Fairfax County Wetland Board

Comments Received on

Applicant Guide For Tidal Wetlands Alteration/Stabilization

And

Supplemental Information Form

Summer 2022

Comment 1

The most clear and concise comment I can make is that the maintenance, however extensive, of existing stabilization structures should remain outside of any permitting process. Existing property owners should not be expected to bear the burden of “improving” currently existing structures. The justification for this is myriad. The property owners see no additional value and should not be burdened with a disproportionate cost, not to mention the diminished usability of their property. It is not equitable to existing fixed-income property owners. And on and on.

Fundamentally, all existing property owners should have the option to maintain the construct of their heart and paid for property.

Furthermore, all living shoreline requirements, regarding both new and existing structures, should be vacated when needed to accommodate disability related accessibility improvements.

Any repair or maintenance that does not fall outside of the “no net detriment” should not require a permitting process unless otherwise required by existing county ordinances.

V/R,

-DS

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David E. Simon, Ph.D.

(571) 235-7717

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Comment 2

Good afternoon,

We have reviewed the Fairfax County WB Policy documents and have two suggestions:

- In the Applicant Guide under section 3 (and elsewhere), a tidal wetland that falls under the County's jurisdiction is listed as "*Lands lying between and contiguous to mean low water and between mean low water and mean high water subject to flooding by normal tides and wind tides.*" This definition does not include vegetated tidal wetlands where jurisdiction increases to 1.5 times the tide range.
- Our office website has been updated and includes useful information for both WB staff and members and applicants, including links to a variety of useful information. We recommend including this link in Appendix A as we update links as needed and add additional useful information as it becomes available. https://www.vims.edu/about/leadership_admin/oras/advisory-services/index.php

Please let me know if you have any questions.

Have a great weekend.

–Emily

Upcoming out of office:

29 August – 9 September

Emily Hein

Pronouns: she/her
Assistant Director for Advisory Services

VIMS Research and Advisory Services

eahein@vims.edu, 804-684-7482

Comment 3

Hello--

I think you've done a very good job developing guidance. I'm attaching some suggestions for revising and clarifying the documents. I hope the suggestions are helpful.

Betsy

It won't be at all clear to an applicant what is meant by the quotes on "complete." I would suggest either deleting them, or adding a footnote that explains that an application is considered complete when it includes all the information necessary for staff to understand and evaluate it.

Wetlands Board has committed to a policy of no net loss of wetlands.

How does the WB evaluate whether it is meeting this commitment?

Replace the last paragraph in the guide with this paragraph, and add links? (I think it belongs both places.)

In addition to the Wetland Permit Application, your project may require other permits from the Fairfax County Department of Public Works and Environmental Services related to the County's Chesapeake Bay Preservation Ordinance, the Erosion and Sedimentation Control Ordinance and the floodplain regulations of the County's Zoning Ordinance. If a structure is proposed, a building permit will be required.

I think it's a very good idea to include a checklist, but you really need to explain these terms. I was on the WB for years, and there are some terms on this list that I don't know what they mean (Project life

landward vegetation migration?—I can take a guess, but I would prefer to be told). Maybe provide a link to a glossary that in a paragraph or even sentence defines each and perhaps says why the info is needed. Leaving them undefined may unnecessarily overwhelm and confuse applicants, and make them mad.

The FCWB may or may not take these secondary considerations…This wording seems almost insulting. It suggests that you may ignore the info they provide. I suggest you say you'll consider it, without making any pro

Since you are using this map as a guide for applicants, shouldn't you name the unnamed creeks? (Accotink and Pohick, I think.). They don't have as much tidal reach as Little Hunting Creek, but they do have some and property owners should be tipped off that they may need to apply for a WB permit.

mises.

Should you mention that the contractor may also be held liable?

May I suggest you use different, and paler, colors that have different value (i.e. darkness) so they can be distinguished when printing out in black and white? When I printed this, all the boxes were equally dark, and the text could not be read because it is too dark for all of them.

Could you give a link/website where this information is available? They likely will need help interpreting it, but it would be a courtesy to tell them where it is.

The Fairfax County WB adopted a living shoreline policy long before 2020. Shouldn't it be listed?

Would they still submit an application if they don't need a permit? This language suggests they would, and that seems confusing. I've suggested some possible revised language.

A permit may be required for maintenance and repair, regardless of functioning condition,.

This sentence is garbled and unclear. Doesn't the second clause belong in a different sentence, where I've moved it?

Additional Permits

This is pretty confusing and incomplete. #1, there are other permits besides C'Bay that are required, and #2 the second paragraph is quite vague. It's not true that a C'bay permit is only required when 2500 sf are disturbed, as this sentence seems to suggest. Applications considered by the C'Bay Exception Review Committee are often for a few hundred sf.

Suggest you replace this with the paragraph at the beginning of the Supplementary Info Form, and provide links to the website where they can learn more about other permits that may be required. Or maybe include these links in Appendix A that immediately follows

September 29, 2021

Dear Supervisor Storck:

I'm writing to support the proposed amendments to the Comprehensive Plan and the wetlands ordinance, which basically codify policy that was adopted by the Wetlands Board a decade or so ago.

I urge you to vote for them.

From what I hear, there seems to be a great deal of misunderstanding and misinformation about the wetlands ordinance and what adoption of these changes will mean. I thought it might be useful to address some of these concerns and questions.

Purpose of Wetlands Ordinance. Some people seem to misunderstand the primary purpose of the wetlands ordinance, which is not to protect the water quality flowing into the Chesapeake Bay (that is the purpose of the Chesapeake Bay Preservation Ordinance) but rather to protect wetlands, shorelines, and sensitive coastal habitats.

This is spelled out in the Fairfax County Code: "In fulfilling its responsibilities under this Ordinance, the [Wetlands] Board shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development consistent with wetlands preservation" (see Section 116-1-9 of the ordinance, here).

Why and how to protect wetlands? The wisdom of protecting wetlands is supported by a vast research literature demonstrating the benefits of wetlands in mitigating flooding, providing essential habitat for many species of birds, fish, and other wildlife, improving water quality through absorption of nutrients and sediments, and protecting upland areas from erosion.

To preserve and protect wetlands, Virginia gives preference to living shoreline approaches to stabilizing shorelines. That preference is based upon a great deal of scientific, peer-reviewed literature that demonstrates the value of living shoreline approaches in providing habitat and preserving and protecting water quality, as well as preventing erosion. Many technical studies done by Virginia Institute of Marine Sciences can be found here.

The rock sill built in the Potomac River to protect Dyke Marsh from further destruction due to storms blowing up the river is an example of a living shoreline. The rock sill slows the erosive force of waves and allows sediment to slowly build up behind the sill, to reclaim the marsh from the river.

By contrast, traditional hardened approaches—such as bulkheads and rip-rap—sever the connection between shoreline and shore, alter and destroy habitats (especially shallow water habitat) that provide essential nursery and spawning areas, protection from predators, nesting areas for birds, and foraging for fish and many aquatic species, birds, and other wildlife. Hardened approaches also increase erosive forces on adjacent properties.

How does the wetlands board decide to grant a permit? The appropriate approach for stabilizing a shoreline is considered by the wetlands board on a case-by-case basis. Every property is different—the slope of the land, the closeness of structures to the shore, the fetch, etc.—and one size does not fit all. Living shorelines cover a variety of methods, and may include placement of rock away from the shoreline (as was done in Dyke Marsh) to break the erosive force of waves, or grading a steep bank, or

planting vegetation to hold soil, slow down and absorb upland runoff, and absorb the force of waves against the shore. Here's a 12 minute movie that shows various living shoreline methods.

While the law gives preference to living shorelines, it does not mandate them, as some are claiming. The property owner may make the case for a different form of shoreline stabilization. In high energy environments, especially near houses or other manmade structures, hardened shorelines may be the only effective way to stabilize a shoreline. A decision support tool created by VIMS can help people decide what sort of shoreline stabilization is appropriate for their situation.

In the end, the wetlands board grants a permit when "The anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment," as the law states.

Some cast doubt on the neutrality or legitimacy of Wetlands Board decisions by calling it a "political body." Members of the Wetlands Board are appointed by the Board of Supervisors, like hundreds of other boards, authorities, and commissions in Fairfax County. It is not a political body. In my experience on the board, political considerations never entered into or affected its deliberations or decisions.

Should old projects be grandfathered in? Some people argue that old projects should be grandfathered in, so that (for example) a homeowner who has built a bulkhead in the past has the right to rebuild it forever. This seems inadvisable and I oppose it. On Little Hunting Creek, for example, a number of bulkheads were built without benefit of a permit from the Wetlands Board or any other agency. Some were improperly constructed and jut out into the channel, beyond mean low tide. They are likely to have a short lifespan because of their improper construction and the infiltration of water behind them. They should not be grandfathered in; they will fail again in short order, causing repeated and unnecessary expense to the homeowner. Other bulkheads were built for aesthetic reasons, because a homeowner liked the look, not because they were needed to stabilize a shoreline. Illegal and damaging and unnecessary shoreline structures should not be rebuilt automatically at a homeowner's request unless they are actually needed to stabilize the shoreline.

Any new or replacement shoreline stabilization project requires engineering consultation and permitting expense. And should! The fact that the ancients built bulkheads and revetments does not mean they are the most effective way to control erosion, or preserve water quality, wildlife habitat, or the natural functions of creeks. If a property owner wants to install new stabilization or reinforce an existing one, the engineering should meet current standards. Moreover, the state law now requires new shoreline projects planning to include consideration of sea level rise, which was not required in the past.

On the other hand, a decision tree published by VIMS to aid property owners in decisions about shoreline protection treats already armored shorelines differently from others, which suggests that a form of grandfathering is already built into the process.

Finally, I note that the discussion so far has focused almost exclusively on the concerns of shoreline property owners. Many others also have an interest in preserving Fairfax County wetlands, and they also should be consulted, and their views reflected in decisions on this matter.

I hope this is helpful. Thank you for your consideration.

Elizabeth Martin

Comment 4

From: Stephen Vlach <svlach@hotmail.com>
Sent: Thursday, September 8, 2022 11:33 AM
To: DPD Wetlands Board <DPDWetlandsBoard@fairfaxcounty.gov>
Cc: Storck, Dan <Dan.Storck@fairfaxcounty.gov>
Subject: Concerned Wessynton Home Owner - Draft Application Guidelines

Dear Members of the Fairfax County Wetlands Board,

I am a waterfront homeowner in the Wessynton neighborhood on Little Hunting Creek and have significant concerns regarding the Legislation passed in 2020 that requires "Living Shorelines" and the draft application guidelines as it pertains to existing seawall/bulkheads. The existing legislation and guidelines do not take into consideration the impacts to homeowners who stand to lose a significant part of their yard, perhaps 50 feet, if a seawall/bulkhead is not allowed to be maintained or replaced in-kind and puts the entire burden and cost on the homeowner. In some instances in Wessynton, this could result in the water being 5 to 15 feet from the foundations of the house which is completely unacceptable. Please also take into consideration that people that have purchased these waterfront homes have paid a premium of about $500,000 to $600,000 in today's dollars as compared to a similar home across the street and now will be penalized by losing use of a major part of their property.

Other states have grandfathered existing bulkheads and allowed them to be maintained. The way the law seems to read now, suggests that homeowners will effectively lose the use of a significant portion of their yards and have it taken away similar to eminent domain. The difference is that when the government takes land via eminent domain, they are required to pay just compensation per the Fifth Amendment which equates to fair market value. In this case, the homeowner will not only lose use of their land, but could be required to pay upwards of $100,000 to change it to a living shoreline and lose a navigable canal.

Please consider my comments and concerns regarding the draft guidelines.

1. The draft guidance is unresponsive to direction to address Supervisor Storck's motion before the Board of Supervisors requesting that the Wetlands Board work with the Office of the County Attorney to revise the existing policy/guidance document on Living Shorelines:

The Fairfax County Wetlands Board policy development considerations should include, but not be limited to, 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, and living shoreline property impacts provided that these items do not conflict with any other federal, state or County ordinance and regulations and seek significant public engagement in the draft policy before it is finalized.

Under "Board Decisions" the draft states:

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, and living shoreline property impacts, when making its decision.

