

# RULES AND REGULATIONS

## Title 25—ENVIRONMENTAL PROTECTION

### ENVIRONMENTAL QUALITY BOARD

[ 25 PA. CODE CH. 85 ]

#### Bluff Recession and Setback

The Environmental Quality Board (Board) amended Chapter 85 (relating to 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 (BRHA), clarify minimum setback distances and delete requirements for specific supporting documentation.

This order was adopted by the Board at its meeting of June 16, 2009.

#### A. *Effective Date*

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form 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, [wcummings@state.pa.us](mailto:wcummings@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) web site at [www.depweb.state.pa.us](http://www.depweb.state.pa.us).

#### C. *Statutory Authority*

These amendments are made under the Bluff Recession and Setback Act (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 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 BRHAs. 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 BRHAs, the Department recommended including the City of Erie as a municipality identified as having a BRHA.

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 BRHA and the City of Erie should be included as a regulated municipality in Chapter 85.

The compelling public need for this rulemaking is based on the six basic purposes stated in the 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 BRHAs to preserve and restore the natural ecological systems, and to prevent continuing destruction of property and structures.
- 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 amendments follows:

##### *Subchapter A. General Provisions*

Minor clarification changes to: § 85.1. (relating to definition of persons), and in §§ 85.26(d) and 85.35.

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

In § 85.12(c) the following language was added, "In accordance with section 4(c) of the act (32 P. S. § 5204(c)), the geographic areas identified as Tentatively Identified BRHAs in Sections I and II of the Department's 'Study to Tentatively Designate BRHAs', dated November 2004, are designated as BRHAs. The Department will 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.

Section 85.26(c) was modified 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 BRHA, as designated in § 85.12, shall be in accordance with the following table:" This was a change that helps clarify that § 85.12 was added.

##### *Subchapter D. Municipal Bluff Setback Ordinance and Regulations*

The new requirements proposed in § 85.37(7)(i) and (ii) for every deed or plat within the BRHA to include an appropriate BRHA notice were removed. 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-form 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 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 proposed 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 § 85.12(c), and a modification of § 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 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.

§ 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 RECESSION 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 to make recommendations to tentatively designate 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 amendments 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 §§ 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 § 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 onsite 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 § 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, and the like. The language in the proposed rulemaking has been deleted.

*Time frame for future updates*

One comment asked for a time frame 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 requires that studies will be conducted when necessary to identify BRHAs. 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 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 the EQB. Based on these requirements, the Department does not recommend any changes to the proposed rulemaking regarding time frames.

#### *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 the previously mentioned amendments to §§ 85.12 and 85.26 address that concern.

#### *G. Benefits, Costs and Compliance*

##### *Benefits*

The benefit of this rulemaking is the protection of the health and safety of coastal property owners, the prevention of the destruction of property and structures in designated BRHAs, 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 CRMP 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 CRMP 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 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department 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 multimedia 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 BRHAs will promote safe and sensible practices by placing new construction outside and away from BRHAs, making all new construction moveable and minimizing improvements to existing structures in BRHAs. 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 BRHA 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*

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were 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 the proposed rulemaking, published at 38 Pa.B. 4617 (August 23, 2009), and a copy of a Regulatory Analysis Form to the IRRC and the House and Senate Environmental Resources and Energy Committees (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 (71 P.S. § 745.5a(j.2)), on August 5, 2009, these final-form regulations were deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 6, 2009, 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 Pa. Code §§ 7.1

and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(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.

(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, 25 Pa. Code Chapter 85, are amended by amending §§ 85.1, 85.2, 85.11—85.15, 85.22, 85.23, 85.25, 85.26, 85.32, 85.35, 85.37, 85.42, 85.52, 85.55 and 85.61 and by deleting § 85.41 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(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 IRRC and the 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.

JOHN HANGER, Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 39 Pa.B. 5096 (August 22, 2009).)

Fiscal Note: Fiscal Note 7-404 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subchapter C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 85. BLUFF RECESSION AND SETBACK

Subchapter A. GENERAL PROVISIONS

§ 85.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—The Bluff Recession and Setback Act (32 P. S. §§ 5201—5215).

