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COMMENT/RESPONSE DOCUMENT

DOCUMENT NUMBER: [_____]

BLUFF RECESSION AND SETBACK

CHAPTER 85

DEPARTMENT OF ENVIRONMENTAL PROTECTION

WATER PLANNING. OFFICE

[DATE]

LIST OF COMMENTATORS

1. Manufacturer and Business Association
   Erie, PA 16508

2. Thomas M. Sider North
   East, PA 16428

3. Erie Regional Chamber and Growth Partnership
   Erie, PA 16507

4. North East Township Supervisors
   North East, PA 16428

5. MacDonald, Illig, Jones and Britton LLP (Steven C. Beckman)
   Erie, PA 16507

6. MacDonald, Illig, Jones and Britton LLP (Russell S. Warner)
   Erie, PA 1650

7. Erie-Western PA Port Authority
   Erie, PA 16507

8. City of Erie Erie,
   PA 16501

9. Senator Jane M. Earll (on behalf of her following constituents: Steve Gorman and Paul Nelson, owners of Waldameer Park, Inc.; and SB3, LLC) Erie, PA 16501

10. Millcreek Township Board of Supervisors
    Erie, PA 16507

11. SB3, LLC Erie,
    PA 16511

12. Independent Regulatory Review Commission
    Harrisburg, PA 17101

A. Preamble

Vegetation Management Requirements

Comment: "Vegetation management requirements should not be added to the bluff recession and setback regulations." (5)

Comment: "I would like to express my concern with the possible inclusion of vegetation management requirements of coastal property owners. As an Environmental Scientist, I understand and appreciate the need for such a requirement. However, the legislation should outline whose responsibility it will be to create, administer and educate the property owners of such a requirement. While we may have the staff capacity to administer the setback requirements of the legislation, enforcement of vegetation management plans and property owner education is beyond the capability of our existing staff." (8)

Response: The Department will not include requirements for vegetation management in the rulemaking. Through the Coastal Resources Management program, the Department will continue the current practice of working with partners to provide outreach and workshops regarding management of vegetation.

B. Chapter 85

Specific Location of Bluff Recession Hazard Areas (BRHAs)

"In 1980 when the EQB first implemented the Bluff Recession and Setback Act, it failed to adequately designate specific areas as having bluff recession hazards. Rather, the EQB simply blanketed all properties along the Lake Erie shoreline (excluding those within the City of Erie) as subject to the new regulations. This caused confusion among municipalities and planning commissions throughout the region and ultimately led to a 2001 DEP study of the entire Lake Erie shoreline to define areas where a bluff recession hazard area existed." (1)

"EQB has failed to designate specific geographic areas within each municipality along Lake Erie as `bluff recession hazard areas'." (5)

"Also long overdue is the assignment of specific parcels along the entire length of the Lake Erie shoreline to either the bluff recession hazard area or the exempt area." (9)

"The proposed rulemaking does not expressly define or provide for specific definition of bluff recession hazard areas in Millcreek Township. We understand that the Department and the Board may assume that the rulemaking implicitly adopts the Department's 2004 study - but there is no provision to that effect. The Township's concern in submitting its petition was that municipalities should not be placed in a position of having to make determinations whether land is or is not within a bluff recession hazard area. The Board must make and adopt these detenninations."(10)

"The proposed rulemaking does not designate specific geographic areas within the City of Erie as bluff recession hazard areas. Failure of the proposed rulemaking to designate specific areas within the City of Erie is contrary to the requirements of the Act and regulation and results in a blanket designation that is not supported by actual data. In fact; under the current regulation as amended by the proposed rulemaking, all of the City of Erie, including the area inside Presque Isle Bay, would be covered by the setback requirements." (11)

Response: Section I of the Department's study utilized topographic maps that depicted the geographic locations of tentatively designated Bluff Recession Hazard Areas (BRHAs). Section II of the study depicted the BRHA locations on aerial photography, which allowed for more detailed representation.

The Department has considered the commentator's recommendations and has amended the rulemaking to include a requirement for the Department to maintain the most current study and corresponding maps on its website. Section 85.12 is amended by adding the following:

85.12 (c) <u>The Department will maintain and make available to the public the geographic location of BRHAs as designated by EQB.</u>

Methodology for Tentatively Designating BRHAs

"Now, rather than act on the scientific data resulting from the study, the EQB is proposing to expand the already too broad regulation to include all shoreline properties in the City of Erie."

"While we recognize the efforts of the EQB to ensure the safety of our environment and the citizens of the Commonwealth from the erosion that occurs as a result of Lake Erie; we feel that simply broadening the regulation without any regard to the DEP study (which clearly identified properties that should be and should not be subject to the regulation) ignores private property owners rights. In addition, it is a poor public policy decision that will not only limit businesses from expanding, but will also limit those who are interested in locating their operations along the Erie shoreline."

