

Applicant Guide For Tidal Wetlands Alteration/Stabilization

This applicant guidance expresses the Fairfax County Wetlands Board's support for the Commonwealth's goal of protecting and preserving tidal wetlands. Tidal wetlands permitting is governed by the law and regulations of the Commonwealth and County Ordinance. This guidance does not substitute for those provisions and is not binding. The FCWB may consider other approaches consistent with the legal provisions of the Commonwealth and the County not discussed in this document.

October 2022

Fairfax County Wetlands Board Applicant Guide

For Tidal Wetlands Alteration/Stabilization

1. Introduction

The Code of Virginia requires local Wetlands Board to preserve and prevent the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation. The Fairfax County Wetlands Board (FCWB) is committed to a policy of no net loss of the remaining wetlands and prefers alternatives that restore wetlands and their natural functions. This guide is intended to assist owners of Tidal Wetlands in understanding their responsibilities to preserve and prevent the despoliation and destruction of wetlands.

2. Living Shorelines Required Where Suitable

Shore stabilization methods vary from hardening methods, such as stone revetments and breakwaters or wooden bulkheads, to more natural methods, such as marsh restoration. Both methods are effective at shore stabilization under certain situations. However, hardening methods create a disconnect between the upland and the water, and typically limit natural habitats along the shoreline. Shoreline stabilization using “living shorelines” are required to be implemented where suitable. Living shoreline methods use natural elements to create effective buffers for absorbing wave energy and protect against shoreline erosion. The natural materials used in the construction of living shorelines enhance, create, and maintain valuable habitats. Sand, wetland plants, sand fill, submerged aquatic vegetation, stones and coir fiber logs are materials commonly used in the construction of living shorelines. Properties protected from erosion through living shorelines perform essential ecological services that improve water quality. Together with private property protection of erosion these water quality benefits provide the public with increased enjoyment of the natural world.

There are many locations where living shorelines may not be suitable for implementation, including locations with long fetch distances, navigation channels, and others. Where exclusive use of living shorelines are not suitable for a stabilization project, feasible elements of living shorelines may still be required in concert with other hardening measures.



3. Do I have a Tidal Wetland Subject to Permitting Requirements?

Permitting requirements apply to vegetative and non-vegetative wetlands. Non-vegetative tidal wetlands are delimited as follows:

Unvegetated lands that lie between mean low water and mean high water.

Vegetative Wetlands include specific wetlands plants and are delimited as follows:

Lands containing vegetation that lie between mean low water and 1.5 times the local mean tide range.”

If your property is adjacent to any of the bodies of water shown on the figure above, it is likely that you have tidal Wetlands.

4. What activities require permitting?

If your property contains tidal wetlands, or is located next to tidal creeks or rivers, you may need FCWB approval (as well as other approvals) for any improvements or alterations on or close to the shoreline of your property. Alterations include, but are not limited to, new construction and maintenance of seawalls, rip-rap, bulkheads, and boat ramps. The area of your property subject to FCWB approval may extend well-above the area inundated during high tide. While contractors may assist you with many aspects of your project, you should first contact the FCWB staff before proceeding with design and construction of any project as follows:

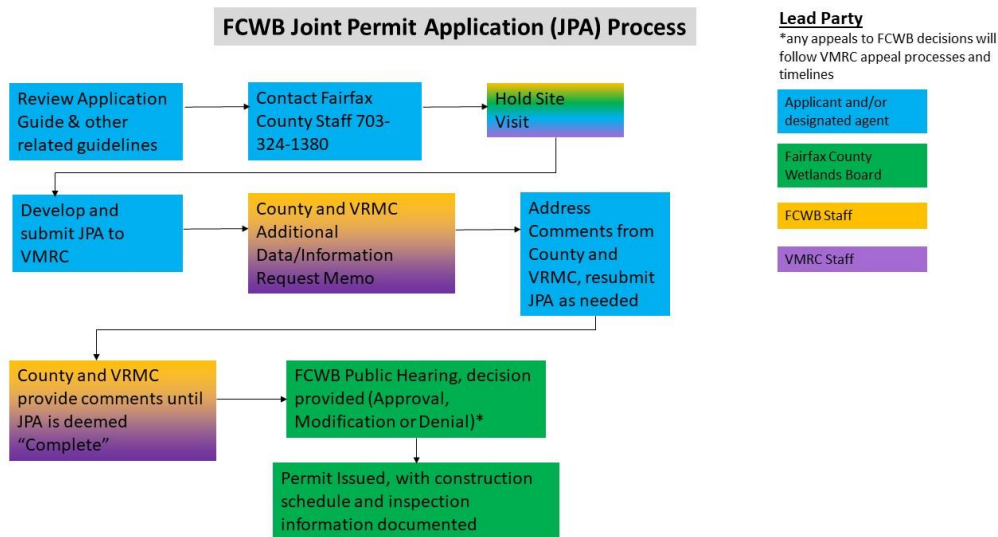
Fairfax County Wetland Board Staff
Department of Planning and Development, Planning Division
12055 Government Center Parkway, Suite 730
Fairfax, VA 22035-5504
Phone: 703-324-1380, TTY 711
DPDWetlandsBoard@fairfaxcounty.gov

If you or your contractor proceed without approval and it is later found your project required a permit from the FCWB, you and your contractor may be subject to civil charges or civil penalties. In addition, you may have to remove your alterations and make extensive improvements beyond the shoreline protection previously in place.

Do not hesitate to call first.

5. Wetlands Board Application Submission Requirements

If the FCWB staff informs you that an application is needed, detailed information on submission requirement is provided on the Wetlands Board Supplemental Information Form. This form details the requirements for submittals to the Wetlands Board and to Virginia Marine Resources Commission (VMRC). The submittal to VMRC is made through a Joint Permit Application ([JPA](#)). The JPA is forwarded by the VMRC for review by the appropriate State, County, and Federal agencies, including the U. S. Army Corp of Engineers, the Virginia Department of Environmental Quality, the Virginia Marine Resources Commission, and the Fairfax County Wetlands Board. While each application is unique, a typical application process is described as follows:



6. Overview of Laws, Regulations, and Guidelines

Shoreline protection structures are justified only if there is active, detrimental shoreline erosion which cannot be otherwise controlled; if there is rapid sedimentation adversely affecting marine life or impairing navigation which cannot be corrected by upland modifications; or if there is a clear and definite need to accrete beaches. There are multiple laws, regulations and guidelines that may impact your tidal wetlands project. A few of these are discussed below.

1972 Virginia Tidal Wetlands Act

The 1972 Wetlands Act did the following:

- Acknowledged the environmental value of tidal wetlands
- Established a tidal wetlands permitting system for their protection
- Authorized local jurisdictions to establish wetlands boards to approve or deny tidal wetlands projects
- Fairfax County has established the Fairfax County Wetlands Board (FCWB) as called for in the 1972 Act.

There have been multiple updates to the 1972 act. The updates are reflected in VMRC regulations, policies, and guidelines

Fairfax County Chapter 116 Wetlands Zoning Ordinance

Chapter 116 of the Fairfax County Code implements the state-mandated Wetlands Zoning Ordinance. The FCWB is required to determine if a proposed project conforms to applicable statutes and regulations, which includes determining whether the public and private benefit of the proposed activity exceeds its anticipated public and private detriment. Applications should contain information or otherwise explicitly state how the application satisfies this criterion.

VMRC Regulations, Policies and Guidelines

Under the 1972 act and subsequent revisions, the Virginia Marine Resources Commission (VMRC) has issued a number of regulations, policies, and guidelines. These are listed in Appendix A. The most

recent update of the law is the “2020 Wetlands Protection; Living Shoreline Act.” Among other things, the 2020 law required VMRC to promulgate and periodically update minimum standards for the protection and conservation of wetlands and to approve only living shoreline approaches to shoreline stabilization unless the best available science shows that such approaches are not suitable. VMRC established the guidelines called for under the 2020 Wetlands Protection Act in 2021. The FCWB utilizes the “VMRC Tidal Wetland Guidelines-May 2021” in the evaluation of tidal wetland projects.