Thus, while Supervisor Storck had asked that the Wetlands Board address how the factors that he identified could be considered, the draft guidance only said that these factors may be considered, which provides for no useful guidance. Also, the draft fails to address how the policy will address the factors that Supervisor Storck has outlined and ignores the question of consistency with other laws. The draft guidance was circulated for comment but there has been no outreach to explain what the guidance would mean for waterfront property owners. If more information had been shared and property owners could understand the implication of the guidance and associated law, there would have been far more interest in this guidance because the cost impact of well over $100K and the associated loss of yard will be of concern to most waterfront property owners.

2. The draft guidance poses a conflict with property rights that are widely recognized constitutional rights and are seen by many as part of the basis of American democracy as explicitly stated in the 5th[1] and 14th[2] amendments to the U.S. Constitution.

The requirement that property with a shoreline stabilization structure, which was consistent with laws when constructed, be dedicated to a living shoreline constitutes the taking of a property right. Property rights are generally conveyed through easements or purchase.

3. The documents fail to guide the Wetlands Board or inform applicants when living shorelines are not suitable, which is very important to property owners as the creation of living shorelines can easily cost over $100K and reduce property value because the useable yard is diminished. This lack of specifics is a

source of considerable concern to property owners because it provides for the ability to make decisions that are very costly to the property owner and take part of the yard that was designed to be part of the property. Such a decision creates a legal vulnerability to the county and state as it could be judged to be "arbitrary and capricious" by a court. Similarly, decisions that conflict with the 5th and 14th Amendments to the U.S. Constitution also present a legal vulnerability to the County and State.

4. A more constructive approach would be to work with waterfront property owners to adopt an effective outreach program for waterfront property owners and support voluntary conversion of hardened structures to living shorelines where appropriate with grants. Instead of guidance that alienates waterfront property owners, waterfront property owners should be partners in promoting clean water and habit for aquatic creatures. This voluntary approach would mitigate the responses of existing waterfront property owners fighting to retain full use of their property and its continued value.

5. The documents are inconsistent in characterizing the jurisdiction of the Wetlands Board. In some cases, it appears to imply that the Wetlands Board has greater jurisdiction than what is stated in existing law and guidance (see draft annotated Fairfax County Wetlands Board documents). An example of the inconsistency can be provided from the annotated document that is attached. On page 2 the draft guidance states: "Fairfax County defines a tidal wetland as, "*Lands lying between and contiguous to mean low water and between mean low water and mean high water subject to flooding by normal tides and wind tides*." 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." However, those properties that have a bulkhead generally have no wetlands on either side of the bulkhead. Moreover, the VIMS Decision Support Tool notes that a bulkhead in need to work in a residential should be replaced with a bulkhead[3]. This example and others in the annotated document highlight the confusing if not conflicting information that is being presented.

Please take a reasonable and responsible approach to protecting our waterways and wetlands instead of a "who cares about the citizens and homeowner approach".

Regards,

Stephen Vlach

[1] "…nor shall private property be taken for public use, without just compensation. See: https://constitution.congress.gov/constitution/amendment-5/#amendment-5

[2] "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See: https://constitution.congress.gov/constitution/amendment-14/

[3] See: https://cmap2.vims.edu/LivingShoreline/DecisionSupportTool/

Comment 5

Hello. I'm writing to voice concerns about the recent wetlands guidance.

1. The draft guidance is unresponsive to direction to address Supervisor Storck's motion before the Board of Supervisors requesting that the Wetlands Board work with the Office of the County Attorney to revise the existing policy/guidance document on Living Shorelines:

The Fairfax County Wetlands Board policy development considerations should include, but not be limited to, 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, and living shoreline property impacts provided that these items do not conflict with any other federal, state or County ordinance and regulations and seek significant public engagement in the draft policy before it is finalized.

Under "Board Decisions" the draft states:

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, and living shoreline property impacts, when making its decision.

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that Supervisor Storck has outlined and ignores the question of consistency with other laws. The draft guidance was circulated for comment but there has been no outreach to explain what the guidance would mean for waterfront property owners. If more information had been shared and property owners could understand the implication of the guidance and associated law, there would have been far more interest in this guidance because the cost impact of well over $100K and the associated loss of yard will be of concern to most waterfront property owners.

2. The draft guidance poses a conflict with property rights that are widely recognized constitutional rights and are seen by many as part of the basis of American democracy as explicitly stated in the 5th and 14th amendments to the U.S. Constitution.

The requirement that property with a shoreline stabilization structure, which was consistent with laws when constructed, be dedicated to a living shoreline constitutes the taking of a property right. Property rights are generally conveyed through easements or purchase.

3. The documents fail to guide the Wetlands Board or inform applicants when living shorelines are not suitable, which is very important to property owners as the creation of living shorelines can easily cost over $100K and reduce property value because the useable yard is diminished. This lack of specifics is a source of considerable concern to property owners because it provides for the ability to make decisions that are very costly to the property owner and take part of the yard that was designed to be part of the property. Such a decision creates a legal vulnerability to the county and state as it could be judged to be "arbitrary and capricious" by a court. Similarly, decisions that conflict with the 5th and 14th Amendments to the U.S. Constitution also present a legal vulnerability to the County and State.

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no wetlands on either side of the bulkhead. Moreover, the VIMS Decision Support Tool notes that a bulkhead in need to work in a residential should be replaced with a bulkhead . This example and others in the annotated document highlight the confusing if not conflicting information that is being presented.

I've also attached comments on relevant forms. Thank you for considering these concerns.

Kind regards,

Nicole Sanchez

Little Hunting Creek Resident

Comment 6

Our property is one of several lots in Wessynton abutting a canal off Little Hunting Creek that was dredged and supported by a bulkhead put in place when our neighborhood was developed over 50 years ago. Our homeowners association has spent considerable time, effort and funds to reinforce the bulkhead (about 20 years ago) and re-dredge the canal (about two years ago) to keep it in navigable condition for small boats, canoes, kayaks and fishermen.

Other concerned neighbors have written about significant cost concerns and loss of property value if we would not be allowed to fix or maintain our current bulkhead, as well as constitutional issues with the 5th and 14th amendments. I will not repeat those here.

Rather, I would ask a more common sense question. Looking at the attached photo of our backyard, if the current bulkhead were removed to accommodate a living shoreline, our yard loss would be somewhere between the three markers at 25, 30 and 40 feet respectively from the water's edge, based on my guesstimates. Fair enough.

But at any of those points, we would need to build a new bulkhead to prevent the rest of our yard (and the trees and garden behind the stone wall) from eventually sliding down toward the living shoreline. Does that make sense, given it would be easier (and less environmentally destructive) to repair what is currently in place? Many of my neighbors on the canal would face the same issues.

Comment 7

Dear Wetlands Board Members,

The guidance can be tightened to provide greater clarity for property owners regarding expectations and likely outcomes. The Wessynton Marine Association (WMA) community members have shared our concerns in prior Wetlands Board meetings, but the guidance continues to insufficiently consider the unnecessary impacts to property owners the way it is currently drafted. The WMA community's concerns are well founded based on prior experience with a past request to proactively institute a living shoreline in Wessynton.

Suggested Improvements:

Consistent with the guidance provided by Dan Storck to the Wetlands Board, it should be revised to include greater detail on how the following factors will be analyzed and weighed.

- Property use impacts
- Seawall/bulkhead maintenance

Thank you for taking these concerns into consideration.

Regards,

Jim and Melissa Thiel

3002 Cunningham Drive

Alexandria, VA 22309

- Cost to remove a sea wall
- Cost to install a living shoreline
- Consistency with other laws
- Boat traffic

In addition, there should be the following changes to eliminate unnecessary burden on property owners:

- Clarify conditions under which studies are unnecessary given certain facts, such as clearly identifiable navigation channels. The referenced map should be updated to also show existing hardening structures and not just shoreline. **Note:** The map needs to be corrected as the Cunningham canal hardening structure is not on the map. https://cmap2.vims.edu/CCRMP/Fairfax2012/Fairfax_CCRMP_Viewer.html
- Provide an express determination consistent with the VIMS Decision Support Tool that notes that a bulkhead in need to work in a residential area should be replaced with a bulkhead.
- Define what is meant by "best possible science" so that it is clearly understood by all parties and thereby reduce the possibility of personal bias.

The attached copy of the guidance document contains comment bubbles highlighting specific areas of concern.

<u>Illustrative Example:</u>

The attached plat and photo illustrate potential problems with implementation of a living shoreline in a scenario where replacement of a bulkhead would be clearly indicated by a reasonable person. However, this outcome is not a foregone conclusion based on this guidance, and there may be significant expenses incurred to support the outcome.

- Installation of a living shoreline would eliminate access to 30% of this example property given a 10 to 1 grade and a 3 foot tide. This property loss would be even greater if projected wind tides and accommodations for future sea level rise are required to be considered.

- This loss of property represents at a minimum the loss of a significant premium paid by property owners for their waterfront, and in fact would be greater given the reduced lot size relative to other homes.
- "Best possible science" would not seem to support a living shoreline under these circumstances, but that is not certain given latitude for interpretation in the guidance.
- The expense for legal and engineering experts to support a determination that seems self-evident for preserving the current seawall, would be unnecessary and potentially financially ruinous to property owners.
- This property loss also seems in to be indirect contradiction with language in two amendments to the U.S. Constitution.
    - 5th - "…nor shall private property be taken for public use, without just compensation."
    - 14th - "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<u>Conclusion:</u>

Greater clarity should be provided in the guidance to protect all stakeholders and promote efficient and effective government oversight. We appreciate the fact that the lack of greater clarity in the guidance provides the Wetlands Board with more latitude in making determinations. However, guidance without sufficient structure does not serve the intended purpose of providing guardrails to protect all stakeholders.

Even if a homeowner's proposed repair or replacement is eventually permitted, the latitude under insufficiently clear guidance may result in unnecessary and significant expense for engineers, scientists, and lawyers. The Wetlands Board may, and has previously, asked for repeated submissions for additional information, which both delay appropriate action and increase property owner expense. This scenario is well founded from past experience where the WMA previously attempted to install a living shoreline of its own initiative and eventually abandoned the proposal after the Wetlands Board's multiple

information requests and $20,000 expended by WMA on experts in order to provide responses.

Thank you for the opportunity to comment.

Paul Sanford

Wessynton Marine Association President

Comment 8

I agree with The WMA Board's observations and Larry Zaaragozas highlighted questions on the draft guidance. Please thoroughly address our concerns as soon as possible.

Regards,

Linda Gower

3004 Sevor Lane

703-360-9179

---------- Forwarded message ---------

From: Wessynton Marine <wessynton.marine.association@gmail.com>

Date: Mon, Sep 12, 2022 at 6:37 PM

Subject: Living Shoreline Wetlands Board Guidance

To: <DPDWetlandsBoard@fairfaxcounty.gov>

Cc: Larry & Karen Zaragoza <larry.zaragoza@yahoo.com>, Sneitzer, Elizabeth N. <esneitzer@bakerlaw.com>, Ghandi Gharaibeh <Ghandi.gharaibeh@gmail.com>, Petroff, Rosemary <rosemary.petroff@verizon.net>, Carla Amerau <camerau77@gmail.com>, Michelle Patterson <michelle.l.patterson@gmail.com>, Sabin, Charles & Carla <cbsabin@aol.com>,

Patrick Burke <patricks_burke@ml.com>, Ricardo Sanchez <rtsanchez@gmail.com>, Mary Rohweder <mwrohweder@gmail.com>, Martinez, Antonio & Susanna <susie_martinez@yahoo.com>, Bill McGovern <bmcgovern@cox.net>, Leslie Tucker <lsltucker@gmail.com>, Paul Smyth <paulb.smyth@verizon.net>, Gower, Perrin & Linda <gowerlg@gmail.com>, Miller, Mark & Julia <juliaelainemiller@gmail.com>, Frank Petroff <frankpetroff@gmail.com>, Hal Amerau <hfamerau99@gmail.com>, Sabin, Charles & Carla <SabinCarla@aol.com>, Melissa Thiel <hysterdoc@gmail.com>, David Patterson <david.k.patterson@gmail.com>, Molden, Jennifer <jennifermolden@aol.com>, Jim Thiel <jamesmthiel@gmail.com>, Nicole Sanchez <nmsanchez42@gmail.com>, Adam Sneitzer <adam.sneitzer@gmail.com>, Frueh,Martha <kc1319@aol.com>, Stephen Vlach <svlach@kcct.com>, Piya Vlach <pungpiya@gmail.com>, Baltas, Monty <bbaltas@verizon.net>, Paul Sanford <paulsanford1@me.com>, Wessynton Homes Association <Wessynton1@gmail.com>, Virginia McGovern <vmcgovern@cox.net>, Conner Johnson <conner.johnson33@gmail.com>, Lois Ligoske <ligoske@aol.com>, Miller Sr., Mark R <mark.miller@gryphontechnologies.com>, Denise Freeland <eco.voce@verizon.net>, Souryal, Christa <CSouryal@cox.net>, Leslie Sulenta <lesliesulenta@yahoo.com>

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The guidance can be tightened to provide greater clarity for property owners regarding expectations and likely outcomes. The Wessynton Marine Association (WMA) community members have shared our concerns in prior Wetlands Board meetings, but the guidance continues to insufficiently consider the unnecessary impacts to property owners the way it is currently drafted. The WMA community's concerns are well founded based on prior experience with a past request to proactively institute a living shoreline in Wessynton.

