

MEMORANDUM

TO: Transportation, Infrastructure, Energy and Environment Committee

FROM:  Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Bill 60-10, Erosion and Sediment Control - Violations

Bill 60-10, Erosion and Sediment Control - Violations, sponsored by Councilmember Elrich and Council President Ervin, was introduced on December 14, 2010. Bill 60-10 would increase the maximum civil penalty for a violation of the County sediment control law from \$500 (initial offense) or \$750 (later offense) to \$1000.

A public hearing was held on January 18. All testimony supported the Bill. See testimony, ©5-16. After the hearing, Executive staff informed Council staff that the County Executive supports this Bill.

Maximum penalty Currently, under the County's system of Class A, B, and C violations, contained in County Code §1-19, the maximum penalty for a Class A civil violation is \$750 for each offense. The maximum criminal penalty is \$1000 per offense. Almost all County Code violations are treated as civil violations, although the enforcing agency may opt for either approach unless the underlying law limits the violation to a civil violation. The \$1000 maximum penalty derives from the state's general home rule powers law, the Express Powers Act (Maryland Code, Article 25A §5(A)), which limits the penalty for violation of a County law to \$1000 (with a few exceptions not relevant here).

As the attached testimony on ©5-16 and news article on ©17-18 indicates, environmental activists view the current penalties for violations of sediment control laws as too lenient in view of the watershed damages caused by loose construction practices. They urged that the maximum penalty for these violations be increased to the highest allowable County level, as this Bill does.

However, after this Bill was introduced, Council staff further checked state laws and discovered that the state sediment control and stormwater management laws both authorize the County to bring a civil action against a violator and seek the imposition of a civil penalty up to \$10,000 for each violation. See Maryland Code, Environment Article, §§4-116(c) and 4-215(c). Council staff is unsure whether the County has ever used either provision, and if not why not.

Committee members may want to discuss with Executive branch staff the level of fines sought in the context of overall enforcement policies, including whether, as some speakers at the hearing and Councilmember Elrich urged, stop work orders be used more frequently.

Council staff recommendation: enact Bill 60-10 as introduced.

This packet contains:	<u>Circle #</u>
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Bill No. 60-10
Concerning: Erosion and Sediment Control - Violations
Revised: 12-9-10 Draft No. 1
Introduced: December 14, 2010
Expires: June 14, 2012
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmember Elrich and Council President Ervin

AN ACT to:

- (1) increase the maximum civil penalty for violations of the County sediment control law; and
- (2) generally amend the law regarding enforcement of sediment control requirements.

By amending

Montgomery County Code
Chapter 19, Erosion, Sediment Control, and Storm Water Management
Section 19-69

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 19-69 is amended as follows:**

2 **19-69. Violations.**

3 Any violation of this Chapter is a Class A violation. However,
4 notwithstanding Section 1-19, the maximum penalty for a civil violation of Article I
5 is \$1000 for an initial or repeat offense. Each day a violation continues is a separate
6 offense.

7 *Approved:*

8

Valerie Ervin, President, County Council

Date

9 *Approved:*

10

Isiah Leggett, County Executive

Date

11 *This is a correct copy of Council action.*

12

Linda M. Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Bill 60-10

Erosion and Sediment Control - Violations

DESCRIPTION: Bill 60-10 would increase the maximum civil penalty for a violation of the County sediment control law from \$500 (initial offense) or \$750 (later offense) to \$1000..

PROBLEM: Inadequate level of civil fines to deter violations of the County sediment control law.

GOALS AND OBJECTIVES: Increase compliance with the County sediment control law.

COORDINATION: Department of Permitting Services, Planning Board

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Michael Faden, Senior Legislative Attorney, 240-777-7905

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Currently Class A.

BILL 60-10



NAN
CC
SBF
LL
MF

OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

MEMORANDUM

Joseph F. Beach
Director

January 11, 2011

060032

TO: Valerie Ervin, President, County Council
FROM: Joseph F. Beach, Director, Office of Management and Budget
SUBJECT: Council Bill 60-10, Erosion and Sediment Control - Violations

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

Bill 60-10 would increase the maximum civil penalty for a violation of the County sediment control law from \$500 (initial offense) or \$750 (repeat offense) to \$1,000.

