

**Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code, Chapter 85)
(Bluff Recession and Setback Regulation)**

Order

The Environmental Quality Board (Board) proposes to amend Chapter 85, Bluff Recession and Setback, to make minor editorial changes, clarify municipal response on designation, add the City of Erie to the list of municipalities having a Bluff Recession Hazard Area, clarify minimum setback distances, and delete requirements for specific supporting documentation.

This order was adopted by the Board at its meeting of _____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact Andrew Zemba, Assistant Director, Water Planning Office, Rachel Carson State Office Building, 2nd Floor, 400 Market Street, P.O. Box 2063, Harrisburg, PA 17105-2063, (717-772-4785), or William S. Cumings, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464 (e-mail: wcumings@state.pa.us). Persons with a disability may use the Pennsylvania AT&T Relay Service by calling (800) 654-5984 (TDD users) or 800 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) website at www.depweb.state.pa.us.

C. Statutory Authority

These amendments are made under the authority of the Bluff Recession and Setback Act (32 P.S. §§ 5201 – 5215) and Section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20) which grant the Board the authority to develop and adopt rules and regulations to implement the provisions of the Bluff Recession and Setback Act.

D. Background of the Amendments

In response to a 2001 petition to the Board by Millcreek Township, Erie County, to clarify the designation of Bluff Recession Hazard Areas along Lake Erie, the Department conducted a study of Pennsylvania's entire Lake Erie shoreline to determine Bluff Recession Hazard Areas. Considering the results of this study and other related studies and data, and responses from the coastal municipalities along Lake Erie concerning tentative designations of Bluff Recession Hazard Areas, the Department recommended including the City of Erie as a municipality identified as having a Bluff Recession Hazard Area.

A majority of the shoreline of the City of Erie is along the southern edge of Presque Isle Bay, sheltered from open lake wave energies by the protective land feature of Presque Isle Peninsula. However, approximately 1.5 miles of the City's eastern shoreline are outside Presque Isle Bay and are exposed to

open lake wave energies. The bluffs adjacent to this section of shoreline are undercut by wave attack, have steep slopes, are periodically devoid of vegetation, and have experienced active bluff recession or have been heavily protected. If left unregulated with setbacks and improvement limitations, existing and future development in this area will be subject to property damage from bluff recession. Therefore, this portion of the City of Erie is designated as having a Bluff Recession Hazard Area and the City of Erie should be included as a regulated municipality in Chapter 85 (Bluff Recession and Setback Rules and Regulations).

The compelling public need for this proposed rulemaking is based on the six basic purposes stated in the Bluff Recession and Setback Act and Chapter 85. Those purposes are:

- To encourage planning and development in bluff areas that is consistent with sound land use practices;
- To protect people and property in bluff areas from the dangers and damages associated with the inevitable recession of bluffs;
- To prevent and eliminate urban and rural blight which results from the damages of bluff recession;
- To minimize the expenditure of public and private funds for shoreline protection and bluff stabilization structures and activities;
- To authorize a comprehensive and coordinated program to regulate development activities through the use of setback ordinances in Bluff Recession Hazard Areas to preserve and restore the natural ecological systems, and to prevent continuing destruction of property and structures; and
- To encourage local administration and management of bluffs consistent with the duty of the Commonwealth as trustee of natural resources, and the constitutional right of the people to the preservation of the natural, scenic, aesthetic and historic values of the environment.

E. Summary of Changes to the Proposed Rulemaking

A brief description of the proposed amendments follows:

Subchapter A. General Provisions

Minor clarification changes to: Section 85.1. Definitions, under *Person[s]* bold **any**, and adding the word **Subsection** in front of the section number in subsections §85.26(d) and §85.35.

Subchapter B. Procedure for Designation of Areas with Bluff Recession Hazards.

Section 85.12(c) added with the following language, “In accordance with Section 4(c) of the Bluff Recession and Setback Act, 32 P.S. 5204(c), the geographic areas identified as Tentatively Identified Bluff Recession Hazard Areas in Sections I and II of the Department’s ‘Study to Tentatively Designate Bluff Recession Hazard Areas’, dated November 2004, are designated as Bluff Recession Hazard Areas. The Department shall make the November 2004 Study available to the public.” This change was made in response to comments made during the public comment period, and comments made at the Water Resource Advisory Committee meeting April 8, 2009.