Suggested Improvements:

Consistent with the guidance provided by Dan Storck to the Wetlands Board, it should be revised to include greater detail on how the following factors will be analyzed and weighed.

- Property use impacts
- Seawall/bulkhead maintenance
- Cost to remove a sea wall
- Cost to install a living shoreline
- Consistency with other laws
- Boat traffic

In addition, there should be the following changes to eliminate unnecessary burden on property owners:

- Clarify conditions under which studies are unnecessary given certain facts, such as clearly identifiable navigation channels. The referenced map should be updated to also show existing hardening structures and not just shoreline. Note: The map needs to be corrected as the Cunningham canal hardening structure is not on the map.
nhttps://cmap2.vims.edu/CCRMP/Fairfax2012/Fairfax_CCRMP_Viewer.html.

- Provide an express determination consistent with the VIMS Decision Support Tool that notes that a bulkhead in need to work in a residential area should be replaced with a bulkhead.

- Define what is meant by “best possible science” so that it is clearly understood by all parties and thereby reduce the possibility of personal bias.

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Illustrative Example:

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- Installation of a living shoreline would eliminate access to 30% of this example property given a 10 to 1 grade and a 3 foot tide. This property loss would be even greater if projected wind tides and accommodations for future sea level rise are required to be considered.

- This loss of property represents at a minimum the loss of a significant premium paid by property owners for their waterfront, and in fact would be greater given the reduced lot size relative to other homes.

- "Best possible science" would not seem to support a living shoreline under these circumstances, but that is not certain given latitude for interpretation in the guidance.

- The expense for legal and engineering experts to support a determination that seems self-evident for preserving the current seawall, would be unnecessary and potentially financially ruinous to property owners.

- This property loss also seems in to be indirect contradiction with language in two amendments to the U.S. Constitution.

o 5th - "…nor shall private property be taken for public use, without just compensation."

o 14th - "…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Conclusion:

Greater clarity should be provided in the guidance to protect all stakeholders and promote efficient and effective government oversight. We appreciate the fact that the lack of greater clarity in the guidance provides the Wetlands Board with

more latitude in making determinations. However, guidance without sufficient structure does not serve the intended purpose of providing guardrails to protect all stakeholders.

Even if a homeowner's proposed repair or replacement is eventually permitted, the latitude under insufficiently clear guidance may result in unnecessary and significant expense for engineers, scientists, and lawyers. The Wetlands Board may, and has previously, asked for repeated submissions for additional information, which both delay appropriate action and increase property owner expense. This scenario is well founded from past experience where the WMA previously attempted to install a living shoreline of its own initiative and eventually abandoned the proposal after the Wetlands Board's multiple information requests and $20,000 expended by WMA on experts in order to provide responses.

Thank you for the opportunity to comment.

Paul Sanford

Wessynton Marine Association President

Comment 9

Dear Fairfax County Wetlands Board Members,

I would like to take this opportunity of echo the thoughts and concerns of the Wessynton Marine Association which appear below. My personal comments follow:

My concerns boil down to one single issue: the potential cost to prove "best available science" when we inevitably have to apply for a permit to maintain or repair the seawalls surrounding our community canals, which were dug out of upland areas over 50 years ago. In our case, it seems clear from both VIMS' Living Shoreline Guidelines (e.g., "If a site has a deep nearshore (greater than about 3 ft deep, 30 ft seaward of MLW), a revetment might be the preferred alternative" – and this depth offshore describes every inch of our waterfront) as well as your own draft applicant guide (e.g., "There are many locations where living shorelines may not be suitable for implementation, including locations with long fetch distances, **navigation channels** *(emphasis added*), and others.") that bulkheads are appropriate to our case and do reflect "best science." I have no question as to whether we would prevail with a permit request to repair or replace our bulkheads, provided they have not yet failed and thus created new wetlands, my concern is the potential cost to prove our case, open and shut as it may appear.

Thank you for this opportunity to provide comments on your draft *Applicant Guide For Tidal Wetlands Alteration/Stabilization*.

Mark Miller

3005 Sevor Lane

Alexandria VA 22309

See Comment F for markup

Comment 10

Dear Members of the Fairfax County Wetlands Board:

I have enjoyed my waterfront home in Wessynton for over 30 years. I am writing this because I am very concerned by the August Wetlands Board guidelines and associated 2020 living shorelines law. Even though our community was designed with bulkheads along the man made canals, these guidelines could require my bulkhead be removed and a living shoreline installed. My understanding is that this could

have significant economic impact including the cost of creating the living shoreline and the loss of property value because of considerable loss of part of my yard. These economic impacts could total well over $100,000.00 and change the beauty of my yard. All this is very troubling because the development of our community did undergo reviews by Fairfax County at a time when bulkheads were recommended by the regulatory agencies for shoreline stabilization. Now the state and Fairfax County have reversed that recommendation and can require property owners with shoreline stabilization structures that were constructed in accordance with the law at the time of construction to remove these structures and install a living shoreline.

The guidance is very subjective. The guidance is not clear what information will be considered nor how it will be considered. For example, the guidance states that the Fairfax County Wetlands Board "…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, sea wall/bulkhead maintenance, sea level rise impacts on land ownership, and living shoreline property impacts, when making its decision ." Also, Section 2 of the application guide is titled "Living Shorelines Required Where Suitable" but lacks direction to guide the decision of where living shorelines are or are not suitable.

Given the impacts to our community, I ask the guidance be modified to allow communities that are designed to have a bulkhead be grandfathered so we can continue to repair and maintain our waterfront community as it appears now. Also, I ask that you support changes in the 2020 law as the law seems to have been hastily adopted without due consideration of the impacts to property owners, a process lacking objectivity and a process that exempts government from these requirements.

Thank you for your consideration.

Lois Ligoske

3002 Sevor Lane

Alexandria, VA

(703) 477-7007

Comment 11

Hello,

I write in support of my neighbor's amendments and offer my own concerns about the proposed Guidance for the Preservation of Tidal Wetlands. I recently moved from DC to Virginia and purchased a

house that is—as currently written—subject to the Guidance for the Preservation of Tidal Wetlands. As a new resident I must say that I am gravely concerned about the language of the proposed guidance.

I consider myself to be a strict environmentalist so I will begin with my concerns about how this guidance would turn a well-intended legislation into a hazard to our wildlife and citizens.

1. There are a number of houses and structures that have been built after the creation of the seawalls that confine the water of Virginia's man-made creeks. Should these seawalls be removed the existing structures would most certainly erode. The eroded inorganic materials would dissolve into the waterways and could cause a catastrophic impact on the wildlife and quality of the wetlands. As man-made waterways cannot possibly serve the "Commonwealth's goal of protecting and preserving tidal wetlands" their exemption is necessitated.
2. To the extent that the guidance and legislation is not intended to impact existing structures whose foundations would be impacted by the removal of the seawall, the uncertainty of whether this guidance would impact the ability of property owners to perform routine maintenance will cause property owners to allow their seawalls and bulkheads to fall into disrepair resulting in potential harm to citizens and wildlife.

I am additionally concerned about how this well-intentioned legislation could backfire if the current guidance is not amended:

1. The removal of seawalls essentially repurposes property owners land for state purposes—an unconstitutional easement and the $25/sq ft is woefully insufficient to constitute fair compensation for those whose former dock is turned into a swamp.
2. Without carefully crafting the guidance to address both the legitimate interests of the state and the harm to the property owner this legislation could be overturned entirely and the citizens of Virginia would be have to bare the costs (and could potentially align themselves with persons who do not share their interests in preserving wetlands).
3. The uncertainty about whether waterfront home owners are going to be subject to this guidance will drive down home prices and lessen the property tax revenue of the state. This revenue could otherwise be used for preserving our wetlands.

My neighbors have provided thoughtful amendments to the proposed guidance (attached) and I hope that it will be taken into consideration. At the very least, man-made waterways and maintenance (including the replacement and repositioning of bulkheads) of existing structures must be exempted from the areas and activities that require permitting.

Liza Sneitzer
Associate

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Comment 12

The MVCCA membership of approx. 14,000 members has carefully reviewed your policy and procedures regarding living shore lines implementation.
Our membership voted for approval of the attached resolution and it is forwarded for your review and serious consideration and acceptance.

Thank you for your positive action to our request for changes.

If you have any questions please contact Larry Zaragosa who is cc'd on this email.

Regards,

Katherine Ward
Cochair
MVCCA

See also Comment E

Comment 13

Dear Sir or Madam:

County officials should consider the following points as they finalize guidance to implement the new law:

That the guidance would require a landowner to dismantle an existing protective bulkhead to install a living shoreline would likely constitute a taking of property and require the county to pay compensation for the value of the property taken. Other commenters have indicated how the draft guidance would result in the diminishment of usable yard space, a taking of property. That county and other publicly owned shorelines are exempt from the law demonstrates a targeting of private landowners to meet a public good. This targeting would strongly support any landowners' claim that a taking has occurred when the county demands a living shoreline rather than a bulkhead repair. A solution is to grandfather structures existing at the time the law was enacted.

The Mount Vernon Estate, a privately owned property, is an example of the disaster that overly aggressive implementation of the guidance could create. The hillside at the estate is already subsiding towards the Potomac River. If the solid bulkhead protecting the hillside needed maintenance and therefore was required to be removed for an existing shoreline, it could compromise the historic mansion. Mount Vernon and similar properties protected by existing bulkheads should be grandfathered.

Waterfront structures such as bulkheads often support more than one riparian property. Requiring a living shoreline when one landowner requires a repair to a portion of an existing bulkhead would leave a gap in the bulkhead leading to erosion and/or flooding of adjacent properties not in need of bulkhead repair. This issue needs to be analyzed and addressed because of the potential that piecemeal application could cause greater environmental harm to essential ecological services that improve water quality than any advantages from a living shoreline. If the county cannot make this analysis in a scientific manner in developing its guidance, one solution is to grandfather structures existing at the time the law was enacted. Moreover, this spillover effect would also make the county potentially liable for damages to adjacent properties.

Climate related sea level rise may ultimately necessitate the improvement of bulkheads to protect both private and public property to prevent periodic flooding of uplands. While living shorelines are intended to address climate change impacts, they may not do so in all instances, especially where bulkheads are already installed and providing such protection.

The best available science is to be used in making determinations under the guidance. The guidance should make clear that the county will pay for any scientific determinations necessary in the permitting process. The presumed benefit from the Law is to the public, and private landowners should not be responsible for such studies. We are already paying taxes for the public good. Perhaps the county could seek a grant form the state to fund such science.

If the legal advice that the county receives from its counsel is that there is no way to write a specific grandfather provision into the guidance, despite the risks to the county (and perhaps state) treasury from takings litigation, then the county should issue and publish "county-wide permits," similar to nationwide permits under the federal Clean Water Act, to permit without any application process maintenance to an existing bulkhead and where a bulkhead supports more than one property, to replacement, if necessary. EPA and the Army Corps use this tool with much success and with limited controversy to smooth out potentially harsh applications of the CWA.

Thank you for the opportunity to comment and your consideration of my comments.

