

Frequently Asked Questions for Act 162 of 2014 Implementation

1. *Does this Act apply to all Chapter 102 permits?*

No. The Act is specific in applying only to NPDES permits required under 25 Pa. Code Chapter 102. The NPDES permit required under Chapter 102.5 (related to permit requirements) is the NPDES Permit for Stormwater Discharges Associated with Construction Activities. There are additional non-NPDES permits that are required under Chapter 102, including Erosion and Sediment Control permit for timber harvesting and road maintenance activities (E&S Permit) and the Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities (ESCGP-2). Act 162 does not apply to these non-NPDES permits.

2. *Does Act 162 eliminate the riparian buffer requirements in Chapter 102?*

No. It is not accurate that riparian buffers were eliminated as a stormwater best management practice (BMP) under Act 162. The Act provides that applicants for an NPDES Permit for Stormwater Discharges Associated with Construction Activities (NPDES Stormwater Construction) have two distinct options:

- Use or install a riparian buffer or riparian forest buffer OR
- Use or install BMPs or design standards that are equivalent in effectiveness to buffers or riparian forest buffers.

The amendment does not otherwise eliminate the use of riparian buffers or riparian forest buffers as a BMP.

3. *How are terms defined in Act 162?*

There are no definitions provided in Act 162. However, many of the terms in the Act have already been previously defined in either existing Clean Streams Law definitions or in 25 Pa. Code Chapter 102. Terms used in Act 162 which are defined in Chapter 102 include: earth disturbance activities, riparian buffer, riparian forest buffer, best management practice, perennial stream, intermittent stream, surface water, and post construction stormwater. Under the rules of statutory and regulatory interpretation, where terms that are already defined in law are used in amendatory legislation, but the amending legislation does not revise or define those terms, the existing definitions should be used.

4. *Does this Act apply to new NPDES Stormwater Construction permits that were issued prior to December 21, 2014?*

The Act does not apply to those NPDES Stormwater Construction permits that were issued prior to December 21, 2014. These NPDES permits must meet all regulatory requirements that were in place prior to the effective date of the Act.

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5. *How does this Act apply to applications for new NPDES permits submitted prior to December 21, 2014 that were not issued prior to December 21, 2014?*

Pending NPDES Stormwater Construction permit applications submitted prior to December 21, 2014, but not issued before December 21, 2014, will be reviewed under the regulations and guidance in effect at the time of application. Applicants may choose, at their discretion, to withdraw such an application and submit a new revised permit application after December 21, 2014, should the applicant wish to pursue the options provided by the Act 162 requirements in its entirety. Applicants who wish to pursue this option would pay the application fee but would not need to pay the disturbed acreage fee, if already paid.

6. *How does Act 162 apply to a renewal of an NPDES permit that includes riparian buffer BMPs required under Section 102.14 during the previous permit term?*

Act 162 is not retroactive. The renewal of an existing NPDES Stormwater Construction permit that included riparian buffer or riparian forest buffer BMPs as required under Section 102.14 (related to Riparian buffer requirements) is not eligible for the options available under Act 162.

7. *What are the permitting requirements for NPDES stormwater construction permits related to riparian buffers and riparian forest buffers in implementation of Act 162?*

The table below describes the applicability of Act 162 in the NPDES Stormwater Construction permitting context:

	Submitted Prior to 12/21/2014	Submitted On or after 12/21/2014
Application for new individual NPDES stormwater construction permits	Must meet pre-Act 162 regulatory requirements related to riparian buffers; if within 150 feet of a special protection river, stream, creek, pond, lake or reservoir, must apply for a waiver or qualify for an exception.	Must be consistent with Act 162. <ul style="list-style-type: none"> • Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration. • If no riparian buffer and earth disturbance is proposed within 100 feet of a special protection river, stream, creek, pond, lake or reservoir, must provide an offset demonstration. • Equivalency demonstration guidance and offsetting guidance will be tools to assist in these demonstrations.

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Applications for individual NPDES stormwater construction permit renewals with grandfathering related to § 102.8¹	Grandfathering applies; the riparian buffer and riparian forest buffer requirements do not apply.	Grandfathering applies; the riparian buffer and riparian forest buffer requirements do not apply.
Applications for individual NPDES stormwater construction permit renewals without grandfathering related to § 102.8	Must meet pre-Act 162 regulatory requirements related to riparian buffers; if within 150 feet of a special protection river, stream, creek, pond, lake or reservoir, must apply for a waiver or qualify for an exception.	Must be consistent with Act 162. <ul style="list-style-type: none"> • Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration. • If no riparian buffer and earth disturbance is proposed within 100 feet of a special protection river, stream, creek, pond, lake or reservoir, must provide an offset demonstration. • Equivalency demonstration guidance and offsetting guidance will be tools to assist in these demonstrations.
Minor Modifications to individual NPDES stormwater construction permits	There are no changes created by the Act.	There are no changes created by the Act.

