



**The Mount Vernon Council of Citizens Associations, Inc.**  
P.O. Box 203, Mount Vernon, VA 22121-9998 <http://www.mvcca.org>

May 1, 2024

Ms. Heather Mackey  
Office of Watersheds and Local Government Assistance  
Virginia Department of Environmental Quality  
1111 E. Main St., Suite 1400  
Richmond, VA 23219

Dear Ms. Mackey:

The General Council of the Mount Vernon Council of Citizens Associations has unanimously passed the attached resolution commenting on the Virginia Department of Environmental Quality Bay Act Resiliency Guidance (MVCCA E&R 2024-03). We request that you include our suggestions in the revisions to the Resiliency Guidance.

Thank you.

B. Lynn Pascoe  
Co-Chair  
Mount Vernon Council of Citizens Associations

CC: Mr. Justin Williams, Manager, Office of Watersheds and Local Government Assistance  
Senator Scott Surovell  
Delegate Paul Krizek  
Delegate Mark Sickles

MOUNT VERNON COUNCIL OF CITIZENS' ASSOCIATIONS (MVCCA) Comment on the Virginia Department of Environmental Quality Bay Act Resiliency Guidance (MVCCA E&R 2024-03)

WHEREAS, the Virginia Department of Environmental Quality (DEQ) has issued draft guidance<sup>1</sup> and supporting materials for Bay Act Resilience, which provides guidance to address the flooding hazards from sea level rise and is out for informal comment until May 3, 2024;

WHEREAS, the intent of this guidance and associated materials is to provide for resilience against sea-level rise and storm impacts;

WHEREAS, in order to provide for the continued effectiveness of any shoreline stabilization structure, operation and maintenance provisions should be established, especially for living shorelines, which can erode or deposit materials changing the shoreline;

WHEREAS, the draft guidance does not cite the Virginia Institute of Marine Sciences' Decisions Support Tool<sup>2</sup>, which specifies that bulkheads as the appropriate shoreline stabilization structure along canals;

WHEREAS, residents of Fairfax County with existing shoreline stabilization structures, such as bulkheads, that are maintained in good working order have been told by members of the Virginia legislature that they can continue to maintain their shoreline stabilization structures;

bulkheads and other shoreline stabilization structures will need modification to respond to rising sea levels so they are adaption measures and the guidance should be clear that a new bulkhead or possibly others structure can be placed in front of an existing structure, unless wetlands are impacted;

WHEREAS, the amended regulation adding 9VA24-830-155<sup>3</sup> provides that fill can be allowed under limited conditions;

WHEREAS, in order to mitigate against the impact of sea level rise attributable to climate change a shoreline stabilization structure, such as a bulkhead, will require that the level of the bulkhead be raised and that soil behind the bulkhead be backfilled to preserve the intended use of the structure;

WHEREAS, the draft guidance provides for an interpretation of the Nonconforming Structures and Uses guidance that will preclude the continued use of nonconforming shoreline stabilization structures that require an increase in height and additional fill in the RPA; and

WHEREAS, the draft guidance states that slopes should be less than or equal to 10% but other guidance and advice from staff have asserted that the required slope should vary with site conditions.

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<sup>1</sup> <https://www.deq.virginia.gov/our-programs/water/chesapeake-bay/chesapeake-bay-preservation-act/local-program-regulations-guidance>

<sup>2</sup> <https://cmap2.vims.edu/LivingShoreline/DecisionSupportTool/index.html>

<sup>3</sup> <https://register.dls.virginia.gov/details.aspx?id=9813>

THEREFORE, BE IT RESOLVED guidance and supporting documents should explicitly allow for increases in height to accommodate for sea level change for existing structures and that fill behind the bulkhead to maintain the functionality of the structured as originally intended;

BE IT FURTHER RESOLVED that the guidance provide that the removal of man-made structures and creating of living shorelines be supported by sound technical designs to prevent the erosion of living shorelines into tidal waters and to require operation and maintenance requirements so that the shoreline will be preserved;

BE IT FURTHER RESOLVED that the guidance be amended to include reference to the Virginia Institute of Marine Sciences' Decisions Support Tool<sup>4</sup> and recommend that canals continue to use bulkheads for shoreline stabilization, which are generally unsuitable for a living shoreline;

BE IT FURTHER RESOLVED that the guidance be clarified to allow for the placement of a new bulkhead on the water side of an existing bulkhead;

BE IT FURTHER RESOLVED that the guidance and supporting materials promote building support from waterfront property owners through outreach and outlining benefits, recognizing impacts to waterfront property owners, and avoiding takings without compensation, which would conflict with the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the US Constitution; and

BE IT FINALLY RESOLVED that the guidance and supporting materials recommend outreach and providing information on the benefits of nature-based solutions and maintaining existing man-made structures in good working order to preserve and protect waters.

To assist with the identification and modification of language, redline/strikeout edits are attached. Also, see table that follows the redline/strikeout edits.