Paul B. Smyth

3002 Doeg Indian Ct.

Alexandria, VA 22309

Comment 14

I am a homeowner on Little Hunting Creek who is deeply troubled by the new law requiring waterfront homeowners with bulkheads to convert to living shorelines. My bulkhead is sturdy, well-maintained, and the surrounding vegetation absorbs rainwater runoff effectively and provides valuable tree canopy. I live on a steep slope and if a living shoreline is mandated, it is possible that the slope or hillside would collapse with the removal of my bulkhead. In turn, that could very well impact the stability of my home which may then slide down the hillside. Has the Wetlands Board thought about that kind of risk?

I am asking that the Wetlands Board make a decision to "grandfather in" existing bulkheads. That interpretation would make guidance so much easier. My bulkhead was built to specifications and regulations available at the time it was built and has performed well. But if I wish to keep maintaining it or make repairs, I have to get a permit from the Wetlands Board which is now likely to say I need to dismantle my bulkhead in favor of a living shoreline?! Where is the soil science determining this action? Not every piece of property is appropriate for a living shoreline. Who's paying for this? It will render the navigation channel I live on useless if a living shoreline is mandated for my property.

The lawmakers who wrote this may have meant all NEW construction must consider living shorelines. That way, the necessary living shoreline elements could be designed into a project from its beginning. Trying to retrofit existing properties making them living shorelines is more problematic than environmentally sound. Therefore, I ask you to exempt existing bulkheads from this new law.

Thank you for your time and for all you do for Fairfax County!

Sincerely,

Denise Freeland

3002 Doeg Indian Court,

Alexandria, VA. 22309

Comment 15

Wessynton is a marine community…it was when we purchased our home 35 years ago and it still is a thriving marine community. The canals are not just for the use of the 26 homes located on the canal but also for the 130+ additional homes that have access to the community dock to launch and recover their personal boats, canoes, etc. The canals are well used and provide an extraordinary amount of pleasure and opportunity for the entire Wessynton community and local fishermen from neighboring communities.

Looking at the attached photos of our backyard, which has one of the longest waterfronts in Wessynton and is situated on a hill approximately 50 feet above the canal, I would like to point out that if the current bulkhead was removed to accommodate a Living Shoreline, due to the new statute, our waterfront lot would likely result in a loss of approximately 30-45 feet from the canal waterline. When we purchased our home, we had a masonry wall installed approximately 20 feet from the canal and parallel to the bulkhead to prevent visible erosion from the area between the wall and our house. If the bulkhead and/or stonewall had to be removed to accommodate a Living Shoreline this could cause our entire back lot to slide toward the Living Shoreline and possibly effect the foundation of our house. The cost to rebuild a new stone wall higher up could be prohibitive and would include removing trees and a patio deck to conform to the statute and could impact the overall stability of our house and upper deck.

It seems to us that it would more sensical and environmentally conscious to be provided authority within a statute to repair what is currently in place.

Thank you for taking these concerns under consideration.

Carla and Hal Amerau

3006 Cunningham Drive

Alexandria, VA 22309

Comment 16

Dear Fairfax County Wetlands Board,

Thank you for this opportunity to comment on the Fairfax County Wetlands Board (FCWB) draft Applicant Guide For Tidal Wetlands Alteration/Stabilization. I am writing on behalf, and as president of, the Wessynton Homes Association (WHA), a neighborhood of 156 homes on Little Hunting Creek wherein all homes in the neighborhood share ownership and use of two manmade canals. Separately, the Wessynton Marine Association (WMA) provided you comments, and I support their comments and concerns.

Speaking for WHA, our primary concern is, first and foremost, the potential loss of property should we be forced to install living shoreline where we currently have bulkheads on our canals. That is hopefully an unlikely outcome, but it would result in a loss of 20 to 40 feet from all affected waterfront property, constituting a 20% to 30% loss of yards for all waterfront homes, community property, as well as an enormous expense. Again, that is an unlikely outcome, as VIMS guidance, as well as your draft Applicant Guide, suggests living shoreline may not be indicated for canals that exist primarily for navigation, which accurately describes our canals, or where there is near shore deep water, which also describes all the bulkheaded sides of our canals.

Our very real fear is the potential cost Wessynton residents could incur to make the case that bulkheads, in Wessynton's case, really do represent "best available science." Our neighborhood had an unfortunate experience with the Fairfax County Wetlands Board (FCWB) back in 2014 when we submitted an application to install a living shoreline on Parcel G in place of a dense thicket of invasive bamboo with steep drop-offs to deep water. While the Wetlands Board did not vote Wessynton's application down at the public hearing, the subsequent items the FCWB requested (roughly a dozen or so additional questions and pieces of information) before making a decision on Wessynton's application rendered the project no longer feasible. The cost to keep answering data requests from the FCWB with no clear end in sight and no assurance the project would be approved before sinking considerable resources into answering myriad questions made the project unaffordable. Wessynton subsequently removed the bamboo and installed approved wetlands plantings, with the guidance and approval of the Fairfax County Land Development Services (which was included in the permit application), but we were unable to install a gradual slope with wetlands-friendly grasses as we had hoped. That represents a missed opportunity to improve the wetlands environment, part of which blame can be placed on the WB's failure to appreciate the good work Wessynton hoped to accomplish, as well the WB failing to understand the cost implications they were putting back onto the Wessynton community and its residents. There can be a very real cost to providing data, and private homeowners or homeowners associations do not always have the resources to fund seemingly endless studies.

On an administrative note, I would like to suggest one editorial to your draft where it states, "Fairfax County defines a tidal wetland as, "Lands lying between and contiguous to mean low water and between mean low water and mean high water subject to flooding by normal tides and wind tides. 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." I recommend that you substitute "possible" or "quite possible" for the word "likely" in the last sentence above. In our neighborhood, there are no yards that have any wetlands, though we do have wetlands across the canal from one of our bulkheads and we take the husbandry of those wetlands quite seriously.

Again, I thank you for this opportunity to comment.

Sincerely,

Leslie Tucker, President

Wessynton Homes Association

Comment 17

Dear members of the Fairfax County Wetlands Board,

I am attaching my comments on the August draft guidance.

I also appreciate the work that has gone into preparing this draft. I believe that we all share an interest in improving the health the Chesapeake Bay Watershed. These comments are intended to help build agreement on the facts, raise concerns that I hear from other waterfront owners, and begin a dialogue on steps that will result in environmental benefits to Chesapeake Bay Watershed in Fairfax County.

I believe that if the goal is to remove any hardened shorelines that are not needed and to replace them with living shorelines, then a better approach would be to obtain grants to support such work as other parts of the state and country have done. Such an approach should include grants for property owners to help pay for the conversion. I further believe that forcing waterfront property owners to pay for legally constructed hardened shorelines will lead to appeals, litigation and alienate waterfront property owners. Most waterfront property owners that I know purchased their property because they appreciate the waterfront and they take various actions to help improve the waterfront from collecting trash in the water to reducing the use of chemicals in their yard.

Thank you for your time and consideration. I am copying my waterfront neighbors in Wessynton and a few others.

Larry Zaragoza

703-577-7466

Comments on the August 2022 Fairfax County Wetlands Board Guidance
By Larry J. Zaragoza, D.Env.

September 14, 2022

Summary

The August 2022 Draft Wetlands Guidance does not provide clarity for waterfront property owners as to what is required to obtain a permit without multiple iterations of requests that require the support of Professional Engineers, lawyers, consultants, surveyors, and others to respond to questions from the Wetlands Board. While existing shoreline stabilization structures have been installed in a manner consistent with the law at the time of construction, the draft guidance does not recognize existing guidance that provides the ability repair or replace an existing bulkhead on a residential canal, which can create significant impacts on waterfront property owners such as the removal of a bulkhead, the cost of creating a living shoreline, damage to property from the creation of a living shoreline, loss of property value because of the loss of useable yard, and the loss of part of the yard that the originally purchased.

These impacts to the waterfront property owner are significant and can easily exceed $100K but the description of the benefits of living shorelines relative to the impacts is absent. It appears that there is no regulatory mandate beyond the 2020 legislation, which appears to be the result of a lobbying effort with no clear environmental benefit, or reasonable justification for denying repair/maintenance/replacement of existing shoreline stabilization structures. Data from the Virginia Marine Resources Institute (VIMS) for Little Hunting Creek, which has the highest percentage of residential shoreline, is reported to have about 9% hardened shorelines. Given that VIMS also states that about 18% of the Chesapeake Bay has hardened shorelines and that about 14% of the shoreline in Fairfax County is hardened, what is the goal? How much shoreline does the Wetlands Board believe should be converted from a hardened shoreline to a living shoreline to see the desired environmental benefit and what will be the criteria for requiring living shorelines?

At present, the draft guidance seems to indicate that these decisions appear to be largely arbitrary. Unfortunately, the draft guidance fails to provide information on determining when a living shoreline will not be suitable. Moreover, the guidance does not address considering the influence of wind on tides, the determination of required slopes for a living shoreline, consideration of the impact of sea level rise due to climate change, and the determination of the high tide for the design of a living shoreline. These considerations will play a significant role in determining how much yard will be required to support a living shoreline.

Organization of Comments

These comments on the August 2022 draft Fairfax County Wetlands Board Guidance have been separated into 2 groups. First, review of the responsiveness to the draft guidance to Supervisor Storck's motion that he made and was adopted by the Board of Supervisors directing that this guidance be updated. Second, other comments.

I. Responsiveness to Supervisor Storck's motion that he made and was adopted by the Board of Supervisors directing that this guidance be updated:

> The Fairfax County Wetlands Board policy development considerations should include, but not be limited to, 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, and living shoreline property impacts provided that these items do not conflict with any other federal, state or County ordinance and regulations and seek significant public engagement in the draft policy before it is finalized.

A. Supervisor Storck's motion included "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, and living shoreline property impacts provided that these items do not conflict", which is not addressed in a substantive manner.

The draft guidance only said that these factors may be considered, which does not guide either the Wetlands Board or provide permit applicants an idea of what they should submit if they want their permit application to be approved, especially if they wish to retain their existing shoreline stabilization structure. The draft does not even explain how it will incorporate other guidance like the VIMS Decision Support Tool, which recommends that residential canals with bulkheads be repaired/replaced.

B. The guidance does not address the question of legal conflicts. In particular, there are at least 3 conflicts with federal law. First, **given that the guidance supports decisions to require a property owner to remove a shoreline stabilization structure, like a bulkhead, and replace it with a living shoreline that can require a significant part of a yard, there is a potential takings issue as the 5th and 14th Amendments to the U.S. Constitution provides**:

- **Fifth Amendment Rights of Persons:** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.** [bolding added for emphasis]
- **Fourteenth Amendment: Section 1:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the equal protection of the laws. [bolding added for emphasis]

Second, **the lack of objective direction provides for wide latitude by the Wetlands Board that make it impossible for a property owner to anticipate what will be required, especially should they wish to retain their existing shoreline stabilization structure. The arbitrary-or-capricious test is a legal standard of review used by judges to assess the actions of administrative agencies.** It was originally defined in a provision of the 1946 Administrative Procedure Act (APA), which instructs courts reviewing agency actions to invalidate any that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The test is most frequently employed to assess the factual basis of an agency's rulemaking, especially informal rulemakings.[1]

Third, while decisions should be informed by relevant scientific information, impacts on property owners and law, much of the focus on living shorelines decisions ignores impacts to property owners. Supreme Court cases (e.g., Michigan vs. EPA: 576 (2015)) have found that cost or economic impact must be considered in decisions. Moreover, the Planning Commission meeting on October 6, in the discussion of the Plan Amendment 2013-CW-9CP, Commissioner Eisner said that cost does not need to be considered and cited EPA. On February 19, 1981, President Ronald Reagan signed Executive Order 12866, which requires the preparation of a cost benefit analysis for any economically significant rule, which can be triggered by several conditions and captures the vast majority of rules. The cost benefit analysis calls for examination of the costs and benefits of a rule. For example, if a rule is designed to prevent cancer cases by reducing industrial emissions, then the costs to industry of reducing those emissions to comply with the law and the health benefits will be estimated in dollars so that costs and benefits can be compared. Individual agencies or departments draft rules and cost benefit analysis but the rule making package is reviewed by the Office of Management and Budget. Since this initial executive order, there have been multiple updates under different administrations that have updated the process. Thus, while a statute might not call for a review of costs and benefits, the federal government routinely reviews costs and benefits as a normal part of the rule making process. Additional information on the work of the Office of Management and Budget can be found on their website (see: https://www.whitehouse.gov/omb/information-regulatory-affairs/).