Virginia Institute of Marine Science (VIMS) Guidelines

VIMS provides review of proposed tidal wetlands permit applications to the FCWB on a case-by-case basis. Under the VMRC Guidelines, VIMS is the arbiter of what constitutes the suitability of a living shoreline based on the best available science. VIMS has extensive guidance, some of which is listed in Appendix A. As a part of VIMS guidance, a recommended shoreline erosion abatement is included for each tidal wetlands property in Fairfax County. During the application process, FCWB staff can assist you in locating guidance for your property.

7. FCWB Policies and Procedures

The FCWB has adopted or is in the process of adopting the following Policies and Procedures:

- Mitigation and Compensation – Where tidal wetlands impact is unavoidable, compensation by the property owner may be required.
- Wetlands Board By-Laws – Among other things, these by-laws describe how FCWB meetings and hearings are conducted
- Model Permit Application
- Permit Application Supplemental Information

8. Application and Permitting Process;

Site Inspection

As discussed above, it is recommended that prior to beginning any project that may be in the FCWB jurisdiction, that a property owner contact FCWB staff for a phone interview and if needed, a site inspection. The Board Staff can guide you as to the level of application recommended.

Application Preparation and Certification

For complex projects, projects that permanently impact wetlands, and for violations, it is strongly recommended that Permit Applications be prepared and certified as complete and accurate by a professional engineer or other appropriate person(s) duly licensed by the Commonwealth of Virginia to practice as such. In violation cases, the FCWB has included permit requirements for certification by a licensed professional that the project has been completed in accordance with the approved permit and construction plans.

Application Levels

The FCWB recognizes the following levels of application:

- No Permit needed
- Emergency Repair
- Erosion Control Structure Maintenance
- Failed Erosion Control Structure Repair (not an Emergency)

- Projects with the potential wetlands impacts
- Living Shorelines

Each of these levels of permit application are described below. The Permit Application Supplemental Information Form includes a checklist of information recommended for each level. Additionally, the example permit application is intended to provide guidance on how such information can be obtained and presented in a permit application.

No FCWB Permit Needed

[Wetlands Zoning Ordinance § 116-1-3](#) (included in Appendix B) identifies the uses that do not require a permit from the Wetlands Board. If any part of your project, including access and the location of materials and machinery, is near or in the tidal wetlands, you should contact FCWB staff and verify with them that you do or do not need a permit before beginning a project even if you believe you do not need a FCWB permit

Emergency Repair

Emergency repairs authorized by the Fairfax County Director of Health, or designee, or the Commonwealth of Virginia, are exempt from the permit requirement. If you believe you have an emergency, contact the FCWB staff immediately.

Erosion Control Structure Maintenance

Tidal wetlands owners are encouraged to prevent damage to the environment by keeping control structures in good repair. A FCWB permit may be required for maintenance and repair, regardless of functioning condition, and there are no tidal wetlands landward of the structure. The Permit Supplemental Information form and the example permit application provides guidance on the minimum level of information that should be provided. If no existing wetlands are impacted by the maintenance, this level of permit application may be suggested by FCWB staff in consultation with VIMs staff. The FCWB and staff will strive to process and expeditiously consider and approve maintenance permits with a minimum of application burden.

Failed Erosion Control Structure Repair

This level of permit application may be suggested by FCWB staff where an erosion control structure has failed and is not functioning as intended. The wetlands owner should contact the FCWB staff immediately after the failure occurs. Failure to do so may result in the need for an extensive and well documented permit application addressing in part the potential for tidal wetlands landward of the damaged control structure. The FCWB will assess if a living shoreline is suitable for failed erosion control structures.

Projects with potential Wetlands Impact

Where there is an actual or potential wetlands impact, a substantial amount of information will typically be required. This includes a scale drawing of the property, location of existing and projected future tide levels due to climate change, justification for the structure and more as shown in the FCWB application checklist.

Board Decisions

The FCWB uses the information provided by the permit applicant, adjacent landowners, and testimony during the public hearing. For some applications, VIMS may provide a project evaluation report evaluating if a living shoreline project is suitable based on the best available science.

