

Landowners seek clarity over VA's living shorelines law

Confusion centers on handling of existing structures, potentially high costs of repair, replacement

By Whitney Pipkin

Some property owners along Virginia's tidal waterways are concerned that a recent change in state law has muddied the waters for managing their shorelines.

Natural or living shorelines have for years been the preferred approach of scientists and state agencies to prevent erosion, accommodate sea level rise and preserve tidal wetlands along shorelines in the Chesapeake Bay region. Rather than hardening property edges with concrete or wood seawalls or piled stones (known as "riprap"), living shorelines create natural contours that receive the water's ebb and flow and, over time, can be more resilient. They also create habitat for wildlife and filter polluted runoff from the land.

So, in 2020, Virginia turned its push for softer shorelines into law. Legislators directed the Virginia Marine Resources Commission to approve only living shoreline designs when property owners seek permits for shore stabilization projects "unless the best available science shows that such approaches are not suitable."

The new law does not necessarily mean that existing hardened shorelines will need to be immediately demolished and replaced with beds of seagrass. About 18% of Bay shoreline has already been armored, with much of that hardening concentrated in urban areas.

But property owners who have a seawall nearing the end of its life or in need of repair are worried the law could require costly changes, and they point to a few properties in the state that have already had trouble getting permits. Words like "suitable" — intended to give the scientific community and regulators flexibility — are viewed as inherently vague by property owners who aren't sure what will be expected of them when they seek a new permit.

"Right now, there's fear about how it would be applied," said Katherine Ward, co-chair of the Mount Vernon Council of Citizens' Association and former president of an association of nearly 500 homes, 64 of them on the Potomac River. Regulators, she said, "may seem to think there's flexibility in the law. But my neighbors who live on the water don't believe there's flexibility."

Shoreline homeowners in Fairfax County, VA, especially concerned about the law's impact on personal property rights, worked



Larry Zaragoza paddles through a portion of Little Hunting Creek in Alexandria, VA, that features both armored and living shorelines. (Whitney Pipkin)

with Del. Paul Krizek (D-Fairfax) to propose a bill with significant changes. It died in committee early this year. The measure would have softened living shoreline requirements for properties with existing erosion measures or where a living shoreline would "substantially detract... from enjoyment of the property."

Maryland has had a living shorelines law similar to Virginia's since 2008. But Maryland explicitly mentions existing structures in its permit process and allows for "certain exceptions" through a waiver application.

A well-worn wall

About a year after moving into his home in Alexandria, VA, in 2019, Brian Jones began a process that would make him the first in Fairfax County to seek a permit under Virginia's living shorelines law. Other homeowners saw his project as an early test of whether existing infrastructure could be maintained under the new law but say it's still not clear.

Jones hired a contractor to assess the condition of a wooden seawall that forms the edge of his lawn which, at low tide, stands several feet above the creek. The contractor said it was beyond repair — nibbled by beavers, with sediment leaking from gaps — and needed to be replaced. He proposed building a new wall on the

water side before removing the existing one and filling in the gap.

But by the time the contractor sought a permit for the work, the living shorelines law was in place. Through conversations with state and county officials who visited his property, Jones said it became clear that a permit to replace the wall was not likely to be approved.

"If I didn't have a wall and they said, 'Oh, you can't have a wall,' then that's OK," said Jones, whose house is on Little Hunting Creek, a tidal tributary to the Potomac River. "But I do have a wall, so let me fix the wall or reinforce the wall."

Jones said installing a new wall would have cost about \$70,000. A quote to turn the treeless half of his yard into a living



Brian Jones' efforts to repair or replace the seawall along his property in Alexandria, VA, met with complications under the state's new living shorelines law. (Whitney Pipkin)

shoreline, grading it to slope down to the water's edge, came in at about the same price. But that quote didn't include the potentially high cost of removing the wall's water-soaked wood or account for losing the use of about half of his yard, Jones said.

"In the end, we took the state's and county's reluctance to talk about anything other than a living shoreline as a 'no,'" Jones said. He now hopes to work around the deteriorating wall by building a walkway to a floating dock. "It would be nice to get some clarity about what they're going to do when the wall actually fails."

Larry Zaragoza lives nearby along a constructed canal that spurs off Little Hunting Creek. The neighborhood was built in the 1960s around two canals carved into the landscape and lined with wooden seawalls. They are periodically dredged to provide boat access to some two dozen homes.

Zaragoza said he doesn't think the law was written with an intent to remove seawalls and the yards they hold in place. But, by not explicitly addressing existing infrastructure, he said the regulation leaves property owners vulnerable to what a local board might decide.

"I think a lot of this is an unintended consequence," Zaragoza said. "But what this law is actually doing is alienating property owners who care about the environment. I think, in the end, that is going to do more harm than good."

Local environmentalists and officials have tried to assure Zaragoza and others that they should be able to maintain existing infrastructure under the law. Many cite a 1984 attorney general opinion written by Gerald Baliles. It states that "normal maintenance, repair or additions to a bulkhead would be permitted under [a section of existing law] if no further wetlands were covered."