\* \* \* \* \*

Person—An individual, partnership, public or private association or corporation, firm, trust estate, municipality, governmental unit, public utility or other legal entity which is recognized by law as the subject of rights and duties. Whenever used in any section prescribing or imposing a penalty, the term "person" includes the members of a partnership, the officers, members, servants and agents of an association, officers, agents and servants of a

corporation, but excludes any department, board, bureau or agency of the Commonwealth.

Plat—A map, drawing or print accurately drawn to scale showing the proposed or existing location of all structures.

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§ 85.2. Scope.

This chapter is adopted in accordance with the duties relating to bluff recession placed on the Department by the act, and applies to all municipalities designated as having bluff recession hazard areas and to all persons constructing, installing or engaging in substantial improvement to any structure or utility facility within bluff recession hazard areas.

Subchapter B. PROCEDURE FOR DESIGNATION OF AREAS WITH BLUFF RECESSION HAZARDS

§ 85.11. General requirements.

The Department is authorized under section 4 of the act (32 P. S. § 5204) to identify areas in this Commonwealth that contain bluff recession hazard areas. Prior to formal designation by the EQB, the tentatively identified municipality will be invited to submit comments to the Department concerning the designation.

§ 85.12. Identification of bluff recession hazards.

(a) Under section 4 of the act (32 P. S. § 5204), studies will be conducted when necessary to identify bluff recession hazard areas in this Commonwealth. Studies prepared for these purposes must do all of the following:

(1) Identify the geographic location of the potential hazard area; county, township, and so forth.

(2) Define and evaluate the bluff recession hazard in relation to geophysical processes such as recession and erosion related phenomena and examine the causative factors.

(3) Review and evaluate existing and potential damage to property and structures caused by progressive bluff recession.

(4) Develop a recession rate based on historical evidence.

(5) Develop conclusions and recommendations based on the findings of the studies.

(b) To prevent the unnecessary expenditure of public funds, the Department will inventory, identify and evaluate previous studies that may have already been completed. If the studies meet the requirements of this chapter, the studies may be utilized for purposes of section 4 of the act.

(c) In accordance with section 4(c) of the act, 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 will make the November 2004 study available to the public.

§ 85.13. Department notification to municipalities.

Following completion of the study, the Department will, by certified letter, notify the governing body of the municipality that it has been tentatively designated as possessing a bluff recession hazard area. The letter will contain the following information:

- (1) The geographic location of the hazard area.
- (2) A summary of the findings of the study by the Department.
- (3) The historic recession rate and the process used to calculate this rate.
- (4) The minimum bluff setback distances that will be required by the Department.
- (5) A request for comments from the municipality concerning the tentative designation and setback distances.
- (6) Specification of a 60 day time limit for comment.
- (7) Notice that one or more public hearings will be held concerning the designation of bluff recession hazard areas by the EQB prior to formal designation.

**§ 85.14. Municipal response on designation.**

- (a) Each municipality tentatively identified by the Department as possessing a bluff recession hazard area will be invited to submit written comments concerning the tentative designation to the Department within 60 days of receiving the notification letter of the Department.
- (b) If a municipality disagrees with the letter of the Department tentatively designating it as possessing a bluff recession hazard area and the required setback distances, the appropriate representatives of the Department will contact and offer to meet with representatives of the municipality to review, discuss, and attempt to resolve the differences. This meeting will be scheduled within 30 days from the date the letter is received from the municipality.
- (c) If a municipality does not comment within the time prescribed in § 85.13(6) (relating to Department notification to municipalities), it will be presumed that the municipality is in agreement with the designation and the required setback distance.

**§ 85.15. Department notification to the EQB.**

- (a) Following the close of the municipal comment period on the tentative designation, the Department will prepare and transmit to the EQB a proposed rulemaking proposing formal designation of the bluff recession hazard area of the municipality and the establishment of bluff setback distances in the bluff recession hazard area. The proposed rulemaking will contain the following:
  - (1) The findings of the Department concerning the location and determination of the bluff recession hazard area in the municipality.
  - (2) The nature of the existing and potential damage to property and structures.
  - (3) Comments received from the affected municipality.
  - (4) A recommendation, incorporating consideration of the comments received from the municipality, that the area be designated as a bluff recession hazard area and subject to Subchapter D (relating to municipal bluff setback ordinance and regulations).
- (b) Following transmittal of the proposed rulemaking by the Department to the EQB, the EQB will give public notice and hold one or more public hearings on the proposed rulemaking to formally designate areas within municipalities as bluff recession hazard areas.
- (c) Following public hearings, the Department will consider the comments received and make appropriate revisions to the proposed rulemaking. The Department will then submit the proposed rulemaking to the EQB for

final action. Following adoption by the EQB and publication of the formal designation, the Department will notify the municipality that it must within 6 months comply with the act and this chapter.