¹ No new grandfathering is created by this act. This grandfathering refers to those permits that were processed prior to 11/19/2010 or renewed prior to 1/1/2013. For these permits, and for only riparian buffers and riparian forest buffers, the grandfathering carries through the life of the permit. For all other BMPs, grandfathering of existing regulatory requirements is grandfathered for one permit cycle only.

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Major modifications to individual NPDES stormwater construction permits	Must meet pre-Act 162 regulatory requirements related to riparian buffers; if within 150 feet of a special protection river, stream, creek, pond, lake or reservoir, must apply for a waiver or qualify for an exception.	Must be consistent with Act 162. <ul style="list-style-type: none"> • Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration. • If no riparian buffer and earth disturbance is proposed within 100 feet of a special protection river, stream, creek, pond, lake or reservoir, must provide an offset demonstration. • Equivalency demonstration guidance and offsetting guidance will be tools to assist in these demonstrations.
Phased individual NPDES stormwater construction permits	Must meet pre-Act 162 regulatory requirements related to riparian buffers; if within 150 feet of a special protection river, stream, creek, pond, lake or reservoir, must apply for a waiver or qualify for an exception.	Must be consistent with Act 162. <ul style="list-style-type: none"> • Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration. • If no riparian buffer and earth disturbance is proposed within 100 feet of a special protection river, stream, creek, pond, lake or reservoir, must provide an offset demonstration. • Equivalency demonstration guidance and offsetting guidance will be tools to assist in these demonstrations

8. *After December 21, 2014, may applicants for NPDES Stormwater Construction permits who do not meet the requirements of 25 Pa. Code Section 102.14(a), seek waivers under 25 Pa. Code Section 102.14(d)(2)?*

No. Act 162, Section 402(c)(1) (ii) only provides the option of choosing equivalent alternatives to riparian buffers or riparian forest buffers for NPDES permitted activities. Act 162 does not include waivers as an option.

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9. *Are the 25 Pa. Code Section 102.14(d)(1) exceptions still available for NPDES Stormwater Construction applicants?*

Yes. If an applicant qualifies for one of the riparian buffer or riparian forest buffer exceptions provided in 25 Pa. Code Section 102.14(d)(1), they do not trigger mandatory riparian buffer requirements and therefore would not need the options provided by Act 162.

10. *Are there waivers or exceptions available for the replacement buffer offsetting requirements in the Act?*

No. Act 162 does not contain any waivers or exceptions to the riparian buffer replacement offsetting requirements in Act 162 Section 402(c)(2).

11. *Section 402(c)(2) of Act 162 provides that replacement buffer offsetting is required for projects located in watersheds with an existing and designated use of high quality (HQ) or exceptional value (EV). However, the mandatory riparian buffer requirement in 102.14(a) is triggered when the earth disturbance activity is within 150 feet of rivers, streams, creeks, lakes, ponds and reservoirs with a designated use of HQ or EV at the time of application. How is this difference being addressed by the Department?*

The offsetting requirements in Act 162 have broader applicability than the 2010 Chapter 102 riparian buffer requirements in several ways. First, under Act 162, both existing and designated uses must be considered when determining the applicability of the offset requirements. Second, if under Section 402(c)(1)(ii) an applicant is choosing to provide BMPs for their project that are equivalent to riparian buffers or riparian forest buffers, the offset requirements in Section 402(c)(2) are triggered when the earth disturbance for the project will be within 100 feet of all surface waters (perennial and intermittent streams, rivers, lakes, reservoirs, ponds, wetlands, springs, natural seeps, and estuaries.)

12. *If my project is within 150 feet of a high quality or exceptional value water, what requirements apply?*

Whether or not mandatory riparian buffer requirements are applicable is dependent upon whether a Chapter 102 permit is needed, and in turn, what type of Chapter 102 permit would be required. Further, there are a number of exceptions to the mandatory riparian buffer requirements under 25 Pa. Code Section 102.14(d)(1), which should be evaluated. The Department recommends that the applicant request a pre-application meeting to discuss the applicable regulatory and statutory requirements for the proposed activity and project.

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13. *If the applicant provides an option or various options among available best management practices (BMPs), design standards and alternatives, does the applicant's project qualify for the antidegradation presumption?*

No. Under Act 162, the section 402(c)(1)(ii) alternative BMP option does not include any antidegradation presumption similar to that which is available under Section 102.14(e) for riparian buffers. An NPDES applicant pursuing the riparian buffer alternative option under Section 402(c)(1)(ii) must provide a demonstration on how the antidegradation requirements are met without a riparian forest buffer. Under Chapter 102, Section 102.14(e)(1) includes a presumption of antidegradation compliance and provides that riparian forest buffers prevent thermal impacts and are a non-discharge alternative when the buffer meets the requirements of the Chapter. Under Section 402(c)(1)(ii), the applicant must demonstrate how the alternative BMPs will provide these same thermal and other water quality protections in a manner that is equivalent to a riparian buffer or riparian forest buffer.