Modify § 85.26 (c) to read, “Except as provided in Subsection (e), regardless of any other provision of law or ordinance to the contrary, the minimum Bluff setback distances in the named

municipalities that possess a Bluff Recession Hazard Area, as designated in Section 85.12, shall be in accordance with the following table.” This was a change that helps clarify that Section 85.12 was added.

Subchapter D. Municipal Bluff Setback Ordinance and Regulations

Removed from the final rulemaking are the new requirements proposed in §85.37(7) (i) and (ii) for every deed or plat within the bluff recession hazard area to include an appropriate bluff recession hazard area notice. It was decided that this notification task could be accomplished through the technical assistance element of the program and did not require regulatory change. The change was made as a result of a comment received during the public comment period, and comments made at the Water Resource Advisory Committee meeting April 8, 2009.

F. Summary of Comments and Responses on the Proposed Rulemaking

Twelve sets of comments were received, addressing the following areas:

Vegetation management requirements

In the preamble to the rulemaking, the Department sought comments on the possible inclusion of a section on Proper Vegetation Management. Two comments were submitted, and both opposed a regulatory approach to vegetation management. The final rulemaking does not contain requirements for vegetation management. 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.

Specific location of Bluff Recession Hazard Areas (BRHAs)

Several comments questioned whether the proposed regulatory language clearly identified the location of BRHAs. Another questioned whether the City of Erie Bayfront was included in the areas identified as BRHAs. The Department has considered the commentators’ recommendations and has amended the rulemaking to clarify that the 2004 study identifies the specific locations of BRHAs. The changes also include a requirement for the Department to make the study publicly available. The changes to the regulations were the addition of Section 85.12(c), and a modification of Section 85.26(c), as follows:

85.12 (c) IN ACCORDANCE WITH SECTION 4(c) OF THE ACT, 32 P.S. 5204(c), THE GEOGRAPHIC AREAS IDENTIFIED AS "TENTATIVELY IDENTIFIED BLUFF RECESSON HAZARD AREAS" IN SECTIONS I AND II OF THE DEPARTMENT'S "STUDY TO TENTATIVELY DESIGNATE BLUFF RECESSON HAZARD AREAS", DATED NOVEMBER 2004, ARE DESIGNATED AS BLUFF RECESSON HAZARD AREAS. THE DEPARTMENT SHALL MAKE THE NOVEMBER 2004 STUDY AVAILABLE TO THE PUBLIC.

85.26 (c) [Designated municipalities and setback distances in feet.] EXCEPT AS PROVIDED IN SUBSECTION (e), regardless of any other provision of law or ordinance to the contrary, the minimum BLUFF setback distances in the named municipalities THAT POSSESS A BLUFF RECESSON HAZARD AREA, AS DESIGNATED IN SECTION 85.12, shall be in accordance with the following table:

Also, the City of Erie Bayfront was not included in the areas tentatively designated as BRHAs.

Methodology for tentatively designating BRHAs

Several comments questioned the methodology, science and data utilized to tentatively identify BRHAs. Several comments suggested that specific sites in the City of Erie and Millcreek Township be designated as outside of BRHAs. Others questioned whether the data from the 2004 study was utilized.

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 a third party; high altitude aerial photography; low altitude oblique-angle color prints; and control point measurement data. Some of the photography dated back to 1938. Based on the analysis of this data, the Department recommends no changes to the proposed regulations regarding the tentative designations. The methodology was also discussed in-depth at several advisory committees that supported the regulatory package. Regarding the question of whether data from the 2004 study was employed, the changes to Sections 85.12 and 85.26 help clarify that the study formed the basis for the designations.

Support for the rulemaking

Two comments expressed support for the rulemaking.

Minimum setback distance

One comment supported reducing the minimum possible setback distance from 50 to 25 feet, and suggested that the setback distances established for North East Township be reduced. The regulations establish a setback of 25 feet only for the City of Erie. Based on the analysis of data and employment of a methodology in the 2004 Study, the setback distances for North East Township are not changed. Setback distances for each municipality are listed in Section 85.26.