**Subchapter C. BLUFF RECESSION HAZARD AREAS SETBACK REQUIREMENTS**

**§ 85.22. Methods of determining minimum bluff setback distances.**

(a) The Department will develop minimum bluff setback distances for each municipality tentatively designated as having a bluff recession hazard area by applying the following formula:

Rate of Bluff Recession	×	Appropriate Life Span of Structure	=	Minimum Bluff Setback Distance
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- (1) The rate of bluff recession is the average annual rate of recession for all the municipality's bluffs as calculated by the Department.
- (2) The appropriate life span of a structure is 50 years for residential homes, 75 years for commercial structures, and 100 years for light and heavy industrial structures.
- (b) The minimum bluff setback distance may not be less than 25 feet. When use of the formula identified in subsection (a) would produce a minimum bluff setback distance of less than 25 feet, the formula does not apply and 25 feet shall be the minimum bluff setback distance.

**§ 85.23. Modification of minimum bluff setback distances.**

A minimum bluff setback distance for a municipality may be modified upon presentation of formal studies acceptable to the Department documenting annual recession rates at variance with the recession rate data of the Department. Upon Department review and acceptance of the data as accurate and compatible with the objectives of the act, a new minimum bluff setback distance will be calculated. The Department will request that the EQB amend the designation in accordance with this subchapter concerning the minimum bluff setback distances.

**§ 85.25. Variances granted by the Department.**

- (a) During the period between EQB designation of a bluff recession hazard area and the approval of the Department of a bluff setback ordinance and regulations of a municipality, the Department may grant variances to the bluff setback requirements for all construction in a designated bluff recession hazard area. A property owner shall file an application with the Department for a variance to allow construction on his property.
- (b) When the Department receives the completed application for a variance, it will review the application based on the criteria for a variance under § 85.37(4) (relating to contents of ordinance and regulations submitted by municipality) within 45 days, and send a certified letter to the applicant approving or disapproving the variance. A copy of this letter will be sent to the municipality for its permanent record. If the Department does not take action regarding the application within 45 days of receipt of this application, the application will be deemed approved.

**§ 85.26. Designated municipalities and minimum bluff setback distances for identified categories of structures.**

(a) Under § 85.15 (relating to Department notification to the EQB), the municipalities identified in subsection (c) have been designated as possessing a bluff recession hazard area.

(b) The municipalities designated in subsection (c) are required to adopt and implement a bluff setback ordinance and regulations which incorporate the bluff setback distances listed in subsection (c).

(c) 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 § 85.12 (relating to identification of bluff recession hazards), must be in accordance with the following table:

<i>Municipality (by geographic location)</i>	<i>Light and Heavy</i>		
	<i>Residential</i>	<i>Commercial</i>	<i>Industrial</i>
Springfield Township Erie County	100'	150'	200'
Girard Township Erie County	60'	90'	120'
Lake City Borough Erie County	60'	90'	120'
Fairview Township Erie County	50'	75'	100'
Millcreek Township Erie County	50'	75'	100'
Erie City Erie County	25'	25'	25'
Lawrence Park Township Erie County	50'	75'	100'
Harborcreek Township Erie County	50'	75'	100'
North East Township Erie County	50'	75'	100'

(d) The setback distances listed in subsection (c) are minimum distances. The actual distance of the area subject to bluff recession may be greater in certain areas. Nothing in this chapter shall be construed to guarantee that bluff recession will not occur beyond the specified setback distances during the usable life span of a structure originally installed or constructed in accordance with the setback requirements at the time of installation or construction. Because of variations in the bluff recession rates, municipalities may adopt more restrictive ordinances in accordance with § 85.35 (relating to municipal adoption of more restrictive ordinances).

(e) If the setback distance for the placement of structures regulated under another law or ordinance, such as the Uniform Construction Code or zoning regulation, is greater than that specified in subsection (c), the greater setback distance shall apply within the bluff recession hazard area.