14. *Does the Department/Environmental Quality Board (EQB) need to amend Chapter 102 to conform to Act 162?*

The Department is still evaluating this question.

15. *Section 402(c)(1) Does not indicate a distance - is it still 150 feet for the trigger for the buffer requirement? Asked another way, is the riparian buffer trigger-distance still going to be 150 feet, but only require the offset if within 100 feet?*

Yes. Act 162 does not modify when mandatory riparian buffer or riparian forest buffer requirements are triggered; rather, the Act provides options for compliance with the riparian buffer requirement once it has been triggered. If the applicant chooses to proceed under Section 402(c)(ii) and instead of utilizing riparian buffers to manage stormwater onsite, they employ alternate stormwater BMPs, they must also comply with Section 402(c)(2) and provide offset replacement riparian buffers if the project is within 100 feet of all surface waters.

16. *Does Section 402(c)(1) apply to all watersheds, rather than just special protection? Under Section 102.14(a), riparian buffer requirements are not triggered for projects that are not located in special protection watersheds.*

No. Act 162 does not modify the riparian buffer requirement trigger; rather, the Act provides options for compliance with the mandatory Chapter 102 riparian buffer requirements. This means that Section 402(c)(1) would not be relevant to projects that would not otherwise be subject to the requirements of 25 Pa. Code Section 102.14(a).

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17. *Are applicants proposing a riparian buffer or a riparian forest buffer under Section 402(c)(1)(i), relieved from compliance with other Chapter 102 requirements including the post construction stormwater management requirements of 25 Pa. Code post construction stormwater management (PCSM)?*

No, Act 162 is narrowly drafted and does not otherwise modify the applicability of any other requirements of Chapter 102, including the erosion and sediment control requirements in 25 Pa. Code Section 102.4(b), nor the post construction stormwater management requirements of 25 Pa. Code Section 102.8.

18. *What does substantially equivalent mean in Section 402(c)(ii)?*

This question will be addressed in detail in the forthcoming Department's Riparian Buffer, Riparian Forest Buffer Equivalency Demonstration Policy, Document # 310-2135-002.

19. *Section 402(c)(2) provides that an offset is required for "ANY earth disturbance within 100 feet..." is this in context with some permit requirement or is it actually any/all earth disturbance?*

No. The offset requirements of Section 402(c)(2) are triggered by NPDES stormwater construction permit applicants subject to the riparian buffer requirements of 25 Pa. Code Section 102.14(a) who choose to proceed under Section 402(c)(1)(ii) and provide alternate BMPs onsite to manage stormwater.

21. *Under Section 402(c)(2) is the replacement buffer offset in addition to PCSM BMPs on the project site?*

Yes, the stormwater BMPs must be substantially equivalent to the riparian buffer or riparian forest buffer.

22. *In Section 402(c)(2), how do "replacement planting costs" factor into the Department's decision making?*

Replacement planting costs are relevant to understanding what type of vegetation is required for a riparian buffer created or enhanced as a result of an offset. It appears from the reference to "replacement planting costs" as provided in the Pennsylvania Stormwater BMP Manual that the replacement riparian buffer offset should be a riparian forest buffer, as the replacement planting cost guidance references specific types of native trees and shrubs. It does not include references to grasses or non-native species.

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23. *Are 150 foot riparian buffers still considered a nondischarge BMP under Section 102.8(h)(1), and how does this apply to Act 162?*

Yes, riparian buffers are still nondischarge BMPs under Chapter 102. Act 162 only modifies the mandatory nature of the riparian buffer requirements, but does not otherwise modify other provisions of Chapter 102. Further, applicants must still comply with other sections of Chapter 102, such as Section 102.8(h) (related to PCSM implementation for special protection waters).

24. *When an applicant proposes alternative BMPs and triggers the Section 402(c)(2) offset, how will the Department implement the inclusion of alternative BMPs to manage post construction stormwater to protect, maintain, reclaim, and restore water quality and existing and designated uses?*

This question will be addressed in detail in the forthcoming Department's Riparian Buffer, Riparian Forest Buffer Equivalency Demonstration Policy, Document # 310-2135-002.

25. *Does the equivalency demonstration have to be conducted onsite?*

Yes. The equivalency demonstration is to be conducted on the same project site covered by the NPDES stormwater construction permit application.

26. *Are the equivalency demonstration and the offsetting demonstration independent of one another?*

Yes. DEP will provide more detail in the forthcoming guidance documents: Riparian Buffer, Riparian Forest Buffer Equivalency Demonstration Policy (Document # 310-2135-002) and Riparian Buffer, Riparian Forest Buffer Offsetting (Document # 310-2135-003).