

**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**Bureau of Waterways Engineering and Wetlands**

**DOCUMENT NUMBER:** 310-2135-001

**TITLE:** Implementation Plan for Act 162 of 2014

**EFFECTIVE DATE:** December 20, 2014

**AUTHORITY:** The Pennsylvania Clean Stream Law, as amended by Act 162 of 2014, 35 P.S. §§ 691.1—691.1001, and regulations at 25 *Pa. Code* Chapters 92(a), 93, 96 and 102.

**POLICY:** Provides guidance on the Department of Environmental Protection's (DEP) interpretation of Act 162 of 2014 related to regulatory requirements for riparian buffers or riparian forest buffers.

**PURPOSE:** Act 162 of 2014 was passed by the Pennsylvania General Assembly and signed into law on October 22, 2014. The Act amends the Pennsylvania Clean Streams Law to add provisions that affect individual National Pollutant Discharge Elimination System (NPDES) permits for Discharges Associated with Construction Activities (hereinafter NPDES Stormwater Construction permits). The purpose of this document is to provide guidance to the Department of Environmental Protection (DEP), County Conservation Districts, regulated entities and the public on DEP's interpretation and implementation of Act 162, which becomes effective on December 21, 2014.

**APPLICABILITY:** This policy applies to applications for individual NPDES Stormwater Construction permits proposing an earth disturbance within 150 feet of a special protection (High Quality and Exceptional Value) river, stream, creek, lake, pond or reservoir.

This policy does not apply to Erosion and Sedimentation Control General Permits (ESCGP) for oil and gas activities or Erosion and Sediment Control (ESC) permits for road maintenance and timber harvesting activities.

**DISCLAIMER:** The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of DEP to give these rules that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

**PAGE LENGTH:** 6 pages

## Guidance for Implementation of Act 162 of 2014

### I. General

Act 162 of 2014 specifically amended § 402 of the Pennsylvania Clean Streams Law (35 P.S. § 691.402), to add a new subsection, 402(c). This new subsection is limited to and specifically addresses riparian buffer requirements in the Pennsylvania regulations found in *25 Pa. Code* Chapter 102 (erosion and sediment control).

### II. Impacts on Permitting

#### A. Alternative to Buffer Requirement

The amendment contains two substantive provisions. Section 402(c)(1) essentially provides that riparian buffers are a non-mandatory option for persons whose earth disturbance activities trigger the requirement for an NPDES permit under *25 Pa. Code* Chapter 102. Section 402(c)(1) abrogates – for this category of applicants – the portion of *25 Pa. Code* § 102.14(a) which mandates the use of riparian buffers in certain circumstances. Under § 402(c)(1)(i), NPDES applicants still have the option to use riparian buffers or riparian forest buffers as described in *25 Pa. Code* § 102.14. However, under § 402(c)(1)(ii), an applicant may utilize alternative best management practices (BMPs) that are as equivalent in effectiveness to riparian buffers.

Specifically, § 402(c)(1)(ii) provides that these applicants may use:

“another option or options among available best management practices, design standards and alternatives that collectively are substantially equivalent to a riparian buffer or riparian forest buffer in effectiveness, to minimize the potential for accelerated erosion and sedimentation and to protect, maintain, reclaim and restore water quality and for existing and designated uses of a perennial or intermittent river, stream or creek or lake, pond or reservoir of this Commonwealth to ensure compliance with *25 Pa. Code* Chapter 93 (relating to water quality standards).”

These options are only available in accordance with Act 162 for individual NPDES Stormwater Construction permits required under *25 Pa. Code* Chapter 102 (Chapter 102) after December 21, 2014. The types of approvals that are affected are described below under “Applicability.”