There also appears to be an inconsistency or conflict between the draft guidance and State law in the jurisdiction of the Wetlands Board (See 1st sentence under section 3. Do I have a Tidal Wetland Subject to Permitting Requirements?). Section 28.2-1302 of the Virginia Code defines the jurisdictional boundaries of both nonvegetated and vegetated tidal wetlands as follows:

- "Nonvegetated wetlands" means unvegetated lands lying contiguous to mean low water and between mean low water and mean high water, including those unvegetated areas of Back Bay and its tributaries and the North Landing River and its tributaries subject to flooding by normal and wind tides but not hurricane or tropical storm tides.
- "Vegetated wetlands" means lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project in the county, city, or town in question, and upon which is growing any of the following species: saltmarsh cordgrass (Spartina

1 See: https://ballotpedia.org/Arbitrary-or-capricious_test.

alterniflora), saltmeadow hay (Spartina patens), saltgrass (Distichlis spicata), black needlerush (Juncus roemerianus), saltwort (Salicornia spp.), sea lavender (Limonium spp.), marsh elder (Iva frutescens), groundsel bush (Baccharis halimifolia), wax myrtle (Myrica sp.), sea oxeye (Borrichia frutescens), arrow arum (Peltandra virginica), pickerelweed (Pontederia cordata), big cordgrass (Spartina cynosuroides), rice cutgrass (Leersia oryzoides), wildrice (Zizania aquatica), bulrush (Scirpus validus), spikerush (Eleocharis sp.), sea rocket (Cakile edentula), southern wildrice (Zizaniopsis miliacea), cattail (Typha spp.), three-square (Scirpus spp.), buttonbush (Cephalanthus occidentalis), bald cypress (Taxodium distichum), black gum (Nyssa sylvatica), tupelo (Nyssa aquatica), dock (Rumex spp.), yellow pond lily (Nuphar sp.), marsh fleabane (Pluchea purpurascens), royal fern (Osmunda regalis), marsh hibiscus (Hibiscus moscheutos), beggar's tick (Bidens sp.), smartweed (Polygonum sp.), arrowhead (Sagittaria spp.), sweet flag (Acorus calamus), water hemp (Amaranthus cannabinus), reed grass (Phragmites communis), or switch grass (Panicum virgatum).

However, the draft guidance appears to employ a different definition, that is: Fairfax County defines a tidal wetland as, "*Lands lying between and contiguous to mean low water and between mean low water and mean high water subject to flooding by normal tides and wind tides*. 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."

The definition in the draft guidance differs from the law cited in the above two bullets. This new definition appears to expand the jurisdiction of the Wetlands Board. **Moreover, to be consistent with Virginia law, shouldn't the County guidance be clarified to say that if bulkheads/sea walls with no wetland plants that they can be repaired/replaced as directed in the VIMS Decision Tool?[2]**

Other states in the Chesapeake Bay Watershed also share an interest and obligations to address the impacts on the Chesapeake Bay Watershed. However, in contrast to other states in the Chesapeake Bay Watershed, only Virginia and Maryland "require" that living shorelines be used for shoreline stabilization (see Table 1). Other states may prefer, allow or have no position on living shorelines. When New York developed their guidance, they concluded that the science does not support requiring living shorelines. However, Maryland provides for property owners to seek an exemption for existing structures. **Thus, the denial of a permit to repair or replace a shoreline stabilization structure can create legal vulnerabilities for the County, which should be mitigated by allowing/grandfathering of existing shoreline stabilization structures. Given this wide interpretation of Virginia's 2020 living shoreline law, a court might find that 1) the law fails to provide a property owner information needed to comply and that the decisions resulting from this law are arbitrary and capricious[3], 2) that there is a taking of property without just compensation and 3) that the implementation of the law is ignoring impacts, including cost.**

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2 https://cmap2.vims.edu/LivingShoreline/DecisionSupportTool/

[3] There should be a clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. [Natural Resources Defense Council, Inc. v. United States EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)]. See: https://definitions.uslegal.com/a/arbitrary-and-capricious/

B. Supervisor Storck's motion also directed that "The Wetlands Board Shall seek Significant Public Engagement in the Draft Policy before it is Finalized"

I have held a strong interest in the living shorelines policy since the introduction of the draft change to the Comprehensive Plan last year and I usually am provided notice of meetings on meetings involving the living shorelines policy. The public notice for the comment period for the draft guidance states the beginning of the comment period was August 3 but I did not get notice of the document until August 15 from an email from the Chair of the Wetlands Board. However, I did not receive any notice of the only Wetlands Board meeting that took place during the comment period, which would seem like an excellent opportunity for public engagement. I had been checking the Wetlands Board website for a meeting notice but did not see one even just a few days before the meeting. I did see that the meeting that was originally scheduled was canceled. Thus, I do not see how the efforts have been made to seek significant public engagement in the draft policy at this point.

II. Other Comments

A. The draft does not provide citations to show that the guidance is consistent with law, State guidance, and County policies.

The draft guidance omits citations to legal authority and guidance throughout the document. The absence of this information reduces the objectivity of a Wetlands Board and reduces transparency for the permit applicant.

B. Areas that would benefit from information for Clarity

1. Determination of normal and wind tides (See 1st sentence under 3. Do I have a Tidal Wetland Subject to Permitting Requirements?)

How are normal and wind tides determined? There should be an objective source that can be cited and consistently used. Also, this kind of information should be subject to review as it can have a substantial impact on the yard required for a living shoreline.

2. Authority for Fines

Page 3 states: "If you or your contractor proceed without approval and it is later found your project required a permit from the FCWB [Fairfax County Wetlands Board], you will be subject to fines, may have to remove your alterations and make extensive improvements beyond the shoreline protection previously in place."

It would be helpful to cite the legal authority for the fines and the amount of the fines and the criteria for issuing fines.

3. Joint Permit Application (JPA) Process Figure

The JPA Process figure does not address the question of what happens upon denial of an application. Also, in describing this figure, it would be helpful to describe the documents that an applicant should review.

4. Permit types

For an Erosion Control Structure Maintenance permit, what is a minimum of application burden? Would this include a bulkhead replacement or maintenance on rip rap that has not failed?

5. Appendix A

Links should be provided for the different documents cited in Appendix A.

As stated in Appendix A of the guidance, allowed uses include grazing, which has historically been a significant source of nitrogen, government structures and a variety of other allowed uses but excludes existing shoreline stabilization structures. While this information is consistent with the 2020 law, it is not logical.

6. Professional Engineer

The guidance also calls for the use of a Professional Engineer. A Professional Engineer will add to the cost of a project. The requirement for a Professional Engineer appears to be arbitrary as it is certainly possible for a consulting team to assemble the information needed without a Professional Engineer based on the discussion in the guidance. If there is a need for a Professional Engineer, the need should be clear.

D. Determining when a Living Shoreline is not Suitable

Under Overview of Laws, Regulations, and Guidance, the statement about VIMS is provided: "As a part of VIMS guidance, a recommended shoreline erosion abatement is included for each tidal wetlands property in Fairfax County (recommend that the guidance provide the specific reference). During the application process, FCWB staff can assist you in locating guidance for your property."

I have reviewed the Fairfax County Comprehensive Map Viewer[4], which I believe is the VIMS tool that this language references. This tool does provide best management practices for Fairfax County tidal shorelines but sometimes the "recommendation" lacks information that would guide the user to an implementable best practice. For example, Wessynton's main canal in our community is labeled seek regulatory advice. This mapping tool also appears to need some validation as it does not identify an old bulkhead in an area near the mouth of this canal. I have reached out to VIMS staff to discuss this tool and know that VIMS is seeking to improve functionality, but this tool does not seem to be ripe for use. Moreover, this seems like another product that should undergo some formal testing to ensure that it is adequate to support its intended use. **If the Fairfax County Comprehensive Map Viewer is intended to be the**

4 https://cmap2.vims.edu/CCRMP/Fairfax2012/Fairfax_CCRMP_Viewer.html

primary source to guide decisions, then it places the Wetlands Board in the very difficult position of making decisions that can have major impacts on a property owner with very little guidance that would inform the decision. Moreover, inconsistency among wetlands boards across the state would be expected given the state of this tool.

I have also reviewed some data from the Virginia Marine Resources Commission (VMRC) permitting database and found significant variation in decisions. In some cases, existing hardened structures are being repaired/replaced and in others there is at least some part of the project that has a living shoreline. Some examples of homeowner impacts provide perspective on some of the impacts. A property owner hired a contractor to add some rock to his existing rip rap and a kayak launch. The contractor thought the work was so minor it did not need a permit. Then as construction was coming to an end, the Hampton City Wetlands Board came to the house asked that work be stopped. While the property owner sought guidance as to what would be needed to obtain a permit for work, he could not get a clear answer. Furthermore, the Wetlands Board repeatedly fined him with new proposals that were denied. Then during an appeal to the Virginia Marine Resources Commission (VMRC) the chair of the VMRC and VMRC staff supported the property owner during the discussion, but the VMRC members sided with the Hampton City Attorney who said the proposal did not do enough for a living shoreline. It seems that the property owner undertook a good faith effort to satisfy the Wetlands Board (including taking advice from a member of that Board during a site visit to their home). This property owner had also employed a consultant who had served on and chaired a wetlands board in a neighboring county for decades. It is hard to see how a property owner could comply without removing all the rip rap, which would cause a problem for his neighbors as they all had rip rap. Following a new JPA, which was very similar to a previously denied application, the Hampton City Wetlands Board approved the permit application. Another property owner whose sea wall was approved by the Accomack County Wetlands Board only to be reversed within few months by the VMRC.

E. Outreach

One of the big problems with the living shorelines process is that there has been little done to let homeowners know of the change in law. Knowing that it is important to maintain structures and undertake work before failure is not widely appreciated by waterfront property owners. VIMS, VMRC and wetlands boards all seem to focus communications and guidance amongst themselves.

The County regularly provides information on flooding for property owners with part of their property in the floodplain. Similar information could be provided on wetlands, shoreline stabilization structures and their maintenance, and resource protection area responsibilities. Also, it is not unusual for County staff and Boards or commissions to proactively brief the Mount Vernon Council of Citizens' Associations and other organizations but a briefing of the MVCCA was not provided until issues were raised to Supervisor Storck when he facilitated a briefing from the Wetlands Board for the MVCCA'S Environment and Recreation Committee.

Outreach should also include information as to why removing hardened shorelines and replacing them with living shorelines is important as requiring removal of shoreline stabilization structures

and replacement with a living shoreline can be very expensive, result in the loss of yard, and alienate waterfront property owners.

I know that many in the Mount Vernon area were surprised that the Virginia would adopt the 2020 law without the input of those impacted as many still have not heard of the 2020 law and the impact that it can have on their property. State and County resources are spent delivering information that is far less important to property owners and it is disappointing that more robust efforts are not being taken because it is a shock to hear that they might lose part of their yard to a living shoreline and be responsible for bills that could total over $100k and lose property value in the process. It is especially painful because there is no clear environmental benefit to installing a living shoreline.

F. Perspective on Hardened Shorelines

Overall about 14% of the tidal shoreline within Fairfax County has been hardened according to VIMS's Fairfax County Comprehensive Map Viewer. The decisions to develop properties adjacent to wetlands were reviewed and approved by Fairfax County or at least developed in accordance with the law at the time of construction. The 2020 living shorelines law places a higher priority on wetlands and the draft guidance places the burden of creating wetlands on waterfront property owners. According to the VMRC permitting database, the construction of bulkheads has decreased as the value of wetlands has been highlighted.