"Rather, we would encourage you to consider implementing a regulation that utilizes the scientific data compiled from DEP's 2001 study to exempt appropriate properties from the proposed bluff recession setbacks. Such a proposal would allow the EQB to maintain the environmental integrity of the Lake Erie shoreline and at the same time permit the necessary exemptions that are conducive to economic growth." (1)

"As the unified voice of the Erie regional business community, the Erie Regional Chamber and Growth Partnership opposes the proposed Bluff Recession and Setback Regulations. We believe the Department of Environmental Protection (DEP) has made blanket designations of all of Erie County, contrary to the results of their own study."

"The arbitrary. designations of all of Erie County and Erie City as Bluff Recession Hazard Areas will place serious limitations on the development of lakefront property, further hindering the economic vitality and development of the Erie region."

"It is our position and recommendation that the addition of the City of Erie to this regulation be removed. We also strongly recommend that the setback designations be derived solely from the formula and specific calculations stated by the DEP, not the arbitrary numbers proposed in this regulation. We believe the current zoning and building codes are more than sufficient to ensure safe and reasonable development along the lakefront." (3)

"The EQB should designate all of the Waldameer Park property as outside the bluff recession hazard area, not just a portion of Waldameer's property." (5)

"Waldameer requests that EQB designate all of the Waldameer property as outside of the bluff recession hazard area." (6)

"Therefore, I urge the Environmental. Quality Board to accept the recommendations of Attorneys Beckman and Warner on behalf of Waldameer Park, Inc. to exempt the Park's property from the bluff recession hazard area. I also encourage the Board to take under serious consideration the concerns of the City of Erie, the Erie-Western Pennsylvania Port Authority,

the municipalities and the other testimony from area citizens. If I can be of further assistance, please do not hesitate to contact me. Thank you for your attention to this matter." (9)

"In the interest of enabling productive current use and future development on the former IP site, and due to the lack of scientific evidence indicating that the property would meet the definition of a bluff recession hazard area (i.e., "an area or zone where the rate of progressive bluff recession creates a substantial threat to the safety or stability of nearby existing or future structures or utility facilities"), I urge the EQB to continue to exempt transects 87E through 113E from the setback requirement proposed for the City of Erie." (Testimony/9)

"While the Township submitted its petition to secure the delineation called for under the Act, it is aware from inspections and reviewing information pertinent to Waldameer Park that the park's property does not abut Lake Erie or the bay of Lake Erie, but instead is approximately 500 feet distant from a body of water. The land does not involve a precipitous bank or any wave action from Lake Erie or its bay which might prompt erosion or recession. For these reasons, the Township cannot disagree with comments offered on behalf of Waldameer Park that the Department's 2004 study should be adopted with the revision that the remainder of the Park's land from Transect 167M to 172M be excluded from a defined bluff recession hazard area." (10)

"The proposed rulemaking purports to add the City of Erie as a municipality containing bluff recession, hazard areas but DEP has failed to produce any objective data justifying the addition of the City of Erie. The proposed rulemaking would require the creation of bluff setback restrictions on the SB3 LLC property where there is no objective data to demonstrate that bluff recession hazards actually exist on this property. DEP's own data in the 2004 Report predicts that there will be no bluff recession along the SB3 LLC property by the year 2050. In the absence of any evidence that there is a bluff recession hazard risk along this property, it is arbitrary and capricious for the EQB to designate the SB3 LLC property as containing a bluff recession hazard area." (11)

Response: The Department has considered these comments, but recommends no changes to the rulemaking package. The Department analyzed various data from its study to make the recommended designations, and disagrees that the tentative designations were made on an arbitrary basis, as will be further discussed in this response. Blanket designations were not recommended for municipalities, as illustrated in Sections I and II of the study; exceptions include areas where the Department determined information from its study did not support designation as a BRHA.

As part of the study, the Department considered the following:

1. Geographic location of potential hazard areas,

2. evaluation of the bluff recession hazard in relation to geophysical processes such as recession and erosion-related phenomena and examination of the causative factors,

3. review of existing and potential damage, and
4. review of historical recession rate.

The Department also evaluated historical and other data to detennine which areas of the bluffs showed sufficient indications of recession or potential recession to warrant designation as a bluff recession hazard area creating "a substantial threat to the safety or stability of nearby or future structures or utility facilities."

The Department utilized the following sources of data to conduct its study in order to make recommendations to tentatively designate Bluff Recession Hazard Areas (BRHAs): a report contracted through Wetland and Coastal Resources; high altitude aerial photography; low altitude oblique-angle color prints; and control point measurement data.

Support for Rulemaking

"The Erie Western Port Authority commends the Department of Environmental Protection for protecting its natural environment and one of the Commonwealth's most precious resources - the Lake Erie Shoreline."