A completed supplemental information form provides the FCWB information about the project and secondary impacts of a project. FCWB may consider factors such as the presence of septic systems, loss of trees, the energy of the water body, boat traffic, cost to remove a sea wall, cost to install a living shoreline, property use impacts, seawall/bulkhead maintenance, sea level rise impact on land ownership, other costs, maintenance of navigable channels, and living shoreline property impacts, when making its decision.

Additional Permits

Within Fairfax County, any project within the RPA will require approval in accordance with the Chesapeake Bay Preservation Ordinance (CBPO), Chapter 118 of the County Code. The CBPO is administered by the County's Department of Land Development Services (LDS).

The type of submission will depend on the type of project but typically include proposed activities disturbing more than 2,500 square feet of land. For example, a water dependent facility that qualifies as an 'Allowed Use in the RPA' will require approval of a Water Quality Impact Assessment (WQIA).

Thanks

Thanks to all who that have assisted the Fairfax County Wetlands Board (FCWB) by providing comments on the policy documents developed by the FCWB over the spring and summer of 2022. A responsiveness summary to the many comments and suggestions received is include here as Appendix C.

Appendix A

List of Regulations, Policies and Guidelines

Fairfax County Wetlands Board (FCWB)*:

- Applicant Guide
- Supplemental Application Form
- Mitigation Policy
- Compensation Policy

Chapter 116 (Wetlands Zoning Ordinance) of the Fairfax County Code, (§ 116-1-9)* Available on the Fairfax County website (<https://www.fairfaxcounty.gov>) by searching for “Tidal Wetlands and Shorelines.”

Virginia Marine Resources Commission (VMRC) Regulations:

- Code of Virginia Title 28.2. Fisheries and Habitat of the Tidal Waters » Subtitle III. Habitat » Chapter 13. Wetlands, (§§ 28.2-1300 through 28.2-1320)
- VMRC Tidal Wetland Guidelines, May 2021.
- “Wetlands Mitigation-Compensation Policy and Supplemental Guidelines” Regulation 4 VAC 20-390-10 ET SEQ.
- “Applying for a General Wetlands Permit to Address Catastrophic Erosional Situations” Regulation 4 VAC 20-345-10 ET SEQ.

Virginia Institute for Marine Science (VIMS):

- Living Shoreline Design Guidelines/Manual
- Shoreline Decision Support Tool
- Decision Tree for undefended shorelines and those with failed structures
- Advisory Services

Appendix B

Fairfax County Ordinance Section 116-1-3. - Permitted uses and activities.

The following uses of and activities in wetlands are authorized if otherwise permitted by law:

- (1) The construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters, fences, duck blinds, wildlife management shelters, footbridges, observation decks and shelters and other similar structures; provided that such structures are so constructed on pilings as to permit the reasonable unobstructed flow of the tide and preserve the natural contour of the wetlands;
- (2) The cultivation and harvesting of shellfish, and worms for bait;
- (3) Noncommercial outdoor recreational activities, including hiking, boating, trapping, hunting, fishing, shellfishing, horseback riding, swimming, skeet and trap shooting, and shooting on shooting preserves; provided that no structure shall be constructed except as permitted in Subsection (1) of this Section;
- (4) Other outdoor recreational activities, provided they do not impair the natural functions or alter the natural contour of the wetlands;
- (5) Grazing, haying and cultivating and harvesting agricultural, forestry or horticultural products;
- (6) Conservation, repletion and research activities of the Commission, the Virginia Institute of Marine Science, Department of Game and Inland Fisheries and other conservation-related agencies;
- (7) The construction or maintenance of aids to navigation which are authorized by governmental authority;
- (8) Emergency measures decreed by any duly appointed health officer of a governmental subdivision acting to protect the public health;
- (9) The normal maintenance and repair of or addition to, presently existing roads, highways, railroad beds, or facilities abutting on or crossing wetlands, provided that no waterway is altered and no additional wetlands are covered;
- (10) Governmental activity in wetlands owned or leased by the Commonwealth, or a political subdivision thereof; and
- (11) The normal maintenance of manmade drainage ditches, provided that no additional wetlands are covered. This Subdivision does not authorize the construction of any drainage ditch. (47-88-116; 26-94-116.)