Also, I did not see any requirement that living shorelines replace hardened shorelines is not required by either the Chesapeake Bay Agreement between EPA and Virginia or the Phase III Watershed Improvement Plans to meet water quality standards. It would be helpful to identify the support for the need to remove existing hardened shorelines and replace them with living shorelines along with the environmental benefit. Moreover, usually there is some consideration of impacts and thoughtful evaluation of alternatives, especially alternatives that provide incentives to achieve the desired goal, when environmental policies are adopted but there seems to be no such analysis to support denying a property owner to repair or replace their existing structure. Thus, **it appears that there is no regulatory mandate beyond the 2020 legislation, which appears to be the result of a lobbying effort that may or may not have an environmental benefit, or reasonable justification for denying repair/maintenance/replacement of existing shoreline stabilization structures.**

G. Audience

The guidance says it is intended to be written for waterfront property owners, but it does not provide the information needed so that they can understand what is needed to support a permit application, especially if they wish to retain their existing shoreline stabilization structure. If the guidance is not going to provide information that a property owner is going to need if they wish to retain their existing shoreline stabilization structure or even if they want to create a living shoreline, then the guidance should just say that this information will not be provided. Because others might have a very different view from mine, I recommend that a focus group of property owners with hardened shoreline stabilization structures be used to review and confirm that the guidance provides information that is needed.

Table 1. Summary of Living Shorelines Law and Policy for States in the Chesapeake Bay Watershed (Modified from Jones)

State	Comments
	Presumptively Required
Maryland	• Structural shoreline stabilization measures" may be used in areas identified as appropriate for hardened structures as mapped by the state. • Applicants may seek a waiver from the nonstructural requirement if a structural shoreline stabilization measure is the only feasible alternative that will protect and maintain the person's shoreline." A series of criteria are then used to evaluate whether a site is suitable for a nonstructural shoreline, including measures such as the width of the waterway, fetch, bank elevation and orientation, degree of erosion, and tides.
Virginia	• Virginia's 2020 living shorelines law requires living shorelines unless the best available science shows that such approaches are not suitable." • If not suitable, applicant must incorporate, to the maximum extent possible, elements of living shoreline approaches into permitted projects. • Expedites review for living shoreline permits · Excludes government projects from review
	"Preferred" or Encouraged
Delaware	• Living shorelines preferred."
District of Columbia	· Promote to the maximum extent possible the use of living shoreline projects. (D.C Code § 8–1731.03.)
New York	· New York guidance encourages the use of living shorelines. In response to comments on the draft guidance, New York agreed with commenters that the science is evolving and that people should not be bound to install living shorelines and that site-specific evaluation is needed to determine if a living shoreline is appropriate.
	Voluntary
Pennsylvania	• No law or guidance was identified with recommendations on the use of living shorelines.
West Virginia	· No law or guidance was identified with recommendations on the use of living shorelines.

Comment 18

Dear Wetlands Board Members,

As a homeowner in the Alexandria Wessynton Community, I am writing to express my grave concern that the clarifications we have been seeking to the "Living Shoreline Wetlands Board Guidance" be made expeditiously and in full.

The guidance should be tightened to provide greater clarity for property owners regarding expectations and likely outcomes. The Wessynton Marine Association (WMA) community members have shared our concerns in prior Wetlands Board meetings, but the guidance continues to insufficiently consider the unnecessary impacts to property owners the way it is currently drafted. The WMA community's concerns are well founded based on prior experience with a past request to proactively institute a living shoreline in Wessynton.

Suggested Improvements:

Consistent with the guidance provided by Dan Storck to the Wetlands Board, it should be revised to include greater detail on how the following factors will be analyzed and weighed.

- Property use impacts
- Seawall/bulkhead maintenance
- Cost to remove a sea wall
- Cost to install a living shoreline
- Consistency with other laws
- Boat traffic

In addition, there should be the following changes to eliminate unnecessary burden on property owners:

- Clarify conditions under which studies are unnecessary given certain facts, such as clearly identifiable navigation channels. The referenced map should be updated to also show existing hardening structures and not just shoreline. Note: The map needs to be corrected as the Cunningham canal hardening structure is not on the map. nhttps://cmap2.vims.edu/CCRMP/Fairfax2012/Fairfax_CCRMP_Viewer.html.

- Provide an express determination consistent with the VIMS Decision Support Tool that notes that a bulkhead in need to work in a residential area should be replaced with a bulkhead.

- Define what is meant by "best possible science" so that it is clearly understood by all parties and thereby reduce the possibility of personal bias.

The attached copy of the guidance document contains comment bubbles highlighting specific areas of concern.

Illustrative Example:

The attached plat and photo illustrate potential problems with implementation of a living shoreline in a scenario where replacement of a bulkhead would be clearly indicated by a reasonable person. However, this outcome is not a foregone conclusion based on this guidance, and there may be significant expenses incurred to support the outcome.

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- This loss of property represents at a minimum the loss of a significant premium paid by property owners for their waterfront, and in fact would be greater given the reduced lot size relative to other homes.

- "Best possible science" would not seem to support a living shoreline under these circumstances, but that is not certain given latitude for interpretation in the guidance.

- The expense for legal and engineering experts to support a determination that seems self-evident for preserving the current seawall, would be unnecessary and potentially financially ruinous to property owners.

- This property loss also seems in to be indirect contradiction with language in two amendments to the U.S. Constitution.

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Conclusion:

Greater clarity should be provided in the guidance to protect all stakeholders and promote efficient and effective government oversight. We appreciate the fact that the lack of greater clarity in the guidance provides the Wetlands Board with more latitude in making determinations. However, guidance without sufficient structure does not serve the intended purpose of providing guardrails to protect all stakeholders.

Even if a homeowner's proposed repair or replacement is eventually permitted, the latitude under insufficiently clear guidance may result in unnecessary and significant expense for engineers, scientists, and lawyers. The Wetlands Board may, and has previously, asked for repeated submissions for additional information, which both delay appropriate action and increase property owner expense. This scenario is well founded from past experience where the WMA previously attempted to install a living shoreline of its own initiative and eventually abandoned the proposal after the Wetlands Board's multiple information requests and $20,000 expended by WMA on experts in order to provide responses.

Thank you for the opportunity to comment.

Wanda Ragland

3023 Cunningham Drive

Alexandria,VA 22309

Comment 19

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Thank you for the opportunity to comment.

Richard and Carol Lyon

8800 Mansion Farm Place

Alexandria, Va 22309

Comment 20

Dear Wetlands Board Members,

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Even if a homeowner's proposed repair or replacement is eventually permitted, the latitude under insufficiently clear guidance may result in unnecessary and significant expense for engineers, scientists, and lawyers. The Wetlands Board may, and has previously, asked for repeated submissions for additional information, which both delay appropriate action and increase property owner expense. This scenario is well founded from past experience where the WMA previously attempted to install a living shoreline of its own initiative and eventually abandoned the proposal after the Wetlands Board's multiple information requests and $20,000 expended by WMA on experts in order to provide responses.

Thank you for the opportunity to comment.

Anita Willis

3010 Sevor Lane

Alexandria, VA 22309

Comment 21

Dear Wetlands Board Members,

As a homeowner in the Wessynton Community in Alexandria, I am writing to express my desire that clarifications to the "Living Shoreline Wetlands Board Guidance" (the "Guidance") be made quickly so that members of my community will not be faced with uncertainty about their homes.

The Guidance should be revised to provide greater clarity for property owners regarding expectations and likely outcomes. The Wessynton Marine Association (WMA) community members have shared their concerns in prior Wetlands Board meetings, but the Guidance continues to insufficiently consider the impacts to property owners in its current draft. The WMA community's concerns reflect prior experience with a past request to institute a living shoreline in Wessynton.

Consistent with the guidance provided by Dan Storck to the Wetlands Board, the Guidance should be revised to include greater detail on how the following factors will be analyzed and weighed.

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In addition, the following changes should be considered to eliminate unnecessary burden on Wessynton community members:

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Josh James

3008 Doeg Indian Ct.

Alexandria VA 22309

Comment 22

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Danielle Gao

3115 Cunningham Drive,

Alexandria, VA 22309

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[Sheila Daley

[8804 Four Seasons Court

22309

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Thank you for the opportunity to comment.

Scott Phillips

3003 Doeg Indian Court, Alexandria, VA 22309

email: sephillips69@gmail.com

Comment 25

Dear Wetlands Board Members,

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Robin Herron

3005 Wessynton Way

Alexandria, VA 22309

Comment 26

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Virginia Poole

3312 Wessynton Way, Alexandria, VA 22309

Comment 27

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Martha Frueh and Jennifer Molden

3000 Sevor Lane

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9/15/2023

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Clifford S. Perrin

3410 Wessynton Way

Alexandria, VA 22309

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John Dinan

3406 Wessynton Way

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Thank you for the opportunity to comment.

Comment A

Hello,

I write in support of my neighbor's amendments and offer my own concerns about the proposed Guidance for the Preservation of Tidal Wetlands. I recently moved from DC to Virginia and purchased a house that is—as currently written—subject to the Guidance for the Preservation of Tidal Wetlands. As a new resident I must say that I am gravely concerned about the language of the proposed guidance.

I consider myself to be a strict environmentalist so I will begin with my concerns about how this guidance would turn a well-intended legislation into a hazard to our wildlife and citizens.

1. There are a number of houses and structures that have been built after the creation of the seawalls that confine the water of Virginia's man-made creeks. Should these seawalls be removed the existing structures would most certainly erode. The eroded inorganic materials would dissolve into the waterways and could cause a catastrophic impact on the wildlife and quality of the wetlands. As man-made waterways cannot possibly serve the "Commonwealth's goal of protecting and preserving tidal wetlands" their exemption is necessitated.

2. To the extent that the guidance and legislation is not intended to impact existing structures whose foundations would be impacted by the removal of the seawall, the uncertainty of whether this guidance would impact the ability of property owners to perform routine maintenance will cause property owners to allow their seawalls and bulkheads to fall into disrepair resulting in potential harm to citizens and wildlife.

I am additionally concerned about how this well-intentioned legislation could backfire if the current guidance is not amended:

1. The removal of seawalls essentially repurposes property owners land for state purposes—an unconstitutional easement and the $25/sq ft is woefully insufficient to constitute fair compensation for those whose former dock is turned into a swamp.

2. Without carefully crafting the guidance to address both the legitimate interests of the state and the harm to the property owner this legislation could be overturned entirely and the citizens of Virginia would be have to bare the costs (and could potentially align themselves with persons who do not share their interests in preserving wetlands).

3. The uncertainty about whether waterfront home owners are going to be subject to this guidance will drive down home prices and lessen the property tax revenue of the state. This revenue could otherwise be used for preserving our wetlands.

My neighbors have provided thoughtful amendments to the proposed guidance (attached) and I hope that it will be taken into consideration. At the very least, man-made waterways and maintenance (including the replacement and repositioning of bulkheads) of existing structures must be exempted from the areas and activities that require permitting.

Liza Sneitzer

Associate

Washington Square

1050 Connecticut Ave, N.W. | Suite 1100

Washington, DC 20036-5403

T +1.202.861.1680

esneitzer@bakerlaw.com

bakerlaw.com

Comment B

Dear Fairfax County Wetlands Board,

Thank you for this opportunity to comment on the Fairfax County Wetlands Board (FCWB) draft Applicant Guide For Tidal Wetlands Alteration/Stabilization. I am writing on behalf, and as president of, the Wessynton Homes Association (WHA), a neighborhood of 156 homes on Little Hunting Creek wherein all homes in the neighborhood share ownership and use of two manmade canals. Separately, the Wessynton Marine Association (WMA) provided you comments, and I support their comments and concerns.

Speaking for WHA, our primary concern is, first and foremost, the potential loss of property should we be forced to install living shoreline where we currently have bulkheads on our canals. That is hopefully an unlikely outcome, but it would result in a loss of 20 to 40 feet from all affected waterfront property, constituting a 20% to 30% loss of yards for all waterfront homes, community property, as well as an enormous expense. Again, that is an unlikely outcome, as VIMS guidance, as well as your draft Applicant Guide, suggests living shoreline may not be indicated for canals that exist primarily for navigation, which accurately describes our canals, or where there is near shore deep water, which also describes all the bulkheaded sides of our canals.

