

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

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, add a deed and plat notice requirement and delete requirements for specific supporting documentation.

This proposal was adopted by the Board at its _____, 2008 meeting.

A. Effective Date

These amendments will be effective upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Person

For further information on the proposed rulemaking, contact Shamus Malone, Chief of Monitoring and Technical Assistance, PA Coastal Resources Management Program, P.O. Box 2063, Harrisburg, PA 17105-2063, (717) 772-4785. Information regarding submitting comments on the proposed rulemaking appears in Section J of this Preamble. Persons with a disability may use the AT&T Relay Service (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection's website: www.depweb.state.pa.us.

C. Statutory Authority

The proposed amendments are published under the statutory authority of the Bluff Recession and Setback Act (32 P.S.5201-5315).

D. Background and Purpose

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 Regulatory Requirements

A brief description of the proposed amendments follows:

Subchapter A. General Provisions

Section 85.1. (relating to definitions) is proposed to be amended by adding the EQB as a definitional term and clarifying the definitions for Act, Person, Plat and Structure.

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

This subchapter is proposed to be amended by making minor editorial changes to §85.11 (relating to general requirements) and §85.13 (relating to department notification to

municipalities) and adding clarifying language to §85.14 (relating to municipal response on designation) and §85.15 (relating to department notification to the EQB).

Subchapter C. Bluff Recession Hazard Areas Setback Requirements

This subchapter is proposed to be amended by making changes to 85.22(c) (relating to methods of determining minimum bluff setback distances) to change the minimum allowable bluff setback distance from 50 feet to 25 feet.

This subchapter is proposed to be amended by making minor editorial changes to §85.23 (relating to modification of minimum bluff setback distances) and to move §85.22 (b) to §85.25 (b) for clarity.

In addition, §85.26 (relating to designated municipalities and minimum bluff setback distances for identified categories of structures) is proposed to be amended by making minor editorial changes along with an important clarification in (c.) that this table sets minimum setback requirements and adds the City of Erie as a designated municipality.

Following formal approval and designation of this additional Bluff Recession Hazard Area, the City of Erie will be required to adopt and implement a Bluff Setback Ordinance within six months. The existing regulation (Chapter 85) has been in existence since 1980. Eight municipalities were originally identified as having Bluff Recession Hazard Areas. The proposed rulemaking adds one additional municipality to this list, based on the results of a recently completed study of bluff recession hazards along Pennsylvania's Lake Erie shoreline.

The City of Erie has permitting, technical and administrative capabilities and no additional staff or support capabilities are anticipated to be needed to administer a Bluff Setback Ordinance. The cost of administering the ordinance is reflected by the number of building permits issued for structures in the Bluff Recession Hazard Area. Since the City of Erie already has a building permit system in place, administering the Bluff Setback Ordinance should require only minimal costs and no additional resources.

Subsections §85.26 (d) and (e) are proposed to be added to clarify that municipalities may adopt more restrictive bluff setback distances and that the Uniform Construction Code or local zoning regulation may also apply.

Subchapter D. Municipal Bluff Setback Ordinance and Regulations

This subchapter is proposed to be amended by making minor editorial changes to §85.32 (relating to time limit for municipal adoption of bluff setback ordinance and regulation), to §85.35 (relating to municipal adoption of more restrictive ordinance), and to §85.37 (relating to contents of ordinance and regulations submitted by municipality). A cross reference to the Solid Waste Management Act and regulations is proposed to be added to §85.37(4)(i)(B) and a clarification made to §85.37(7) regarding notice to applicants.

A new requirement is 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.

Subchapter E. Department Oversight of Municipal Compliance

This subchapter is proposed to be amended by deleting §85.41 (relating to general requirements), deleting the requirement for notification by certified letter in §85.42 (b) making minor editorial changes to §85.42(d).

Subchapter F. Grants and Reimbursements to Municipalities

This subchapter is proposed to be amended by making minor editorial changes to §85.52 (relating to limitation of grants and reimbursements) and replacing the specific list of records and supporting documentation required in §85.55 (relating to records and audits) with the requirement that the records be maintained in accordance with generally accepted accounting practices.

As required by statute, the Department reimburses affected municipalities up to seventy-five percent of the costs incurred to develop an ordinance, and up to fifty percent of the cost of ongoing administration. Currently, the grant amount budgeted and spent by the Department for ongoing administrative costs for the eight municipalities is \$4400 annually. For various reasons, one being the addition of another municipality (City of Erie) to the municipalities needing reimbursed for administrative costs, the Department has increased the budgeted amount for this activity in future grant years.

The Department provides free annual training to affected municipalities to keep them up to date with new methods of monitoring development activities in Bluff Recession Hazard Areas. Furthermore, this proposed rule making would result in only minimal changes to the primary technical guidance document used to help the municipalities with daily implementation of their Bluff Setback Ordinances. This change would be to include the City of Erie as one of the regulated municipalities.

Subchapter G. Appeals

This subchapter is proposed to be amended by making a minor editorial change to §85.61(b)(1) (relating to appeals).

The Department is seeking public comment on the possible future inclusion of a section in Chapter 85 on Proper Vegetation Management. This would be a regulatory section that would require coastal property owners to adhere to certain vegetation management practices to ensure bluff stability on their properties and adjoining properties. Poor vegetation management practices (indiscriminant felling of mature trees or property wide topping and thinning mature tree canopies) at the bluff crest or on the bluff face can have devastating effects on bluff stability that usually initiate large scale bluff recession that can result in property loss and/or structural damage.

F. 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".

G. 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 proposed 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 setbacks for new construction (from the bluff crest) are 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.

H. 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.

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on (blank) , the Department submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

J. Public Comment

Written Comments - Interested persons are invited to submit comments, suggestions, or objections regarding the proposed regulation to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by (blank) (within days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by (blank) (within days following publication in the *Pennsylvania Bulletin*). The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments - Comments may be submitted electronically to the Board at RegComments@state.pa.us and must also be received by the Board by (date) . A subject heading of the proposal and a return name and address must be included in each transmission.

K. Public Hearings

The Environmental Quality Board will hold one public hearing for the purpose of accepting comments on this proposal. The hearing will be held at p.m. on at in the City of Erie.

Persons wishing to present testimony at the hearing are requested to contact the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477, (717) 787-4526, at least one week in advance of the hearing to reserve a time to present testimony. Oral testimony is limited to ten minutes for each witness. Witnesses are requested to submit three written copies of their oral testimony to the hearing chairperson at the hearing. Organizations are limited to designating one witness to present testimony on their behalf at each hearing.

Persons in need of accommodations as provided for in the Americans With Disabilities Act of 1990 should contact the Environmental Quality Board at (717) 787-4526 or through the Pennsylvania AT&T Relay Service at 1-800-654-5984 (TDD) to discuss how the Department may accommodate their needs.

BY:

KATHLEEN A. McGINTY
Chairperson
Environmental Quality Board