Appendix C
Fairfax County Wetland Board
Response to Comments on
Applicant Guide For Tidal Wetlands Alteration/Stabilization
And
Supplemental Information Form

Not Binding

This response to comments expresses the Fairfax County Wetlands Board's support for the Commonwealth's goal of protecting and preserving tidal wetlands. Tidal wetlands permitting is governed by the law and regulations of the Commonwealth and County Ordinance. This response to comments does not substitute for those provisions and is not binding. The FCWB may consider other approaches consistent with the legal provisions of the Commonwealth and the County not discussed in this document.

Thanks

Thanks to all who that have assisted the Fairfax County Wetlands Board (FCWB) by providing comments on the policy documents developed by the FCWB over the spring and summer of 2022. We appreciate your input and hope that this brief responsiveness summary will assist you and us in carrying out the Commonwealth and County goal of protecting tidal wetlands while balancing environmental, economic, public and private benefit and detriment. In this response to your comments, we have summarized the principal comments and concerns expressed by you and provided response that we hope will serve you and the Commonwealth tidal Wetlands Goals

Wetlands Board Volunteers

The applicant guide and supplemental information form were prepared with the considerable help of Fairfax County Staff, VMRC staff and many others. The principal work of developing guidelines, soliciting, and studying all the comments received, updating the guidelines based on comments and the preparation of this responsiveness summary was done by the volunteer Fairfax County Board Members appointed by the Board of Supervisors.

Living Shorelines

Many questions were raised about the need for living shorelines. Concern was raised that the FCWB would require existing structures to be removed and replaced with living shorelines. The Wetlands

Zoning Ordinance does not require landowners to replace existing erosion or shoreline control structures, such as bulkeads or rip-rap, with living shorelines. Rather, living shorelines must be considered by landowners when applying for a permit to implement a shoreline control project that impacts tidal wetlands.

Fairfax County adopted a Living Shoreline Policy in 2011 to encourage the implementation of living shorelines. Now, under Va. Code Va. Code Ann. § 28.2-1302 (2020), permit applicants must make “a statement indicating whether use of a living shoreline as defined in § 28.2-104.1 for a shoreline management practice is not suitable, including reasons for the determination.” In evaluating that determination, the Wetlands Board will require “living shoreline approaches to shoreline management unless the best available science shows that such approaches are not suitable. If the best available science shows that a living shoreline approach is not suitable, the [Wetlands Board will] require the applicant to incorporate, to the maximum extent possible, elements of living shoreline approaches into permitted projects.” See Va. Code § 28.2-104.1(D) (This requirement applies to permit applications reviewed by the Wetlands Board, which stands in the shoes of the Virginia Marine Resources Commission when reviewing permit applications).

Best Available Science

Many of you have asked for specific criteria for assessing the best available science. The role of developing criteria was assigned to the Virginia Marine resources Commission Guidelines (VMRC) in the 2020 law. In the 2021 VMRC wetland guidelines, VMRC did not include specific numeric criteria in their guidelines. Instead VMRC made Virginia Institute of Marine Sciences (VIMS) the arbiter of the best available science criterion. VIMS has provided the following with respect to their role in the permitting process:

We recognize that regulatory authorities have responsibilities that extend beyond the scope of our typical science-based recommendations... our analysis of projects will continue an assessment of impacts on adjacent properties and habitats and we assume that it is responsibility of the permitting agencies to weigh the trade-offs associated with these impacts.

VIMS, VMRC and the FCWB are dedicated to permitting living shorelines where suitable. In addition, we have a long history of working with property owners to address economic and environmental tradeoffs. In the FCWB experience, every permit has unique characteristics. As a result, it is in the FCWB opinion that it is impractical to develop specific numeric criteria to apply to all permits.

Need for a Permit

A project that does not disturb tidal wetlands permanently or during construction does not need a permit. The FCWB has no jurisdiction over projects that do not disturb tidal wetlands. You are cautioned however, that modifying tidal wetlands on your property without a permit may be against the law and could result in an enforcement action. This is why we recommend in the guidelines that you contact the FCWB staff if you are contemplating any work that may impact wetlands on your property.

