

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**, the Act of May 13, 1980 (No. 1980-48) (32 P. S. § § 5201—5215).

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EOB-Environmental Quality Board

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Person[s]—An individual, partnership, public or private association or corporation, firm, trust estate, municipality, governmental unit, public utility or other legal entity **whatsoever** 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”** shall include the members of a partnership, **the officers, members, servants and agents of an association, officers, agents and servants of** a corporation, but shall exclude any department, board, bureau or agency of the Commonwealth.

Plat—A map, drawing or print accurately drawn to scale showing the proposed or existing **[the Commonwealth] 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 they shall apply 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.

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

§ 85.11. General requirements.

The Department is authorized by section 4 of the act (32 P. S. § 5204) to identify areas in this Commonwealth **[which have] that contain** bluff recession hazard areas. Prior to formal designation by the **[Environmental Quality Board] EQB,** the tentatively

identified municipality will be invited to submit comments to the Department concerning the designation.

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§ 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 shall 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, such studies may be utilized for purposes of section 4 of the act (32 P. S. § 5204).

(c) THE DEPARTMENT WILL MAINTAIN AND MAKE AVAILABLE TO THE PUBLIC THE GEOGRAPHIC LOCATION OF BRHAs AS DESIGNATED BY EQB.

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§ 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 shall contain **[all of]** 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 **[the] a 60 day** time limit[s] for comment.
- (7) Notice that **[a] one or more** public hearings will be held concerning the designation of bluff recession hazard areas by the **[Environmental Quality Board] 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) In the event 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) In the event 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 **[Environmental Quality Board] EQB**.

(a) [When the Department receives comments from a tentatively designated municipality, it] Following the close of the municipal comment period on the tentative designation, the Department will prepare and transmit to the **[Environmental Quality Board] EQB [a request for] a proposed rulemaking [requesting] 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 **[request] proposed rulemaking** will contain **[,at a minimum, all of]** 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) **[All c] 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) In the event a municipality disagrees with the letter of the Department tentatively designating it as possessing a bluff recession area and the required setback distances and has not submitted comments acceptable to the Department, 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 held within 30 days from the date of the letter received from the municipality.]

(c) In the event a municipality fails to comment within the time prescribed in § 85.13(6) (relating to Department notification to municipalities), the Department will assume the municipality is in agreement and will note that municipality provided no comment concerning the designation and the required setback distance within the allotted time.]

[(d)b] Following transmittal of the [request] proposed rulemaking by the Department to the [Environmental Quality Board] EOB, the [Environmental Quality Board] EOB will give public notice and hold one or more public hearings on the [request] proposed rulemaking to formally designate areas within municipalities as bluff recession hazard areas.

[(e)c] Following public hearings, the Department will consider the comments received [at the public hearing] and make appropriate revisions to the [request] proposed rulemaking. [and resubmit it] The Department will then submit the proposed rulemaking to the [Environmental Quality Board] EOB for final action. Following [an affirmative action by the Environmental Quality Board] adoption by the EOB 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

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§ 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:

$$\begin{array}{rcl} \text{Rate of} & \text{Appropriate} & \text{Minimum} \\ \text{Bluff} & \text{x Life Span} & \text{= Bluff Setback} \\ \text{Recession} & \text{of Structure} & \text{Distance} \end{array}$$

[(b) When the Department receives the completed application, it will review the application based on the criteria for a variance pursuant to § 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, the application will be deemed approved.]

(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 [c]) In no case shall the minimum bluff setback distance be less than **[50] 25** feet. When use of the formula identified in subsection (a) would produce a minimum bluff setback distance of less than **[50] 25** feet, the formula shall not apply and **[50] 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 the **[Environmental Quality Board] EOB** to amend the designation in accordance with this subchapter concerning the minimum bluff setback distances.

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§ 85.25. Variances granted by the Department.

(a) During the period between **[Environmental Quality Board] EOB** 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 pursuant to § 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 [Quality Board] 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) **[Designated municipalities and setback distances in feet.] Regardless of any other provision of law or ordinance to the contrary, the minimum setback distances in the named municipalities shall be in accordance with the following table:**

<i>Municipality (by geographic location)</i>	<i>Residential</i>	<i>Commercial</i>	<i>Light and Heavy Industrial</i>
Springfield Township Erie County	100'	150'	200'
Girard Township Erie County	60'	90'	120'
Lake City Borough Erie County	60'	90'	120'
<u>Fairview Township Erie County</u>	<u>50'</u>	<u>75'</u>	<u>100'</u>
Millcreek Township Erie County	50'	75'	100'
[Fairview Township Erie County]	[50']	[75']	[100']
<u>Erie City Erie County</u>	<u>25'</u>	<u>25'</u>	<u>25'</u>
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 § 85.26(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.

(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), then the greater setback distance shall apply within the bluff recession hazard area.