FISCAL AND ECONOMIC SUMMARY

As proposed, the bill will not have a significant fiscal impact to the County. Violators of the Sediment Control law have the right to a hearing in District Court and the proposed increase in fines could result in more violators opting for a hearing as opposed to paying the fine. The Judge may render a verdict of guilty and will set the fine from \$0 to the allowable maximum. In most sediment control cases resolved in court, the Judge sets the fine well below the maximum permitted. Any additional revenues that may result from the higher assessed fines could be offset or diminished if the number of cases heard in court increases and the Judge were to impose a reduced fine. If the number of hearings increase, the Office of the County Attorney and the Department of Permitting Services have indicated that they would reallocate existing resources to cover costs associated with the increase in the number of hearings and will absorb any additional costs within the current budget appropriation.

The Department of Finance concludes that the proposed increase for the maximum penalty would not have an economic impact as the increase in fines is not so significant that construction or development would be deterred.

The following contributed to and concurred with this analysis: Michael Reahl, Department of Permitting Services; Marc Hansen, County Attorney; Mike Coveyou, Department of Finance; and Amy Wilson, Office of Management and Budget.

JFB:aw

- c: Kathleen Boucher, Assistant Chief Administrative Officer
- Dee Gonzalez, Offices of the County Executive
- Carla Reid, Director, Department of Permitting Services
- Marc Hansen, County Attorney
- Mike Coveyou, Department of Finance
- John Cuff, Office of Management and Budget
- Amy Wilson, Office of Management and Budget

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2011 JAN 10 PM 4:53

Office of the Director

Testimony of Steve Dryden

Co-Chair, Montgomery Stormwater Partners Network

Before the Montgomery County Council

January 18, 2011

Re: Bill 60-10 (Increasing Sediment Control Fines)

Thank you, Madame President and members of the council, for the opportunity to speak to you today. I am Steve Dryden, co-chair of the Montgomery Stormwater Partners Network. The Network was formed in 2005 to support a stronger county stormwater permit; our work with the Department of Environmental Protection and the Maryland Department of the Environment resulted in a permit that we believe is a big step forward for cleaner water. Now numbering almost two dozen environmental and civic organizations, the Stormwater Partners continues to advocate for policies and programs to reduce runoff and improve the health of our streams.

A major concern of Network members is the county's enforcement of sediment control regulations. While we commend the Department of Permitting Service for its devotion to carrying out its inspection duties, we firmly believe that the one of its chief tools – the power to fine companies for violating these regulations – needs to be upgraded. That's why we strongly support Councilman Elrich's bill 60-10 to raise the fine from \$500 to \$1,000, the maximum under state law.

The fine has been set at \$500 for more than two decades, and meanwhile the county and other authorities have regularly raised fines for a variety of offences against the public good. Somehow, the sediment control fine has remained at ^{at} level that can only be viewed by most companies as the cost of doing business – if the frequency of violations is any measure. DPS issues about 1,000 notices of violations annually, but if the situation in my neighborhood in Bethesda is any indication, this number would double or triple if the department had more inspectors. I work at home and therefore am able to keep track of the situations at teardowns and other construction projects—and I would say that I email DPS every month with a couple of violations that have not been seen by the inspector.

(over)

The violations are very predictable:

- Silt fences aren't installed, are installed incorrectly, or aren't maintained.
- Large piles of dirt are left uncovered for weeks at a time.
- Contractors pump muddy water from excavations directly into the street.

We have provided photos to you to illustrate some of these typical violations.

Raising this fine would signal the seriousness with which the county views this issue. With due respect to my friends at DPS, I must argue that the problem here is lawbreaking, not "being out of compliance." There may have been a time when sediment pollution was an obscure problem; that time has long passed. The fact is, the county has been fighting sediment pollution for more than three decades; meanwhile, the health of our creeks and the bay has continued to decline, and WSSC is spending millions more to filter muddy water it converts to our drinking water. Construction companies and their subcontractors enjoy an economy in this region that never really slows down – but despite this blessing, it seems impossible for many to master a very simple engineering task.

