuance of civil penalties should result in fewer violations over time. The proposed ordinance also provides that violations may be addressed as misdemeanors, or through injunctive relief, or by the entry of an agreed consent order between the violator and the County.

Amending Subsection 26-5(c), and Section 26-9 of the Utilities Ordinance, and Subsection 60-5(c) and Section 60-6 of the Stormwater Detention Ordinance will provide the County Manager and designated staff with the authority to issue civil penalties for unauthorized discharges to the County's storm sewer system and state waters as well as improper maintenance of stormwater

detention facilities. This additional enforcement mechanism will help ensure compliance and enforceability of the County Code and the County's MS4 permit.

The enforcement provisions of the County's Chesapeake Bay Preservation Ordinance (Chapter 61) include both criminal and civil enforcement options and are currently adequate for ordinance implementation and MS4 permit compliance. Future changes to Chapter 61, including an update to the Resource Protection Area (RPA) map, are anticipated in the next few years and may include addition of civil penalties.

FISCAL IMPACT: The potential for revenues from collection of civil penalties is expected to be very small and difficult to predict. The goal of the enforcement program, coupled with the County's broad stormwater management outreach and education programs, will be to effectively reduce the number of violations over time to zero.

AN ORDINANCE TO AMEND, REENACT AND RECODIFY CHAPTER 26, SUBSECTION 26-5(c) AND SECTION 26-9, ARTICLE 1 (UTILITIES ORDINANCE) OF THE CODE OF ARLINGTON COUNTY, VIRGINIA, TO ESTABLISH AN ENFORCEMENT MECHANISM FOR VIOLATIONS AND UNIFORM SCHEDULE OF CIVIL.

I. BE IT ORDAINED by the County Board of Arlington County, Virginia that Chapter 26, Subsection 26-5(c) and Section 26-9, Article 1 (Utilities Ordinance) of the Arlington County Code is amended, reenacted and recodified, to read in pertinent part, as follows:

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Chapter 26-5

§ 26-5. Storm sewer system.

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(c) It shall be unlawful for any person to discharge directly or indirectly into the storm sewer system or state waters, any substance likely, in the opinion of the County Manager, to have an adverse effect on the storm sewer system or state waters. A discharge may be considered serious or moderate. A serious discharge is one that is determined to be an immediate threat to the environment, public health, or safety of the County's storm sewer system or state waters. Any other discharge under this subsection shall be considered moderate. To prevent such adverse effects, the County Manager may adopt rules and regulations governing direct or indirect discharges into the storm sewer system and state waters. Discharge of any substance directly to state waters must be authorized by a separate Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9 VAC 25-31-10 et seq., or its successor.

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Chapter 26-9

§ 26-9. Penalty.

(a) Any person who violates any provision of this Article, except for Sections 26-5(b) and 26-5(c), or any rule or regulation pursuant thereto shall be subject to a fine of not less than twenty-five dollars ($25.00) nor more than one thousand dollars ($1,000.00) for each violation. Each day of violation shall constitute a separate offense.

(b) Any person who violates Sections 26-5(b) or 26-5(c), or any regulations adopted thereunder or who fails, neglects or refuses to comply with any order of the County Manager, shall be subject to a civil penalty not to exceed $32,500 for each violation within the discretion of the Court. Each day of violation shall constitute a separate offense. The County Manager may issue a summons for collection of the civil penalty in the Arlington County Circuit Court. Such civil penalties shall be paid to the Treasurer of Arlington County and shall be used for the purpose of minimizing, preventing, managing, or mitigating pollution of the waters.

(1) A first violation under this subsection shall be subject to a civil penalty of $500 for a serious violation or $100 for a moderate violation.

(2) A second violation under this subsection shall be subject to a civil penalty of $1000 for a serious violation or $250 for a moderate violation.

(3) A third violation or thereafter under this subsection shall be subject to a civil penalty of $2500 for

a serious violation or $500 for a moderate violation.

(c) Any person who willfully and knowingly violates any provision of Sections 26-5(b) or 26-5(c) shall be guilty of a Class 1 misdemeanor.

(d) Violations of Sections 26-5(b) or 26-5(c) may also be addressed in the following ways:

(1) The County may apply to the Circuit Court of Arlington County for injunctive relief to enjoin a violation or threatened violation.