**Subchapter D. MUNICIPAL BLUFF SETBACK ORDINANCE AND REGULATIONS**

**§ 85.32. Time limit for municipal adoption of bluff setback ordinance and regulations.**

Each municipality, following publication of the formal EQB designation of a bluff recession hazard area, shall within 6 months of receiving notification amend or adopt and implement a bluff setback ordinance and regulations which are consistent with § 85.37 (relating to contents of ordinance and regulations submitted by municipality).

**§ 85.35. Municipal adoption of more restrictive ordinance.**

No provision of the act may be construed as in any way limiting the power of any municipality to adopt more restrictive ordinances, codes or regulations governing

construction and development in bluff recession hazard areas that are established under Subchapter C (relating to bluff recession hazard areas setback requirements).

**§ 85.37. Contents of ordinance and regulations submitted by municipality.**

The ordinance and regulations submitted by a municipality to the Department must include at a minimum the following components:

(1) A setback ordinance and regulations must meet the minimum requirements and contain a minimum setback distance for each class of structure under this chapter.

(2) The municipality must provide a mechanism for permitting all proposed construction, installation, or substantial improvement of structures, or utility facilities such as water, sewage, electric, gas and telephone facilities in designated bluff recession hazard areas. This bluff setback permitting process may be incorporated into any existing permitting process administered by a municipal building code or zoning officer. At the request of the municipality, the Department will provide assistance to the municipality in developing this procedure.

(3) The municipality must provide a procedure, as a part of the ordinance and regulations, that enables monitoring of substantial improvements to structures bisected by or within the bluff setback distance. The procedure must ascertain the market value of the structure prior to the first improvement and document subsequent improvements to the structure to ensure that they do not exceed 50% of the market value for a consecutive 5-year period. At the request of the municipality, the Department will provide assistance to the municipality in developing this procedure.

(4) The municipality must provide a variance to its bluff setback ordinance and regulations only in the following cases:

(i) When a parcel established prior to a bluff recession hazard area designation does not have adequate depth considering the minimum bluff setback requirements to provide for any reasonable use of the land, a variance may be applied for. The variance shall be authorized when the following standards and criteria are met:

(A) The structure and all associated structures and utility facilities shall be located on the property as far landward of the bluff line as allowed by other municipal ordinances.

(B) The structure shall be designed and constructed to be movable. Construction activities must meet the minimum erosion and sediment control practices established by Chapter 102 (relating to erosion and sediment control) and reflect guidance contained in municipal stormwater ordinances or county watershed stormwater management plans. As part of the moving operation, all construction materials, including foundations, shall be removed and disposed of in accordance with the Solid Waste Management Act (35 P.S. §§ 6018.101—6018.1003) and the regulations promulgated thereto. Access to and from the structure must be of sufficient width and acceptable grade to allow for moving of the structure.

(ii) When a proposed structure or utility facility requires access to the body of water and there is no feasible alternative for obtaining access, a variance may be applied for. The variance will be authorized only when the following standards and criteria are met:

(A) The variance may be granted only for bluff recession control devices designed to reduce bluff recession; water withdrawal lines or discharge lines; power cables; natural gas or oil pipelines; or communication cables; or other public service lines which require access through the bluff recession hazard area to the body of water.

(B) To achieve adequate protection of the bluff, the construction activity must occur in a manner that minimizes potential short-term and long-term disruption of the bluff recession hazard area, must be in conformance with Chapter 102 and reflect guidance contained in municipal stormwater ordinances or county watershed stormwater management plans.

(C) To help ensure that increased turbidity levels on the lake are not caused, all construction activities must comply with the erosion and sedimentation control practices established under Chapter 102.

(D) The area of the construction site shall be reestablished to ensure that subsequent erosion will not damage the structure or harm the environment or adjacent properties.

(5) The municipality must provide a procedure to amend municipal setback ordinances. The Department will, at the request of the affected municipality, provide assistance in incorporating revisions to this chapter into the municipal ordinance and regulations.

(6) The municipality must provide an administrative procedure for maintaining records of all correspondence, applications for permits, and issuance and denial of the permits. The Department will assist if requested. On February 28 of each year, a copy of the records from the preceding calendar year shall be submitted to the Department for its review and permanent record. This procedure must require that necessary records include the name and address of the applicant and the location and description for the following activities:

(i) Construction, installation or engagement in any substantial improvement to structures affected by the minimum bluff setback distance including the information collected as a result of the monitoring procedure established in paragraph (3).