We also are convinced that the county could send a message by instituting a "no excuses" policy that makes automatic citations more likely than mere warnings. The statistics show that warnings (also called notices of violations) outnumber citations by as much as 5 to 1 in some years. What signal does ^{this send} ~~send~~ to environmental lawbreakers? Not the same message that the county sends to speeders — where automatic fines are a common occurrence.

Some inspectors have told me they feel their job is made more difficult by a lenient attitude on the part of judges who hear appeals. Again, we think the Council needs to send a message that these penalties are applied for serious lawbreaking, not minor infractions.

The Stormwater Partners hope the Council will see fit to support Mr. Elrich's measure, a step that will be in line with the solemn declaration by federal authorities to make the Chesapeake Bay cleanup happen in our lifetime. And who knows, we might raise some money for our county's depleted treasury. Thank you.



HUNTINGTON PKWY, BETHESDA

NO SILT FENCE; MUD TRACKED INTO STREET



GREENTREE ROAD, BETHESDA

EXPOSED PILES OF DIRT; INADEQUATE SILT FENCE



LAMBETH ROAD, BETHESDA

SEDIMENT FLOWS FROM CONSTRUCTION SITE

A Case Study: Sediment Control Problem at Leesborough Construction Site, Wheaton

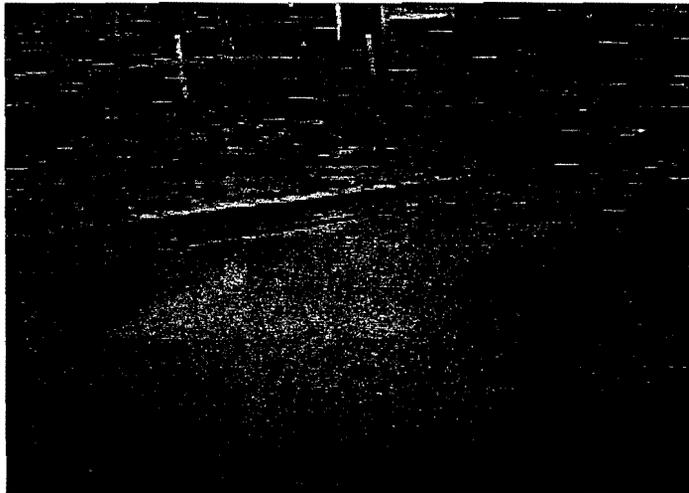
Friday, July 30th, 2010

Kathy Michels

From: www.stormwaterpartners.org

More info on: www.fosc.org

Here is a case study of poor erosion and sediment control in Montgomery County. The site is Leesborough (Centex construction), the former Good Counsel site (bordered by Georgia Ave., Amherst Ave., Arcola Ave. and Elkin St.) in Wheaton, Maryland. The result was sediment laden runoff from the construction site. The photos below are from May 25, 2009 (after many similar overflows for months).