Our very real fear is the potential cost Wessynton residents could incur to make the case that bulkheads, in Wessynton's case, really do represent "best available science." Our neighborhood had an unfortunate experience with the Fairfax County Wetlands Board (FCWB) back in 2014 when we submitted an application to install a living shoreline on Parcel G in place of a dense thicket of invasive bamboo with steep drop-offs to deep water. While the Wetlands Board did not vote Wessynton's application down at the public hearing, the subsequent items the FCWB requested (roughly a dozen or so additional questions and pieces of information) before making a decision on Wessynton's application rendered the project no longer feasible. The cost to keep answering data requests from the FCWB with no clear end in sight and no assurance the project would be approved before sinking considerable resources into answering myriad questions made the project unaffordable. Wessynton subsequently removed the bamboo and installed approved wetlands plantings, with the guidance and approval of the Fairfax County Land Development Services (which was included in the permit application), but we were unable to install a gradual slope with wetlands-friendly grasses as we had hoped. That represents a missed opportunity to improve the wetlands environment, part of which blame can be placed on the WB's failure to appreciate

the good work Wessynton hoped to accomplish, as well the WB failing to understand the cost implications they were putting back onto the Wessynton community and its residents. There can be a very real cost to providing data, and private homeowners or homeowners associations do not always have the resources to fund seemingly endless studies.

On an administrative note, I would like to suggest one editorial to your draft where it states, "Fairfax County defines a tidal wetland as, "Lands lying between and contiguous to mean low water and between mean low water and mean high water subject to flooding by normal tides and wind tides. 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." I recommend that you substitute "possible" or "quite possible" for the word "likely" in the last sentence above. In our neighborhood, there are no yards that have any wetlands, though we do have wetlands across the canal from one of our bulkheads and we take the husbandry of those wetlands quite seriously.

Again, I thank you for this opportunity to comment.

Sincerely,

Leslie Tucker, President

Wessynton Homes Association

On Wed, Sep 14, 2022 at 6:12 PM Denise Freeland <eco.voce@verizon.net> wrote:

Dear Wetlands Board,

I am a homeowner on Little Hunting Creek who is deeply troubled by the new law requiring waterfront homeowners with bulkheads to convert to living shorelines. My bulkhead is sturdy, well-maintained, and the surrounding vegetation absorbs rainwater runoff effectively and provides valuable tree canopy. I live on a steep slope and if a living shoreline is mandated, it is possible that the slope or hillside would collapse with the removal of my bulkhead. In turn, that could very well impact the stability of my home which may then slide down the hillside. Has the Wetlands Board thought about that kind of risk?

I am asking that the Wetlands Board make a decision to "grandfather in" existing bulkheads. That interpretation would make guidance so much easier. My bulkhead was built to specifications and regulations available at the time it was built and has performed well. But if I wish to keep maintaining it or make repairs, I have to get a permit from the Wetlands Board which is now likely to say I need to dismantle my bulkhead in favor of a living shoreline?! Where is the soil science determining this action? Not every piece of property is appropriate for a living shoreline. Who's paying for this? It will render the navigation channel I live on useless if a living shoreline is mandated for my property.

The lawmakers who wrote this may have meant all NEW construction must consider living shorelines. That way, the necessary living shoreline elements could be designed into a project from its beginning. Trying to retrofit existing properties making them living shorelines is more problematic than environmentally sound. Therefore, I ask you to exempt existing bulkheads from this new law.

Thank you for your time and for all you do for Fairfax County!

Sincerely,

Denise Freeland

3002 Doeg Indian Court,

Alexandria, VA. 22309

Comment C

To the members of the Fairfax County Wetlands Board,

We write with concerns regarding the Living Shoreline guidelines and their impact on future needs for repairs of our current bulkhead structures.

Wessynton is a marine community…it was when we purchased our home 35 years ago and it still is a thriving marine community. The canals are not just for the use of the 26 homes located on the canal but also for the 130+ additional homes that have access to the community dock to launch and recover their personal boats, canoes, etc. The canals are well used and provide an extraordinary amount of pleasure and opportunity for the entire Wessynton community and local fishermen from neighboring communities.

Looking at the attached photos of our backyard, which has one of the longest waterfronts in Wessynton and is situated on a hill approximately 50 feet above the canal, I would like to point out that if the current bulkhead was removed to accommodate a Living Shoreline, due to the new statute, our waterfront lot would likely result in a loss of approximately 30-45 feet from the canal waterline. When we purchased our home, we had a masonry wall installed approximately 20 feet from the canal and parallel to the bulkhead to prevent visible erosion from the area between the wall and our house. If the bulkhead and/or stonewall had to be removed to accommodate a Living Shoreline this could cause our entire back lot to slide toward the Living Shoreline and possibly effect the foundation of our house. The cost to rebuild a new stone wall higher up could be prohibitive and would include removing trees and a patio deck to conform to the statute and could impact the overall stability of our house and upper deck.

It seems to us that it would more sensical and environmentally conscious to be provided authority within a statute to repair what is currently in place.

Thank you for taking these concerns under consideration.

Carla and Hal Amerau

3006 Cunningham Drive

Alexandria, VA 22309

Comment D

Dear Sir or Madam:

County officials should consider the following points as they finalize guidance to implement the new law:

That the guidance would require a landowner to dismantle an existing protective bulkhead to install a living shoreline would likely constitute a taking of property and require the county to pay compensation for the value of the property taken. Other commenters have indicated how the draft guidance would result in the diminishment of usable yard space, a taking of property. That county and other publicly owned shorelines are exempt from the law demonstrates a targeting of private landowners to meet a public good. This targeting would strongly support any landowners' claim that a taking has occurred when the county demands a living shoreline rather than a bulkhead repair. A solution is to grandfather structures existing at the time the law was enacted.

The Mount Vernon Estate, a privately owned property, is an example of the disaster that overly aggressive implementation of the guidance could create. The hillside at the estate is already subsiding towards the Potomac River. If the solid bulkhead protecting the hillside needed maintenance and therefore was required to be removed for an existing shoreline, it could compromise the historic mansion. Mount Vernon and similar properties protected by existing bulkheads should be grandfathered.

Waterfront structures such as bulkheads often support more than one riparian property. Requiring a living shoreline when one landowner requires a repair to a portion of an existing bulkhead would leave a gap in the bulkhead leading to erosion and/or flooding of adjacent properties not in need of bulkhead repair. This issue needs to be analyzed and addressed because of the potential that piecemeal application could cause greater environmental harm to essential ecological services that improve water quality than any advantages from a living shoreline. If the county cannot make this analysis in a scientific manner in developing its guidance, one solution is to grandfather structures existing at the time the law was enacted. Moreover, this spillover effect would also make the county potentially liable for damages to adjacent properties.

Climate related sea level rise may ultimately necessitate the improvement of bulkheads to protect both private and public property to prevent periodic flooding of uplands. While living shorelines are intended to address climate change impacts, they may not do so in all instances, especially where bulkheads are already installed and providing such protection.

The best available science is to be used in making determinations under the guidance. The guidance should make clear that the county will pay for any scientific determinations necessary in the permitting process. The presumed benefit from the Law is to the public, and private landowners should not be responsible for such studies. We are already paying taxes for the public good. Perhaps the county could seek a grant form the state to fund such science.

If the legal advice that the county receives from its counsel is that there is no way to write a specific grandfather provision into the guidance, despite the risks to the county (and perhaps state) treasury from takings litigation, then the county should issue and publish "county-wide permits," similar to nationwide permits under the federal Clean Water Act, to permit without any application process maintenance to an existing bulkhead and where a bulkhead supports more than one property, to replacement, if necessary. EPA and the Army Corps use this tool with much success and with limited controversy to smooth out potentially harsh applications of the CWA.

Thank you for the opportunity to comment and your consideration of my comments.

Paul B. Smyth

3002 Doeg Indian Ct.

Alexandria, VA 22309

Comment E

Ward Markup

The Mount Vernon Council of Citizens Associations, Inc.

P.O. Box 203, Mount Vernon, VA 22121-9998 **http://www.mvcca.org**

Supervisor Dan Storck
Planning Commissioner Walter Clarke

Dear Supervisor Storck and Planning Commissioner Clarke, Oct 15, 2021

Ref: SB 776 Living Shorelines

The attached MVCCA Resolution regarding concerns over the SB 776 and Fairfax County's implementation policy requiring living shorelines is forwarded for your serious consideration.

Our membership, many of whom live on tidal streams and the Potomac River, are very concerned over the ambiguity of the language in this bill and the staff's recommended implementation policy. We believe that these homeowners should be grand-fathered and therefore be allowed to keep and if necessary, repair their sea walls and/or riprap if damaged or simply in need of repair. We believe that the grand fathering should run with the land.

While the County's Wetlands Board stated in their meeting with the MVCCA ER committee Oct 14, 2021, that they are here to help homeowners successfully meet the SB776 law, we found their comments to be also vague and contradictory in some cases, for example "what exactly is a fetch?". Furthermore, while some vagueness is needed in order to allow for each case to be adjudicated independently, we still have concerns that the decisions are very subjective. Hence, our position they current riprap and/or sea walls must be grand-fathered and run with the land.

Thank you for your support of our resolution.

Regards,

Katherine Ward

Katherine Ward
Co-Chair
MVCCA

MVCCA (ER) Senate Bill 776 Living Shorelines Resolution 01-2021

WHEREAS rip rap and sea walls have been the methods of choice for the stabilization of shorelines in Virginia, including the Mount Vernon District, and in many other local communities;

WHEREAS the loss of wetlands is and has been a concern because wetlands serve multiple environmental functions and the law arising from Senate Bill 776 constrains development to wetlands of lesser ecological significance and non-vegetated wetlands;

WHEREAS the law arising from Senate Bill 776 establishes living shoreline as the preferred alternative for every permit. The law arising from SB 776 specifically states: "The Commission shall permit only 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 Commission shall require the applicant to incorporate, to the maximum extent possible, elements of living shoreline approaches into permitted projects." Thus, the consideration of practicality would only arise if the best available science shows that a living shoreline is not suitable.

WHEREAS, neither the law arising from Senate Bill 776 nor the accompanying guidance adopted by the Virginia Marine Resources Commission provide any direction on the consideration of cost, suitability, or other impacts to guide decisions on whether to require that existing sea walls or rip rap be removed and a living shoreline installed;

WHEREAS the removal of a sea wall or rip rap and creation of a living shoreline will 1) be more expensive than replacing/maintaining a sea wall or rip rap, 2) require a landowner to reduce otherwise usable property to create the required slope for a living shoreline and can result in the loss of beneficial vegetation and trees; and

WHEREAS the law arising from Senate Bill 776 provides no goals but opens every review to a highly subjective decision.

THEREFORE, BE IT RESOLVED, the Mount Vernon Council of Citizens' Association believes that protecting wetlands is important but also believes that it is important to protect property interests of Mount Vernon property owners;

THEREFORE, BE IT FURTHER RESOLVED, that establishing living shorelines as the preferred alternative without providing any guidance on the impacts to property owners with previously approved or existing rip rap or seawalls, is inequitable and requires clarification;

THEREFORE, BE IT FURTHER RESOLVED, that in order to provide for clarification on the interests of property owners, we ask that the Fairfax County Board of Supervisors direct the

Wetlands Board to adopt a policy to protect the interests of waterfront property owners with existing sea walls or rip rap; and

THEREFORE, BE IT FINALLY RESOLVED, that if the Wetlands Board cannot provide protection to current and future property owners of existing seawalls and rip rap, then the MVCCA asks that the Fairfax County Board of Supervisors to ask our elected Virginia representatives to modify the law arising from Senate Bill 776 to provide for protections through grand-fathering for current and future property owners with sea walls and rip rap.

Approved by the MVCCA Environmental and Recreation Committee on Oct 6,2021and the MVCCA Board on Oct 12, 2021and reaffirmed on Oct 15,2021.

Comment F

Sandford Markup

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.

Draft

July 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?