Maintenance of Bulkheads and Grandfathering

The “not suitable” language shown above and in the law has been of great concern to many of you with existing bulkheads. The purpose of these guidelines is to assist in addressing this concern. With respect to well-maintained existing bulkheads, the FCWB will typically interpret its role in issuing tidal wetlands permits as following:

- Tidal Wetlands Permits are not required for maintenance of existing bulkheads if the proposed maintenance does not disturb tidal wetlands permanently or during construction.

The Commonwealth has decided that there is a need to better preserve and protect tidal wetlands. For those in Fairfax County with tidal wetlands on their property wishing to continue using existing structural controls to protect against erosion, it is important to maintain those structures in a manner that does not disturb tidal wetlands. If erosion control structures are not maintained, it is possible that tidal wetlands may develop landward of the structure. If this occurs, it is likely that a permit to repair the structure will be needed and possible that a living shoreline or elements of a living shoreline may become suitable. There is no grandfathering provision in the law for failed bulkheads.

Maintenance of Navigable Channels.

Concerns were raised about the potential that requiring a living shoreline could interfere with navigation. The issue of maintaining navigation and access is an issue that could be raised by an applicant in assessing a FCWB permit. As discussed above, maintaining erosion control structures is key to this and other issues.

Cost

The FCWB recognizes that owning and maintaining erosion control for tidal wetlands can in some cases impose a considerable economic burden on the property owner. This is the nature of owning property with tidal wetlands in the Commonwealth.

What if my project does not disturb Tidal Wetlands

If your project does not disturb tidal wetlands during construction or after, it is likely that you do not need a permit. In addition, as described in the application guide and the regulations, there are a number of exceptions to the need for a permit. Again, it is recommended that you always consult with FCWB staff before beginning a project that may impact wetlands.

Application Issues

Comments were received on what constitutes a complete application, the time and cost required to go through application process and more.

The supplemental information form includes a list of possible application requirements. Typically the FCWB staff will provide a list of requirements from this list and assist you in understanding the requirements. Some of the terms in the list may not be familiar to you. You are encouraged to work with the staff to address all the issues raised.

In addition to the Fairfax County Wetlands ordinance, there are multiple ordinances, such as the Chesapeake Bay Preservation Ordinance and Erosion and Sedimentation Ordinance that may be

implicated by your project and require additional applications and submissions. For complex projects, projects where there is permanent damage to wetlands and where a violation has occurred, new installations or major rehabilitation, the staff may strongly recommend that the applicant engage a licensed professional engineer or other appropriate licensed practitioner. A licensed professional can assist with addressing the complexity of applications of ordinances, the 2020 tidal wetlands law, and VMRC guidelines. to prepare materials for a permit application. . A professional engineer may not be recommended for minor repairs of privately owned bulkheads, revetments, and piers on calm waters. This would be for such items as cap replacement, repairing a few damaged vertical sheeting members or pier decking, boat lifts, personal watercraft lifts and mooring piles.

The FCWB prefers to work cooperatively with applicants. However, where a wetlands owner has violated the code, caused environmental damage, proceeded without a permit where one is required, willfully resisted requirements, or not provided complete and satisfactory restoration, that owner may be subject to civil charges or civil penalties. The FCWB utilizes VMRC Enforcement Procedures as guidance.

Property Loss

It is the FCWB understanding that requiring a living shoreline is not a taking of private property. Concerns have been raised about having to regrade property to provide for a living shoreline. The FCWB expects to examine each application on a case-by-case basis and balance environmental, economic, public, and private benefit and detriment based on the information provided in the application..

Grants

Grants are available under certain conditions from the Virginia Conservation Assistance Program

Community Cooperation

Comments indicated that community cooperation would better address living shorelines. The FCWB agrees. Community cooperation could be facilitated through the Virginia Clean Water Revolving Loan Fund Living Shorelines Loan Program.

Editorial and Correction Comments

Several Editorial comments and corrections were received. These have been incorporated where appropriate. Some comments asked to strike specific language from the policy documents. Many of these strikeouts were to language taken from the law, regulations, and ordinances. These strikeouts were not incorporated.