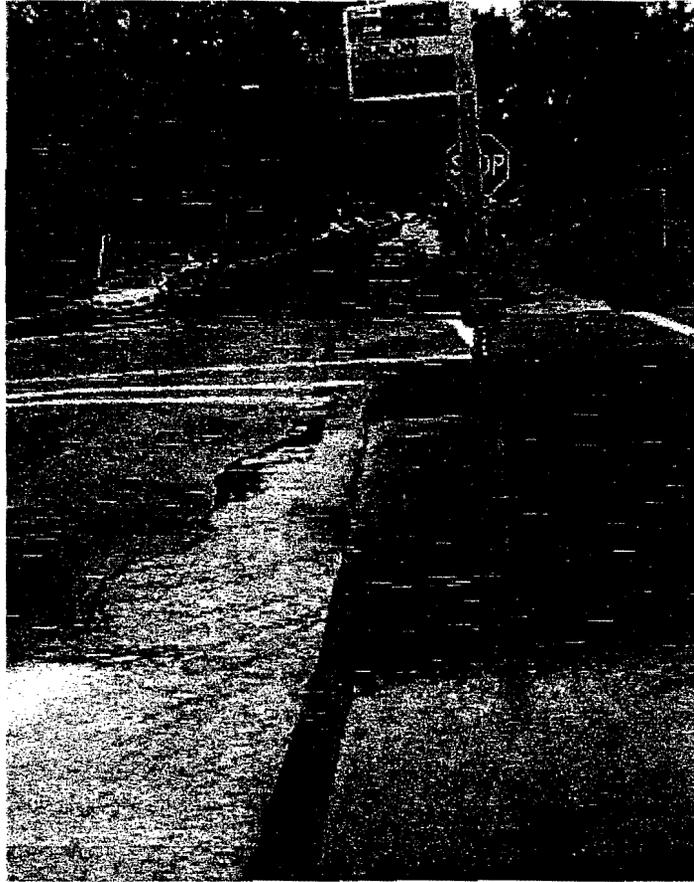


Uncontrolled erosion on-site above basin



*Flow from containment basin, across sidewalk,
into Amherst Ave*





Flow into street leading to storm drain at Amherst and Elkin



The headwaters of Sligo Creek at Channing and Blueridge Ave. — the sediment laden runoff from the Leesborough/Centex site merging with the clear runoff from neighborhood streets.



Sligo Creek about half a mile down stream showing the sediment laden flow from the construction site.

Statement of Bruce A. Gilmore Re Bill 60-10
Montgomery County Council
January 18, 2011

My name is Bruce Gilmore and I appear today on behalf of the Anacostia Watershed Society to testify on Bill 60-10. I am also the director of the Maryland Stormwater Consortium which has over twenty member organizations throughout Maryland.

The legislation before you will increase the civil penalty for violations of the erosion and sediment control provisions of Chapter 19, Montgomery County Code from \$500 to \$1000 for the initial violation and from \$750 to \$1000 for subsequent daily violations. We strongly support this legislation and believe that it will help greatly in breaking the cycle of continued erosion and sediment control violations during construction in Montgomery County.

While I urge the County Council to enact this bill, I also urge you to take the time to review fully the way sediment and erosion plans are approved and enforced in the County. Questions for which you should expect answers include: What is the responsibility of contractors to stop erosion and sediment pollution from their sites? How is this law enforced? Who enforces it and what is the agency's historical enforcement record over the last 10 years? What is meant by the term "encouraging compliance" and what distinguishes it from enforcement with respect to repeat violations?

The above questions which I hope the Council will direct to the appropriate agency are but a part of the larger picture of the damage sediment and erosion from construction and development does to the County waterways, to the Anacostia River and other County watersheds and to Chesapeake Bay. Sedimentation carries all manner of pollution to waterbodies and is a pollutant itself. Its transport and outright pollution of waterways is increasing. If we are to succeed in our efforts to abate it, then this legislation, 60-10, must be enacted. Increasing the cost of sediment and erosion control violations will work and will not cause the employment disruption which stop work orders often do.

Finally, the County Council should always remember that its action and the action of the County Executive departments have placed Montgomery County in the forefront among all other Maryland jurisdictions in enacting a very strong stormwater management code and implementing it. The enactment of 60-10 will continue this great record of accomplishment which will directly benefit the County's waterways and its citizens who enjoy them.

Thank you for the opportunity to present this statement.

Montgomery County Civic Federation
Supports Bill **Bill 60-10**, Erosion and Sediment Control

This bill is but another small step in the right direction. It increases the maximum amount that can be fined to \$1000 – the first increase since 1992. If you really want to put teeth into the law, the \$1000 fine should be set – not a maximum. Give the DPS a clear mandate to impose the full penalty when a violator has failed to come into compliance within 48 hours of receiving the notice of violation. And issue two additional citations every 48 hours thereafter until a violation has continued for one week at which point a SWO is automatic. That’s got teeth!