We believe the majority of the changes to the act are well thought out and reasonable. The inclusion of the City of Erie's shoreline brings continuity to the Department's approach to protecting the `Lakefront Bluffs'." (7)

"Overall, I am pleased with the conditions set forth in the proposed legislation for the City of Erie and trust that we will be able to continue to work in cooperation with the Department of Environmental Protection on issues affecting our beautiful lake and the rights of our citizens." (8)

Response: The Department thanks the commentators for the support of the regulatory changes.

Minimum Setback Distance

"The Proposed Rulemaking referenced above is, in my opinion, a much, much fairer approach to the problem of bluff recession. It allows local authorities the flexibility to treat a very low stable bluff differently from a very high bluff while maintaining a minimum of 25 feet of setback. I strongly support adoption of the Proposed Rule-making allowing local authorities to provide for bluff setback of as little as 25 feet. The Proposed Rule would allow me and others in similar circumstances, the ability to improve and expand our properties and provide additional living space impossible to do under the current regulations." (2)

Response: The Department thanks the commentator for the support of the regulatory changes.

Setback Distances

"We feel having one setback dimension for the coast line of North East Township is arbitrary and we would (propose) the following rate setbacks in the future after 85.22 is amended. With the method of determining minimum bluff setback distances as a formula of the

rate (.5) x 50 years = 25 feet, we feel 25 feet would be an appropriate distance for our cottage area. We would than increase the setback to be equal to the vertical height of the bluff above 25 feet up to 50 feet. We would keep in place our current setback of 50 feet as a maximum setback for any bluff over 50 feet high. In some of our extreme recession areas our building code official would make the setback determination by using the chart established by DEP, Lake Erie Control Point Recession Rates, 2006-2007." (4)

"The Setbacks listed in the Proposed Regulations are Arbitrary and Should Be Revised to Reflect the Actual Scientific Data" (5)

Response: The Department disagrees that the setback distances recommended were determined arbitrarily. Setback distances were calculated by employing the formula contained in Section 85.22. Recession rates from control point data and photogrammetric data from the WCR report were considered. Based on the data and analysis, the Department does not plan on making any changes to the setback distances for North East Township.

Deed Notices

"Deed notices should not be required for bluff recession hazard areas." (5)

Response: The purpose of the deed notice is to provide notice to any future purchaser of property located in an area designated as being within a BHRA of such designation. One of the policies and purposes of the Bluff Recession and Setback Act is to "[p]rotect people and property in bluff areas from the dangers and damage associated with the inevitable recession of bluffs" 32 P.S. § 3201(2). The deed notice serves as a means of providing protection to a potential purchaser.

City of Erie Bayfront

"The Erie-Western PA Port Authority wishes to make sure that the expansion of the Act does not restrict the continued development along the Bayfront that has been considered the most important issue for continued economic stability in Western Pennsylvania. The Commonwealth of Pennsylvania has invested over $100 million in moving our Bayfront forward. We certainly don't wish to impede this momentum." (7)

Response: The Bayfront area of the City of Erie is not included as an expansion area in this regulation package.

Timeframe for Future Updates

"A reasonable timefraine for future updates is also needed, so that the entities required to comply have ample time to incorporate changes to their zoning and other local codes." (9)

Response: Section 85.12 of the regulations requires that studies will be conducted when necessary to identify bluff recession hazard areas. The Department's Coastal Resources

Management Program performs on-going monitoring and evaluation of bluff recession. Due to the resource burden that would be created by requiring a specific timeframe for updates, it is recommended that no changes be made to the regulations, and that studies be conducted as necessary.

Regarding the allotment of ample time for entities to changes to local codes, Section 6(a) of the Bluff Recession and Setback Act provides that "[w]ithin 6 months following designation by the [EQB] of an area and municipality subject to bluff recession hazards, each designated municipality shall adopt or amend, and shall implement, such ordinances and regulations as are necessary to regulate construction and development activities in areas subject to bluff recession hazards . . . ." Section 4 of the Act also requires that the Department notify the chief executive officer of each municipality prior to submitting the report, and the municipality comments, to EQB. Based on these requirements, the Department does not recommend any changes to the rulemaking regarding timeframes.

EQB Scope of Authority

"Commentators assert that while some portions of the City of Erie shoreline meet the definition of "bluff recession hazard area," others do not. They further argue that by designating the entire City of Erie as a bluff recession hazard area, rather than distinguishing specific bluff recession hazard areas within its boundaries, the EQB has exceeded the scope of its statutory authority. The final-form regulation should either identify the specific bluff recession hazard areas within the City of Erie's boundaries or further explain the EQB's statutory authority for designating the entire municipality as a bluff recession hazard area." (Independent Regulatory Review Commission)

Response: This comment is related to previous comments that the rulemaking package did not clearly indicate the location of BRHAs. The Department has considered the commentator's recommendations, and proposes that the previously mentioned amendment to Section 85.12 will address this concern. Section 85.12 is amended by adding the following:

85.12 (c) <u>The Department will maintain and make available to the public the geographic location of BRHAs as designated by EQB.</u>