Subchapter D. MUNICIPAL BLUFF SETBACK ORDINANCE
AND REGULATIONS

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

Each municipality, following **publication of the** formal [Quality Board] **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 the requirements of § 85.37 (relating to contents of ordinance and regulations submitted by municipality).

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§ 85.35. Municipal adoption of more restrictive ordinance.

No provision of the act shall 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 § § 85.22—85.[24] **26** (relating to bluff recession hazard areas setback requirements).

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

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

- (1) A setback ordinance and regulations shall meet the minimum requirements and contain a minimum setback distance for each class of structure under this chapter.
- (2) The municipality shall 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) A municipality shall 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 **[property] 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 shall 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 **[designated] 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 **[utilities] 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 shall 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. **[All construction materials, including foundations, shall be removed and disposed of in accordance with Chapter 75 (Reserved) as part of the moving operation.] As part of the moving operation, all construction materials, including foundations, shall be removed and disposed of in accordance with the requirements of the Solid Waste Management Act (35 P.S. § 6018.101 et seq) and the regulations promulgated thereto.** Access to and from the structure shall 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 such access, a variance may be applied for. The variance shall 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 shall occur in a manner that minimizes potential short term and long term disruption of the bluff recession hazard area, shall be in conformance with Chapter 102 and shall 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 shall comply with the erosion and sedimentation control practices established by 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 shall 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 shall provide an administrative procedure for maintaining records of all correspondence, applications for permits, and issuance and denial of such 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 shall require that all 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) **[The municipality has alerted and shall continue to alert permit applicants, when permits are granted, that the bluff setback requirements are [at best] a minimum distance and, because of variations in local bluff recession rates, cannot guarantee that a structure located in a bluff recession hazard area will not be endangered by bluff recession within its useful life span.] 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).**

(i) Every deed for the transfer of property within designated bluff recession hazard areas shall include appropriate notice that it is within a bluff recession hazard area.

(ii) After the effective date of this subsection, every plat approved for subdivision or land development under a municipal ordinance for areas

within the bluff recession hazard area shall include appropriate notice by the municipal zoning administrator.

Subchapter E. DEPARTMENT OVERSIGHT OF MUNICIPAL COMPLIANCE

§ 85.41. [General requirements.] Reserved

[As required by section 7 of the act (32 P. S. § 5207) the Department will adopt procedures and regulations for the review and approval of municipal ordinance and regulations.]

§ 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 the requirements contained in § 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 set forth in § 85.37 (relating to contents of ordinance and regulations submitted by municipality), notify the municipality [**by certified letter**] of the approval of the ordinance and regulations.

(c) Should the Department fail to respond within the allotted 90 day time limit, the ordinance and regulations shall be deemed to be approved, and the municipality shall use such ordinance and regulations to enforce the provisions of the act.

(d) Should the Department, during the review of the proposed ordinance and regulations, find 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 of** this chapter.

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Subchapter F. GRANTS AND REIMBURSEMENTS TO MUNICIPALITIES

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§ 85.52. Limitation of grants and reimbursements.

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

(1) Seventy-five percent of the costs incurred for the development and implementation of a bluff setback ordinance and regulations required by this chapter as well as **[75%] seventy-five percent** 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 bluff setback ordinance shall not include those costs **[which] that** are offset by reasonable permit fees imposed by the municipality.

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§ 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 such detail as will properly reflect all 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. Such records shall be maintained in accordance with generally accepted accounting principles. **[A detailed explanation of the accounting procedures and types of records are contained in the “Manual of Accounting and Related Financial Procedures for Pennsylvania Municipalities,” published and distributed by the Department of Community Affairs, Forum Building, Harrisburg, Pennsylvania 17120.]**

(b) A municipality shall maintain accounting records and supporting documentation which identify all revenue and costs from the effective date to expiration date of the grant. **[As a minimum, the following books of account shall be used:] The accounting records shall be maintained in accordance with generally accepted accounting practices.**

- [(1) Cash receipts journal.**
- (2) Cash disbursement journal.**
- (3) Payroll journal.**
- (4) General journal.**

(c) In the event a municipality records transactions by the accrual method of accounting, additional records shall be required.

(d) The following documentation should be retained in file:

- (1) **Copies of revenue documents.**
- (2) **Original vendor invoices.**
- (3) **Payroll records.**
- (4) **Cancelled checks.**
- (5) **Worksheets used to prepare grant reports and other related grant information. All records should be retained for a period of three years from the grant expiration date or until all pending matters are resolved.]**

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 such action to appeal such action to the Environmental Hearing Board, under 2 Pa.C.S. § § 501—508 and 701—704.

(b) An appeal of an action under the act shall not act as a supersedeas. A supersedeas may be granted by the Environmental Hearing Board upon a showing by the petitioner:

- (1) **[that] That** irreparable harm to the petitioner or other interested parties will result if supersedeas is denied.
- (2) That there is a likelihood of the success of the petitioner on the merits.
- (3) That the grant of a supersedeas will not result in irreparable harm to the Commonwealth.