Setback Distances

One comment questioned the data utilized to calculate setback distances. Another comment suggested variable setback distances in a municipality. Two sources of data were employed to determine setback distances: Photogrammetric analysis of high altitude aerial photography and control point monitoring. Some of the high altitude aerial photography dated as far back as 1938. The control point measurement data involves on-site measurement of bluff recession from fixed monuments in the ground. Based on the analysis of this data, no changes to the setback distances in the proposed rulemaking were made.

Deed notices

One comment suggested removing the proposed language in Section 85.37 requiring that deeds and plats include appropriate notice of BRHAs. Based upon further research, the intent of this language can be better addressed by developing a voluntary training program that would bring together realtors, municipalities, etc. The language in the proposed rulemaking has been deleted.

Timeframe for future updates

One comment asked for a timeframe to be established regarding future updates, so that the entities required to comply have ample time to incorporate changes to their zoning and other local codes.

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 program performs on-going monitoring and

evaluation of bluff recession that helps identify when studies are necessary. Regarding the allotment of ample time for entities to make 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 proposed rulemaking regarding timeframes.

EQB Scope of Authority

The Independent Regulatory Review Commission (IRRC) questioned why specific BRHAs were not identified. 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 amendments to Section 85.12 and Section 85.26 will address this concern.

G. Benefits, Costs and Compliance

Benefits

The benefit of this proposed rulemaking is the protection of the health and safety of coastal property owners, the prevention of the destruction of property and structures in designated Bluff Recession Hazard Areas, and the prevention of the introduction of debris and hazardous materials into the coastal environment. Federal funds will be available through the Coastal Resources Management (CRM) Program to help develop and implement any necessary ordinance. Future monitoring, training and technical assistance will also be provided by the CRM Program.

Also of interest to the public is the availability of Technical Advisory Services (TAS) provided by the Department to coastal property owners along the Lake Erie shoreline. The TAS is a free service implemented by the staff of the CRM Program and has been in existence for 25 years. The TAS provides technical advice to existing and prospective shoreline and bluff property owners on the causes and effects of shoreline erosion and of progressive bluff recession. This service is highly successful and is credited with saving millions of dollars in property values. The TAS also provides information regarding best management practices for the proper management of bluff and shoreline properties along Lake Erie. Under a Direct Action Policy in the federal and state approved and jointly funded CRM Program, “. . .the Program shall provide technical assistance and advice concerning the design of structural and non structural methods of shore protection and bluff stabilization”.

Compliance Costs

Because the regulations impact only new construction within the designated hazard area, there is estimated to be minimal cost to the regulated community since any new construction can be designed or located outside the designated hazard area. Furthermore, costs associated with the adoption of zoning ordinances by affected municipal governments are also anticipated to be minimal.

Compliance Assistance Plan

Federal funding is available through the Coastal Resources Management Program to assist municipalities with the development and implementation of ordinances that are compliant with this rulemaking. In addition, training and technical assistance will be provided by the Coastal Resources Management Program to affected municipalities and property owners along the Lake Erie shoreline.

Paperwork Requirements

These regulatory revisions should have no significant paperwork impact on the Commonwealth, its political subdivisions, or the private sector.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. DEP encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance.

This rulemaking promotes a multi-media pollution prevention approach for the proposed regulated area of the City of Erie. The construction setbacks in Chapter 85 for new construction and improvements to existing structures within the Bluff Recession Hazard Areas will promote safe and sensible practices by placing new construction outside and away from Bluff Recession Hazard Areas, making all new construction moveable and minimizing improvements to existing structures in Bluff Recession Hazard Areas. The proposed minimum setbacks for new construction in the proposed BRHA of the City of Erie are (from the bluff crest) 25 feet for residential, 25 feet for commercial and 25 feet for industrial. Regulating new construction to keep it out of and away from the Bluff Recession Hazard Area will in effect prevent pollution of Lake Erie waters by avoiding collapse of structures into the waters of Lake Erie caused by erosion and progressive bluff recession.

I. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 13, 2008, the Department submitted a copy of this proposed rulemaking, published at 38 *Pa.B.* 4617, and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on ___(blank), these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on ___(blank) and approved the final-form regulations.

K. Findings of the Board The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pennsylvania Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 38 *Pa.B.* 4617 on August 23, 2008.
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code*, Chapter 85 are amended to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board