2783

CAMILLE "BUD" GEORGE, MEMBER
SPEAKER PRO TEMPORE
ROOM 38B MAIN CAPITOL BUILDING (EAST WING)
P.O. BOX 202074
HARRISBURG, PENNSYLVANIA 17120-2074
PHONE: (717) 787-7316

275 SPRING STREET
HOUTZDALE, PENNSYLVANIA 16651
PHONE: (814) 378-6279

HOME PAGE ADDRESS:
www.pahouse.net/george

E-MAIL ADDRESS:
cgeorge@pahouse.net

House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

ENVIRONMENTAL RESOURCES AND ENERGY COMMITTEE, DEMOCRATIC CHAIRMAN
ENVIRONMENTAL QUALITY BOARD
PENNSYLVANIA INFRASTRUCTURE INVESTMENT BOARD
JOINT LEGISLATIVE AIR AND WATER POLLUTION CONTROL AND CONSERVATION COMMITTEE
WILD RESOURCE CONSERVATION BOARD
RULES COMMITTEE

November 30, 2009

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105

Re: Proposed Rulemaking – Erosion & Sediment Control and Stormwater Management, 25 Pa.Code, Chapter 102.

Comment of Chairman Camille "Bud" George

Background

This Comment addresses the proposed provision for the "Permit-by-rule for low impact projects with riparian forest buffers" (PBR) at Section 102.15 as a part of the proposed rulemaking. This Comment is in part occasioned by the recent revocations of the permits issued to Fortuna Energy Inc. and Ultra Resources Inc., two natural gas companies, under an expedited permit review process that closely resembles the PBR scheme. In October 2008 DEP revoked their permits after a court challenge by the Chesapeake Bay Foundation (CBF) prompted DEP to conduct its own technical review of the permit applications; DEP found, as alleged by the CBF, egregious violations in the permit applications, including significant omissions related to EV and HQ watersheds. Although DEP suggested that it may take future action against the land surveyors who sealed the Erosion & Sediment (E&S) and Post Construction Stormwater Management (PCSM) Plans, the only penalty against these companies is the future disallowance of the PBR process for those projects. Although DEP has issued, since April 2009, over 300 E&S permits for natural gas activities, using the expedited permit review, it has not conducted any audit of the issued permits.

Main Points

As the Majority Chairman of the House Environmental Resources and Energy Committee, I have grave concerns with the proposed PBR option at Section 102.15 and therefore call upon DEP to remove it in its entirety from the proposed Chapter 102 regulations. Although PBR may be a laudable attempt to streamline the permitting process and to promote efficiency, it lacks the necessary enforcement and accountability measures to adequately protect the waters of the Commonwealth. Therefore, the PBR proposal is simply untenable for the following reasons.

1. No technical review

The most troubling aspect of the PBR scheme is that there would be no technical review on the submitted E&S and PCSM Plans once those plans are sealed by a qualified professional. Because there is no independent technical review by DEP to ensure that the sealed plans comply with all relevant local, state and federal laws, DEP is in fact gambling with the water quality protection, merely hoping that the plans prepared by these self-interested professionals will not harm the Commonwealth's waters. But as the incidences involving Fortuna Energy and Ultra Resources amply demonstrate, gambling on private actors pursuing profits to voluntarily regulate themselves and to protect our water supply is a risk that the Commonwealth cannot afford.

Proposed remedy: Mandatory technical review by DEP, the conservation districts, or independent consultants.

2. No meaningful deterrence

Under the proposal, for the technical soundness of the E&S and PCSM Plans, DEP would rely solely on the qualified licensed professionals who would certify that "E&S and PCSM Plans are true and correct, and are in conformance with Chapter 102 of the rules and regulations." Such reliance elevates the importance of the integrity of the certification made by the licensed professional as well as the importance of meaningful deterrence against infraction. Because the risk of environmental degradation and water pollution with respect to the activities covered by the proposed regulation is high, the penalty must reflect that risk.

However, the penalty for making a false certification to DEP is a minimum fine of $1,000 under 18 Pa.C.S. §4904. This penalty is woefully anemic to serve as any kind of meaningful deterrence. The insufficiency of the penalty is particularly shocking given that this particular fine applies only to willful, deliberate lies. Although DEP officials have suggested that DEP may file a complaint with the Bureau of Professional and Occupational Affairs, that remedy is not even mentioned in the proposed regulation. Moreover, an official at the Bureau of Professional and Occupational Affairs overseeing the surveyors and engineers stated that he could recall no cases where an engineer or a surveyor was disciplined for submitting a faulty plan to DEP. Therefore, this remedy may be wholly ineffective. DEP officials have also suggested that DEP could refuse to accept any submissions by a licensed professional who has a history of non-compliance. But this measure also falls short because it would be used only in cases involving egregious and repeated violations.

Importantly, none of the penalties contemplated by DEP actually punishes the company that hires the professional, leaving the company without any share of the burden of compliance. I point out that the only certain consequence that Fortuna Energy and Ultra Resources will face as a result of their infractions, apart from the revocations of their permits, is that PBR will be unavailable for those particular projects, which can hardly be characterized as a penalty. Although the permits for Fortuna Energy and Ultra Resources

were issued under the expedited permit review process, which is not identical to the proposed PBR, the expedited permit review process is a precursor to PBR that closely resembles it, thereby serving as an early warning. The lack of any meaningful deterrence against abuse will only invite further abuses by the permittee who is at all times struggling to lower his or her operating expenses.

Proposed remedy: (1) $100,000 fine on the professional for knowingly or recklessly submitting a plan containing material omissions or misstatements, with joint and several liability on the company that hired the professional; (2) mandatory filing of a complaint to the Bureau of Professional and Occupational Affairs; and (3) non-availability of PBR in the future to any company that files a plan containing material omissions or misstatements.

3. Insufficient requirement for the certifying professional

Under PBR, only "a professional engineer, geologist, or landscape architect registered in the Commonwealth of Pennsylvania" may certify that the submitted plan or plans fully comply with relevant laws and regulations. DEP officials indicated that the certifying professional must be practicing in the field relevant to the project. But, as noted by others, an engineer, geologist or landscape architect may lack the expertise or an adequate training in aquatic biology and hydrology that may be necessary, especially for projects involving protected or impaired watersheds, which expertise DEP and conservation districts possess. Nonetheless, PBR would still allow these professionals who may lack the requisite expertise or training to make the certification of compliance. In other words, this deficiency in the qualification of the licensed professional openly invites incompetence because, given the lack of any review or audit,[1] it is highly probable that this incompetence will go undetected, at the expense of our water quality and environment.

Proposed remedy: the qualifying licensed professional to certify that he or she has the requisite expertise or training in aquatic biology or hydrology.

Summary

Although the PBR scheme has laudable goals, it plainly lacks the necessary tools of accountability to achieve success. As drafted, it cannot deter abuse and protect the Commonwealth's waters. I would ask that DEP either adopt my recommendations given in this Comment or eliminate Section 102.15 from the proposed rulemaking.

Sincerely,

Camille "Bud" George, Chairman
House Environmental Resources and Energy Committee

[1] The proposed PBR scheme contains an extremely weak mandate for a compliance audit. Although the paragraph (p) of Section 102.15 provides for audit of PBR to determine its effectiveness and compliance, it does not specify how often or when DEP must audit. I emphasize that since April 2009 when DEP began issuing E&S permits for natural gas activities under the expedited permit review process, DEP has conducted not one single audit. In fact, it took a non-profit environmental group to discover the egregious violations.