(ii) Improvement projects for an existing structure located within the minimum bluff setback distance.

(iii) Variances granted by the municipality in bluff recession hazard areas.

(7) When an applicant submits an application for a permit for any construction or development activities in areas subject to bluff recession hazards, the municipality shall alert the applicant of the minimum bluff setback prescribed in § 85.26(c) (relating to designated municipalities and minimum bluff setback distances for identified categories of structures).

**Subchapter E. DEPARTMENT OVERSIGHT OF MUNICIPAL COMPLIANCE**

§ 85.41. (Reserved).

§ 85.42. Department review and approval of a municipality setback ordinance and regulations.

(a) The Department will, within 90 days of receiving a written request to approve a bluff setback ordinance and regulations of a municipality, review the proposal pursuant to § 85.37 (relating to contents of ordinance and regulation submitted by municipality).

(b) The Department will, upon ascertaining that the proposed bluff setback ordinance and regulations meet the minimum requirements in § 85.37, notify the municipality of the approval of the ordinance and regulations.

(c) If the Department fails to respond within the allotted 90-day time limit, the ordinance and regulations will be deemed to be approved, and the municipality shall use the ordinance and regulations to enforce the act.

(d) If the Department, during the review of the proposed ordinance and regulations, finds that the ordinance and regulations do not meet the minimum requirements of this chapter, the Department will disapprove the ordinance and regulations and will notify the municipality. The letter will contain the reasons for disapproval and suggestions for correcting the problem. Upon receipt of this letter, the municipality shall have 30 days to correct the problem and resubmit the proposed ordinance and regulations. If the municipality disagrees with the findings of the Department, the municipality may appeal the decision of the Department under the procedures in § 85.61 (relating to appeals).

(e) If the municipality fails to adopt or submit a bluff setback ordinance and regulations to the Department, the Department may institute an action in mandamus to compel the municipality to comply with the act and this chapter.

**Subchapter F. GRANTS AND REIMBURSEMENTS TO MUNICIPALITIES**

§ 85.52. Limitation of grants and reimbursements.

Grants will be available from the Department to municipalities to reimburse them for allowable costs incurred in complying with the act. Grants will be limited to:

(1) Seventy-five percent of the costs incurred for the development and implementation of a bluff setback ordinance and regulations required under this chapter as well as 75% for the costs incurred by a municipality in revising a setback ordinance and regulations established prior to the act to comply with this chapter.

(2) Fifty percent of the allowable costs for the ongoing administration of an ordinance incurred by a municipality. Allowable costs for administration of a bluff setback ordinance do not include those costs that are offset by reasonable permit fees imposed by the municipality.

§ 85.55. Records and audits.

(a) Municipalities shall maintain books, records, documents, correspondence and other evidence pertaining to the costs and expenses incurred under § 85.52 (relating to limitation of grants and reimbursements) to the extent and in detail that will properly reflect the costs, direct and indirect, of labor, materials, equipment, supplies and services, and other costs and expenses of whatever nature for which funding has been provided under the grant. The records shall be maintained in accordance with generally accepted accounting principles.

(b) A municipality shall maintain accounting records and supporting documentation which identify the revenue and costs from the effective date to expiration date of the grant. The accounting records shall be maintained in accordance with generally accepted accounting practices.

**Subchapter G. APPEALS****§ 85.61. Appeals.**

(a) A person or municipality aggrieved by an action of the Department shall have the right within 30 days of the receipt of the notice of the action to appeal the action to the Environmental Hearing Board (EHB), under 2 Pa.C.S. §§ 501—508 and 701—704 (relating to Administrative Agency Law).

(b) An appeal of an action under the act does not act as a supersedeas. A supersedeas may be granted by the EHB upon a showing by the petitioner that:

(1) Irreparable harm to the petitioner or other interested parties will result if supersedeas is denied.

(2) There is a likelihood of the success of the petitioner on the merits.

(3) The grant of a supersedeas will not result in irreparable harm to the Commonwealth.

[Pa.B. Doc. No. 09-1716. Filed for public inspection September 18, 2009, 9:00 a.m.]

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