An airing of concerns

Betsy Martin, president of Friends of Little Hunting Creek, helped host a webinar in March to address some of the concerns she was hearing from Fairfax homeowners about living shoreline requirements.

Many of the residents were not aware of the Virginia Conservation Assistance Program, which reimburses 75% of the cost of a living shoreline project up to \$15,000 per parcel per year to property owners living in a Soil and Water Conservation District (Fairfax County is included in the Northern Virginia district). But that program is not always fully funded each year, and the funds and staffing can fall short of needs.

Zaragoza mentioned his concerns during the webinar — including the potentially high cost of compliance — to Mark



A contractor who built a permitted pier along this shoreline in Hampton Roads, VA, added stone and a gravel kayak ramp without getting a necessary permit required under the state's living shorelines law. The landowners tried to correct the issue by adding living shoreline elements but were denied a permit three times. (Courtesy of Mary Swift)

Eversole, an environmental engineer who oversees permits for Fairfax and a dozen other counties for the Virginia Marine Resources Commission.

Eversole said he didn't think living shorelines would cost as much as some have estimated but was open to discussing "whether cost should be a factor in determining whether a living shoreline is suitable."

"Rest assured, we do hear you," Eversole said, adding later, "If citizens are concerned with this law and how it's enforced, you do need to go back to your legislators. ... I do know that wetland boards all across the state are dealing with this and learning how to enforce the living shoreline [regulations]."

Eversole also said that, in general, repairing existing bulkheads is allowed by local wetlands boards as long as no new wetlands are affected. Some boards, he said, don't even require a permit for certain types of maintenance. But he advised property owners to start a project by filling out a joint permit application (which combines local and state approvals) to be sure.

Pamela Mason, a senior research scientist with the Virginia Institute of Marine Science, also gave a presentation during the webinar. She said determining whether a property is a fit for a living shoreline can often only be done on a case-by-case basis because it depends on so many factors.

"The tidal wetlands law calls for a

public-private balance to assess the benefits and detriments," she said. "That's part of the hearing process."

In practice

Looking for clarity, many looked to a hearing before the Virginia Marine Resources Commission in March. A Hampton Roads couple appealed to the commission after their third attempt to secure a shoreline work permit was denied by a local wetlands board that said they should incorporate more living shoreline elements.

In that case, a contractor hired by Fred Westphal and Mary Swift to construct a permitted pier along their shoreline added stone and a gravel kayak ramp without getting a permit for the additional work, as required by the living shorelines law. The contractor was fined \$2,000. The landowners were fined \$100 and instructed to get a permit to correct the issue.

On their third attempt to get that permit, the couple proposed a plan that added elements of a living shoreline, such as planting grasses into the rocky revetment and replacing the kayak ramp with grasses, at a cost of \$12,000. A more expansive living shoreline design they considered, according to one contractor's estimate, would cost \$69,000.

Testimony at the hearing focused on whether a local wetlands board should deny a permit for failing to devote every

"suitable" square foot to living shoreline practices — and whether cost should factor into such decisions.

Jay Ford, Virginia policy and grassroots adviser for the Chesapeake Bay Foundation, said that it shouldn't, based on the law. Acting Commissioner Justin Worrell of the marine resources commission said it should. "It's unrealistic to pretend that cost doesn't matter when it does," Worrell said.

But the question before the state board, as one member put it, was ultimately about whether the local wetlands board followed the law. The board agreed in a 5-1 vote (and one abstention) that it did, denying the couple's appeal.

Meanwhile, back in Fairfax

After hearing from residents, the Fairfax County Wetlands Board in March released a draft guidance document on how the regulations would be applied. The draft acknowledges that "there are many locations where living shorelines may not be suitable for implementation..." but where "feasible elements of living shorelines may still be required in concert with other hardening measures."

The document indicates that maintenance of existing seawalls, riprap and bulkheads could require a permit and suggests starting any project by applying for one in case its needed (at a cost of \$300). Failed infrastructure, though, could cause the board to assess whether a living shoreline would be suitable for the property.

The guidance document also includes a checklist of factors to help determine whether a living shoreline is suitable for the project's location. Among them are the costs for both removing existing erosion controls and installing the living shoreline.

Aaron Wendt, one of two environmental specialists with the state's Shoreline Erosion Advisory Service, which offers free consultations to Virginians, said that the state guidance is not as clear as it could be and was glad to see a county trying to help. He also said that he can meet with property owners to "talk hypotheticals about what they want to accomplish and guide them before they get to a permit."

Zaragoza said he appreciated the additional guidance from the Fairfax wetlands board but that it doesn't go far enough. He said it should provide "an objective process" that any board could follow rather than a list of considerations.

"The choice of installing a living shoreline, where appropriate, should be that of the property owner and not be dictated by an arbitrary process," he wrote in comments to the board. ■