Fairfax County defines a tidal wetland as, "*Lands lying between and contiguous to mean low water and between mean low water and mean high water subject to flooding by normal tides and wind tides.*" 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:

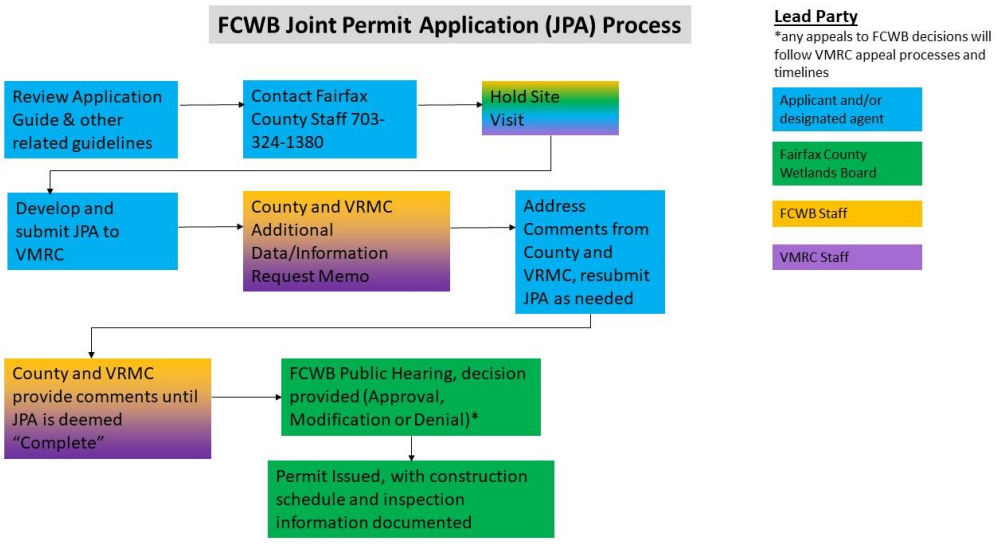
Fairfax County Wetland Board Staff
Department of Planning and Development, Planning Division
12055 Government Center Parkway, Suite 730
Fairfax, VA 22035-5504
Phone: 703-324-1380, TTY 711
DPDWetlandsBoard@fairfaxcounty.gov

If you or your contractor proceed without approval and it is later found your project required a permit from the FCWB, you will be subject to fines, 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 directly 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
All information required in FCWB Permit Applications shall 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. Typically permits issued by the FCWB will include a requirement for certification by the licensed professional of Record that the project has been completed in accordance with the approved permit and construction plans.

Request for waivers to the requirement for a professional certification may be requested by the applicant. Waivers may be granted, but primarily 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. This would not include a new installation or major rehabilitation of an existing structure.

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 before beginning a project even if you believe you do not need a 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 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. 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, 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).

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

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.)

LAW OFFICES OF

H. JAY SPIEGEL & ASSOCIATES

GENERAL CAUSES &
PATENT, TRADEMARK & COPYRIGHT CAUSES

SPIEGEL'S LANDING
8778 THOMAS J. STOCKTON PARKWAY
ALEXANDRIA, VIRGINIA 22308

MAIL ADDRESS: P.O. BOX 11
MOUNT VERNON, VIRGINIA 22121-0011

D.C. BAR
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PATENT BAR
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PARIS CORRESPONDENT
LANGER-NETTER-ADLER
53 AVENUE DE BRETEUIL
PARIS 75007 FRANCE
PHONE: 45 67 01 23
FACSIMILE: 45 67 33 86

October 18, 2021

The Honorable Peter Murphy, Chairman
Fairfax County Planning Commission
County of Fairfax, Virginia
12000 Government Center Parkway
Fairfax, VA 22035

VIA E-MAIL
plancom@fairfaxcounty.gov

Re: PA 2013 - CW - 9CP
Proposed Comprehensive Plan Amendment
Concerning Living Shorelines
Public Hearing October 6, 2021

Dear Chairman Murphy and Members of the Planning Commission:

The referenced proposed Comprehensive Plan Amendment is on the agenda of the Planning Commission meeting to be held on October 20, 2021 on a "decision only" basis. The public hearing was held on October 6, 2021, and at the conclusion of the hearing, the Planning Commission voted to defer the decision to October 20, 2021 while maintaining the record open for further comments. My letter dated September 23, 2021 concerning this matter with its attached photos in already in the record. I testified at the October 6, 2021 hearing, and have attached as Exhibit 1 a transcript of my remarks as they were presented (which differs slightly from the text that was distributed to Planning Commission members at the public hearing).

I am writing to both summarize my concerns as previously expressed and to address additional issues of which I have become aware.

As a first matter, during the public hearing, a discussion between a Planning Commissioner and County staff resulted in the assumption that the U.S. Environmental Protection Agency (USEPA) does not consider costs prior to enacting an environmental regulation. I discussed this issue with Dr. Larry J. Zaragoza, who recently retired as a USEPA official and lives on property fronting Little Hunting Creek as do I. Dr. Zaragoza informed me that he has submitted a letter to the Planning Commission explaining that, in fact, ever since President Ronald Reagan issued Executive Order 12866, cost-benefit analyses are conducted by USEPA before virtually any regulation is enacted. This is important because the law arising

from SB776 does not require any consideration of cost before a locality imposes a living shoreline requirement on a property owner solely based upon the subjective term "best available science." This is highly inappropriate.

As a second matter, during the October 6, 2021 hearing, a Planning Commissioner made reference to my September 23, 2021 letter and its indication that the slope angle that could be required would be 3 to 1. He inquired as to where I had obtained that information. I testified that I did not recall, but subsequently, Dr. Zaragoza reminded me that I had obtained that information during a telephone conversation with Mark Eversole who is the Virginia Marine Resources Commission (VMRC) official who oversees the VMRC permitting process for our locality. During the hearing, it came out that the slope angle could be as much as 10 to 1. I explained to the Planning Commission that a 10 to 1 slope angle, if imposed on a property owner, would take up 3 1/3 times the linear distance of a slope angle of 3 to 1, making a 10 to 1 slope angle that much more intrusive on a property. This is also of great concern.

As a third matter, briefly reiterating my concern expressed in my prior letter and during my testimony, I believe it is inappropriate to enact a Comprehensive Plan Amendment and a Zoning Ordinance Amendment that could preclude a property owner from repairing an existing bulkhead, seawall, or rip rap installation and instead require the property owner to create a living shoreline. If the existing construction was installed on a legal basis and the proposed repair does not extend further out into the body of water, the property owner should be able to repair the facility without being required to go to the considerable expense of replacing it with a living shoreline.

As a fourth matter, the "cost" in the cost-benefit analysis must be considered to include not only the cost of installation but the costs of permitting and maintenance. If a property owner seeks a permit to either repair an existing facility or enact a living shoreline, and the County Wetlands Board denies the application, the property owner may have to appeal the decision to the VMRC. Such an appeal would require the hiring of wetlands experts and legal counsel as well as providing briefing, and preparation for and making a trip to VMRC headquarters to attend a hearing. It would not be unusual for such a process to result in a six-figure expenditure on the part of the property owner. Under circumstances in which repairing an existing facility would be feasible and relatively inexpensive, imposing such an expenditure would be unconscionable.

As a fifth matter, the Mount Vernon Council of Citizens' Associations (MVCCA) conducted a Zoom conference call on October 14, 2021, during which many of the issues detailed above were discussed. Mount Vernon Supervisor Dan Storck participated in the conference. At one point, he explained that he had consulted with the County Attorney and she had informed him that the County is obligated to enact the Comprehensive Plan Amendment and proposed Zoning Ordinance. I respectfully disagree in the following respect: SB776 gives no deadline for a locality to enact a local ordinance or a Comprehensive Plan Amendment. As such, I see no reason why our locality cannot express its serious concerns about a newly enacted State law which obviously was not carefully thought through before its enactment and will have

serious adverse ramifications on waterfront property owners. In this regard, I believe it is extremely premature given the concerns I have expressed as well as the concerns of other individuals and organizations, to just rubber stamp a fatally flawed State law by enacting corresponding local legislation. Instead, a responsible Planning Commission will express serious concerns concerning the proposed actions and recommend that the Board of Supervisors refrain from enacting anything and that the Board convey the serious concerns of potentially affected property owners to the General Assembly so the General Assembly can address those concerns and revise the State law at the next session of the General Assembly.

Finally, as I previously explained, a quarter century ago, I created a living shoreline on my waterfront property. My prior letter had attached photographs showing my living shoreline. As such, I do not believe the proposed Comprehensive Plan Amendment and Zoning Ordinance Amendment can adversely impact my property. However, this does not deter me, as a responsible member of our community, from addressing serious concerns about proposed local legislation that will undoubtedly adversely impact my waterfront neighbors.

Thank you for considering my comments.

Very truly yours,

H. JAY SPIEGEL & ASSOCIATES

H. Jay Spiegel

HJS:tg
Enclosure

EXHIBIT 1

REMARKS OF H. JAY SPIEGEL AT PLANNING COMMISSION HEARING ON OCTOBER 6, 2021 CONCERNING PROPOSED COMPREHENSIVE PLAN AMENDMENT: PA 2013 - CW - 9CP

Chairman Murphy and other members of the Planning Commission, thank you for holding this hearing. On September 23, 2021, I sent a letter to the Planning Commission that you have all seen providing my initial commentary and attaching color photos of the living shoreline I created on my property on the shores of Little Hunting Creek over a quarter century ago. That long ago, I thought it was an appropriate thing to do to protect my shoreline in a way that would limit the amount of fertilizer and other substances that could enter the Creek and cause environmental damage and prevent erosion of my shoreline. Having said this, living shorelines are only one of a number of options waterfront property owners can enact. In fact, most of them employ bulkheads and/or rip rap to protect their tidal shorelines from erosion.

In my letter, I surmised that property owners who employed rip rap or bulkheads and experienced damage to those facilities would be able to repair them even under the newly proposed Zoning Ordinance that will be

considered by the Board of Supervisors next month. However, after conversations with local experts and VMRC staff, I now believe it is uncertain whether those facilities could be repaired or would have to be replaced with living shorelines under the new law. This is a serious concern.

I reviewed the Staff Report prepared for this hearing. The proposed amendment to the Comprehensive Plan includes the following language: "Only living shoreline approaches should be permitted 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, then elements of living shoreline approaches should be incorporated into permitted projects to the maximum extent practicable." It is important, in fact absolutely essential that the Planning Commission read these sentences carefully. What they mean in plain English is that practicality does not enter the equation until after a determination has been made that a proposed approach is not suitable based upon the "best available science." Despite the views of some politicians, scientific conclusions are never "settled." They are always subject to challenge and typically evolve over time both with nuances and significant alterations in what is understood. The term "best

available science" is highly subjective, and failing to consider practicality in the initial analysis is extremely dangerous and potentially inappropriately expensive for private property owners. Practicality can include analysis of the depth of the backyard, the angulation of current slopes, the types of soils present, the types of vegetation present, the fetch and the shape and curvature of the shoreline, as well as the potential costs for various options for adequately and appropriately protecting a tidal shoreline.

The Planning Commission must not recommend enactment of an amendment to the Comprehensive Plan which does not permit practicality to be considered in the first portion of the analysis.

As I expressed in my letter, it is extremely important that the Planning Commission recognize the political nature of the Wetlands Board and take all necessary steps to ensure the Wetlands Board has a limited leeway concerning what conditions it may impose on a private waterfront property owner. If there is existing rip rap or bulkheading, the private property owner must be permitted to repair it if damaged and must not be required to replace it based upon someone's interpretation of "best available science" without taking into consideration practicality. The County must create strict

guidelines limiting the leeway of the Wetlands Board in enforcing the proposed Zoning Ordinance amendment.

I read a letter sent to the Planning Commission from the President of Friends of Little Hunting Creek. A number of the contentions in that letter are inaccurate or false. I note that I established the navigation channel in the Creek in 1990 and have held the Coast Guard permit for buoys marking the channel for 30 years. I am quite familiar with the Creek and know of no bulkheads protruding into the channel nor am I aware of any that were built for "aesthetic reasons" as alleged in that letter. I also note that the contention in the letter that the Wetlands ordinance does not have a primary purpose of protecting water quality is strange indeed, particularly coming from a former member of that Board. There is more that could be said, but I'll leave it at that.

I believe with all due respect to the General Assembly and the Governor, that the State law that arose from Senate Bill 776 was not well thought out based upon my comments today and those set forth in my earlier letter. It is clearly not ready for prime time. As such, I urge the Planning Commission to recommend to the Board of Supervisors that it take no action

on the proposed Comprehensive Plan amendment and concerning the proposed amendment to the Zoning Ordinance, which I understand the Planning Commission takes no official part in recommending that, anyway, the Planning Commission suggest that the Board of Supervisors communicate with the General Assembly, recommendations for revisions to the enacted law that the Board wishes to receive to improve the law before the Board must act on a local basis.

I note that over 90% of the tidal shorelines in Fairfax County are within the Mount Vernon District. As such, I'd appreciate hearing the views of the Mount Vernon Planning Commissioner concerning the legal and technical issues raised by the proposed Comprehensive Plan Amendment. Thank you.