(2) In lieu of any appropriate civil penalty that could be imposed under subsection (b), the County may, with the consent and agreement of any person who has violated or failed, neglected or refused to obey with Sections 26-5(b) or 26-5(c) or any regulation thereunder, provide, in an order issued against such person, for payment of civil charges for violations in specific sums, not to exceed $32,500 for each violation. Any civil charges collected shall be paid to the Treasurer of Arlington County and shall be used for the purpose of minimizing, preventing, managing, or mitigating pollution of the waters.

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II. The remaining sections and subsections of Chapter 26 of the Code of Arlington County, Virginia not amended hereby shall remain in effect as previously enacted.

AN ORDINANCE TO AMEND, REENACT AND RECODIFY CHAPTER 60 (STORMWATER DETENTION ORDINANCE) OF THE CODE OF ARLINGTON COUNTY, VIRGINIA, RELATING TO CERTIFICATIONS AND PENALITIES.

I. BE IT ORDAINED by the County Board of Arlington County, Virginia that Chapter 60 (Stormwater Detention Ordinance) of the Arlington County Code is amended, reenacted and recodified, to read in pertinent part, as follows:

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Chapter 60

STORMWATER DETENTION

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§ 60-5. Criteria.

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(c) *Construction and maintenance.* Construction of all detention facilities shall be in conformance with approved plans. The County may require a test operation of facility during or after construction as a condition of approval. All plans submitted for stormwater detention systems shall describe an adequate procedure of normal maintenance for the detention system. It shall be the responsibility of the owner, or its successors or assigns, of the property on which the detention system is located to provide adequate maintenance for proper functioning of the detention system. The County may require periodic maintenance inspection certificates from the owner, or its successors or assigns, pursuant to schedules outlined by state or federal regulations. Periodic inspection by the Department of Environmental Services will be made to determine conformity with the Chapter. The submittal of plans for such a system or the purchase of property on which such a system is located shall be deemed an acceptance of responsibility for normal and capital maintenance of the system. Additionally, this responsibility of maintenance shall be duly recorded in the land records of Arlington County prior to the issuance of any construction permit

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§ 60-6. Penalty.

(a) Any development or redevelopment in which ~~an~~ person, whether applicant, owner, lessee, principal, agent, employee or assigns, is required to build and maintain a stormwater detention system and fails to do so, the development or redevelopment shall be considered an unlawful use of land and the applicant shall be deemed in violation of this Chapter.

~~(b) Any person violating any of the provisions of this Chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars ($10.00), nor shall it exceed one thousand dollars ($1,000.00) or thirty (30) days imprisonment, or both, for each violation. Where there is a continuing violation of this Chapter from day to day, such violation shall constitute a separate offense. (9-11-76)~~

(b) Any person, who violates this Chapter or any regulations adopted thereunder, or who fails, neglects or refuses to comply with any order of the County Manager or designee, shall be subject to a civil penalty not to exceed $32,500 for each violation within the discretion of the Court. Each day of violation shall constitute a separate offense. The County Manager or designee may issue a summons for collection of the civil penalty in the Arlington County Circuit Court. Such civil penalties shall be paid to the Treasurer of Arlington County and shall be used for the purpose of minimizing, preventing, managing, or mitigating pollution of the waters.

(1) A first violation under this subsection shall be subject to a civil penalty of $250.

(2) A second violation under this subsection shall be subject to a civil penalty of $500.

(3) A third violation or thereafter under this subsection shall be subject to a civil penalty of $1000.

(c) Any person who willfully and knowingly violates any provision of this Chapter shall be guilty of a Class 1 misdemeanor.

(d) Violations of this Chapter may also be addressed in the following ways:

(1) The County may apply to the Circuit Court of Arlington County for injunctive relief to enjoin a violation or threatened violation.

(2) In lieu of any appropriate civil penalty that could be imposed under subsection (b), the County may, with the consent and agreement of any person who has violated or failed, neglected or refused to obey with this Chapter or any regulation thereunder, the County may provide, in an order issued against such person, for payment of civil charges for violations in specific sums, not to exceed $32,500 for each violation. Any civil charges collected shall be paid to the Treasurer of Arlington County and shall be used for the purpose of minimizing, preventing, managing, or mitigating pollution of the waters

(e) Person as used in this section shall mean any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, governmental entity or any other legal entity, or their legal representatives, agents, or assigns. This definition includes, without limitation, all federal, state or local government entities.

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II. The remaining sections and subsections of Chapter 60 of the Code of Arlington County, Virginia not amended hereby shall remain in effect as previously enacted.