The building industry will squawk and rail against the county being “anti-business” and your response should be, “No, we love business but it must be pro-environment, clean business. Builders who do what they are required to do to protect the quality of the water in our streams and drinking water are welcome. Those who flout the law will pay the maximum penalty. And if you don’t want to pay the fine, act quickly to correct the violations.”

The higher maximum is not a big stick but a tiny twig. Adding \$1,000 or 2,000 or 3,000 in fines to the cost of a \$700,000 home is an inconsequential price to pay for flouting the law.

To those who will say we are only doing this to bring in more revenue, we should respond, “What’s wrong with that?” We have a great budget deficit. Here’s a legitimate and useful way to bring in more revenue. If all 274 citations issued in 2008 had been at the \$500 level and all had been paid in full, the county would have taken in \$137,000. As it is, only 141 were paid in full, and the figures from the County Attorney’s office don’t indicate whether the citations were at the \$500 level or something less. Figures from DPS show that 340 citations were made in FY09. If each were fined at the proposed maximum of \$1000, and paid in full, the county would have received \$340,000. Those little sticks add up and when they add up to deter crimes against the environment, they will have a positive affect on all of us.

Wednesday, Aug. 18, 2010

Stormwater group urges increase in fines

Inspections for sediment violations in the county jump from 12,167 in 2002 to 22,512 in 2009

by Sara Gates | Special to The Gazette

If a construction company dumps sediment down a storm drain, it's likely that Steve Dryden, of the Montgomery County Stormwater Partners Network, will hear about it.

Dryden, of Bethesda, has witnessed dumping and spills and has often been the person to report the offenses, which can lead to civil citations and \$500 county fines.

Stormwater Partners, an environmental activist group, is advocating for increasing the fines associated with sediment control and run-off to discourage companies from lagging on permits.

"I think this underlines the seriousness of the situation regarding sediment and pollution in Montgomery County and how day in and day out we are facing these violations and pollution events," said Dryden, who has co-chaired the group since 2005. "I think that the county needs to do a tougher job on these guys."

Dryden and Diane Cameron, Stormwater Partners co-chair and conservation director for the Audubon Naturalist Society, are working to double the fines for sediment control violations to \$1,000 in Montgomery County. County Councilmember Marc Elrich (D-At large) of Takoma Park has been working with the group on the issue. He did not return messages for comment Tuesday.

"I hope it will send more of a message. Obviously some big companies don't care. They just factor it into the cost of business," Dryden said.

Mud pollution, caused by sediment run-off, can be extremely harmful to waterways and often carries dangerous materials into the Chesapeake Bay, Cameron said.

Once it gets into streams and rivers, the soil smothers small fish, amphibians and plants, and can choke them to death, she said.

"Most of Montgomery County has clay soils and clay sub-soils, which is a very fine substance that looks almost like coffee with cream when it gets into the water," Cameron said. "This tends to not only cover eggs and fish, but carries a lot of toxics with it, causing more damage."

County code dictates that any change in fines for sediment control violations must apply to all class A violations, said county spokeswoman Esther Bowring. The county divides violations into classes A, B and C. The \$500 penalty for a class A violation, the most common, applies to noise complaints, hazardous materials spills and public urination.

"If we find something that's a violation we will tell the contractor or individual that this needs to be cleaned up. Then we'll come back and see if it's been cleaned up. Our job is to see that the situation has been corrected," Bowring said.

The Department of Permitting Services, which assesses fines, stop work orders, and notices of violations for sediment run-off issues for construction sites, should have more inspectors working more aggressively to enforce laws on construction sites, Cameron said.

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Data obtained by Stormwater Partners revealed that the department has nearly doubled its number of active inspections from 12,167 in 2002 to 22,512 in 2009; in addition to assessed fines, from 200 to 340 in those years, respectively.

Stop work orders — notices that require companies to cease construction — which Cameron said can be effective in leading to change, was the same for both those years, did not change much in those years. Ninety-four orders were given in both 2002 and 2009.

The county issued \$79,380 in sediment control fines in 2009, according to the data.

Staff Writer Alex Ruoff contributed to this report.