Approved by the MVCCA General Council on April 24, 2024

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<sup>4</sup> <https://cmap2.vims.edu/LivingShoreline/DecisionSupportTool/index.html>

<sup>5</sup> 5<sup>th</sup> Amendment: No person shall be ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. In *Armstrong v. United States* (1960), the Supreme Court wrote: "The Fifth Amendment's [Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (See: <https://constitutioncenter.org/the-constitution/amendments/amendment-v/clauses/634>)

<sup>6</sup> 14<sup>th</sup> Amendment: "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." (See: <https://www.law.cornell.edu/constitution/amendmentxiv>)

Requested changes to the draft resiliency guidance.

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#### 6. *Non-conforming Structures and Uses*

If the proposed development is to expand or modify a principal structure that was in existence as of the time of local program adoption, and the structure encroaches into the RPA or will encroach if the expansion or modification is approved, then pursuant to 9 VAC 25-830-150, the locality may allow the continued use of the structure. Permissible modifications of shoreline protection structures in response to rising sea levels should include increasing the structure height and providing fill behind the structure to avoid accumulation of water behind the structure. Local governments also should consult DEQ's *Nonconforming Structures and Uses* guidance<sup>7</sup> document available on the Virginia Regulatory Town Hall website to ensure that their review of the expansion or modification of principal structures complies with the Bay Act and Regulations. Modifications of shoreline protection structures in response to rising sea levels should include increasing the structure height and providing fill behind the structure to provide a grade that does not result in the pooling of water behind the structure. Moreover, the addition of fill to accommodate a change in a shoreline stabilization structure needed to address climate change does not alter landscaping/vegetation. For structures other than shoreline stabilization structures, the considerations for non-conforming structures should be similar to those identified above for principal and accessory structures, should development be considered for these structures.

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- a. Slope: Slopes less than or equal to 5% or that convey sheet flow of velocities less than 1.5 feet/second are preferred to reduce runoff and tidal wave energies. However, greater slopes will be needed for many situations, especially for areas that are developed, . Localities should ensure that the amount of fill and resulting slopes are consistent with project specifications and that flow is properly [are there criteria to cite here for "proper" evaluation of flow] evaluated in the project application. [This last sentence seems to encourage requirements for additional analyses. If there is a responsible standard, include it. This language seems like "bring me a rock" and I will tell you if it is the right one when I see it.

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<sup>7</sup>[https://townhall.virginia.gov/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs%5C440%5CGDoc\\_DEQ\\_7183\\_v1.pdf](https://townhall.virginia.gov/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs%5C440%5CGDoc_DEQ_7183_v1.pdf)

## Issues and Recommendations on the Draft Resiliency Guidance and Associated Materials

| Concern  | Recommendation  |
|--|---|
| <p>The commonwealth has long recognized that existing shoreline stabilization structures, especially bulkheads are structures and can continue to be maintained without permits but the draft guidance confuses this issue.</p>  | <p>Cite the VIMS guidance that recognizes that bulkheads are appropriate shoreline stabilization structures for canals and recognize that nature-based solutions may be most appropriate for undeveloped property.</p>  |
| <p>While shoreline stabilization structures like bulkheads are effective at separating land from waters, nature-based structures are contiguous with the water and can result and a loss of land to the water, negatively impacting water quality and perhaps requiring additional dredging costs.</p>   | <p>Operation and maintenance requirements are especially important for living shorelines, which are more likely to be problematic without significant design considerations. Recommend operation and maintenance requirements to maintain the footprint of the living shoreline as intended.</p>  |
| <p>Sea level rise and storm surge will necessitate that bulkheads be raised in height and soil fill be added behind the bulkhead to retain proper flow, which is likely to be prohibited by the draft as written.</p>  | <p>Clarify the guidance to expect that bulkheads and other shoreline stabilizations structures be raised in height and that fill be provided behind the structure to avoid pooling of water.</p>  |
| <p>The guidance advocates for placement of adaptation measures channelward, which impact the ability of a property owner to use/enjoy the property that they purchased as intended and will likely destroy whatever existing RPA features exist in the area where the adaptation measures are located.</p>   | <p>This guidance is most appropriate for properties with no existing shoreline stabilization structure. With sea level rise properties will need some shoreline stabilization structure and the guidance should also expect that the area behind the adaptation measure be raised with soil to avoid unintended ponding of water.</p>   |
| <p>The guidance calls for reduced slopes to improve environmental outcomes but the reduced slopes can have a major impact on a property owner.</p>   | <p>Reducing slopes to these low slopes can be difficult without impacting existing primary structures. While decisions should be made on a site-by-site basis, low slopes for adaptive measures are most likely to be feasible for undeveloped properties.</p>  |
| <p>Requiring a property owner to employ nature based solutions, especially with a low slope channelward can have a major impact on the property owner that preclude use of property as intended because of a future threat of sea level rise or a fear that a living shoreline will facilitate the loss of the yard into waters, which will negatively impact water quality and may trigger the need for additional costly dredging. Property owners are likely to resist such requirements and may have a claim for a “takings” without compensation, which is prohibited under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the US Constitution.</p> | <p>Provide outreach and grants to encourage nature-based shoreline solutions. Do not forcing property owners to install living shorelines, especially for properties with existing shoreline stabilization structures. Forcing property owners to install nature-based solutions to a threat that may not be realized for decades will lead to litigation and likely set back environmental programs.</p> |