## B. New Offsetting Requirements

In new § 402(c)(2), the Act also mandates replacement riparian buffer offsets for all projects that do not choose a riparian buffer BMP approach, that are located in a special protection watershed (as determined by the drainage list specified in *25 Pa. Code* Chapter 93, § 93.9) and where an earth disturbance activity associated with the project is located within 100 feet of a surface water. In addition to the alternate BMPs that are to be provided in accordance with § 402(c)(1)(ii), these applicants:

“ . . . shall offset any reduction in the total square footage of the buffer zone that would have been utilized as a best management practice, with a replacement buffer elsewhere along special protection waters in the same drainage list and as close as feasible to the area of disturbance at a ratio of one-to-one. . . ”

## III. Applicability

Section 402(c)(1) only applies to activities requiring individual NPDES Stormwater Construction permits. However, there are additional types of permits required under Chapter 102, such as state permit authorizations for timber harvesting, road maintenance, or oil and gas activities (Erosion and Sediment Control Permits “E&S permits” or Erosion and Sediment Control General Permits, “ESCGPs”). *Act 162 and this guidance do not apply to E&S permits or ESCGPs.*

In implementing the Act, DEP interprets § 402(c)(1) to apply to those NPDES stormwater construction projects that would require an individual NPDES permit and which also would have triggered a mandatory riparian buffer or riparian forest buffer under *25 Pa. Code* § 102.14(a)(1) or (2). This means that Act 162 only applies to individual NPDES stormwater construction permitted projects that are within 150 feet of a river, stream, creek, lake, pond or reservoir with a designated use<sup>1</sup> of high quality (HQ) or exceptional value (EV).

Under § 402(c)(1)(i), these individual NPDES applicants may choose to implement a riparian buffer or riparian forest buffer as required in 102.14(a) or 102.14(b), whichever is applicable; or under § 402(c)(1)(ii), the applicant may complete an equivalency demonstration that shows that alternative BMPs that are proposed will be functionally equivalent to that of either a riparian buffer or riparian forest buffer, whichever is otherwise applicable under *25 Pa. Code* § 102.14(a)(1) or (2).

Section 402(c)(2) is only applicable to projects that proceed under § 402(c)(1)(ii). For the NPDES projects that choose the alternative BMP approach, if the project is in a special protection watershed in a drainage list specified in *25 Pa. Code* § 93.9, and proposes any earth disturbance within 100 feet of a surface water, the applicant shall provide an offset replacement riparian buffer. As indicated above, the offset must equal “any reduction in the total square footage of the buffer zone that would have been utilized as a best management practice, with a replacement buffer elsewhere along special protection waters in the same drainage list and as close as feasible to the area of disturbance at a ratio of one-to-one.” The phrase “that would have been utilized” refers to projects that would have triggered the mandatory buffer requirement under *25 Pa. Code* § 102.14 but who are proceeding instead under § 402(c)(1)(ii) above. The

---

<sup>1</sup> Section 102.14(a) references only designated uses.

offset riparian buffer or riparian forest buffer would need to meet the requirements of 25 Pa. Code § 102.14(g) regarding permanent protection.

The amendment does not otherwise expressly alter the regulatory framework of 25 Pa. Code Chapter 102 or eliminate the voluntary use of riparian buffers or riparian forest buffers as a best management practice including the voluntary use of either of those buffers for coverage under a general NPDES stormwater construction permit. Further, nothing in the Act affects the voluntary buffer programs such as Conservation Reserve Enhancement Program (CREP) buffers.

**IV. Practical Application of Act 162**

The scope of the Act is limited to individual NPDES permits within 150 feet of a surface water with a designated use of HQ or EV. In these cases, if the applicant chooses not to implement the 150 foot buffer triggered under Chapter 102, they must provide an equivalency demonstration that will show that the BMPs being proposed onsite will be at least as effective than a buffer or forest buffer. In addition, any earth disturbance within 100 feet of said surface water will trigger the replacement buffer offset requirement in the Act. Various permitting scenarios and the permitting requirements for each type are included in Table 1.

*Table 1. Requirements for NPDES permits related riparian buffer and riparian forest buffer requirements in implementation of Act 162*

	<b>Submitted Prior to 12/21/2014</b>	<b>Submitted On or after 12/21/2014</b>
<b>Application for new individual NPDES Stormwater Construction permits</b>	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"> <li>• Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration.</li> <li>• 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.</li> <li>• Equivalency demonstration guidance and offsetting guidance will be tools to assist in these demonstrations.</li> </ul>
<b>Applications for individual NPDES Stormwater Construction permit renewals with grandfathering related to § 102.8<sup>2</sup></b>	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.

<sup>2</sup> 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

	<b>Submitted Prior to 12/21/2014</b>	<b>Submitted On or after 12/21/2014</b>
<b>Applications for individual NPDES Stormwater Construction permit renewals without grandfathering related to § 102.8</b>	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"> <li>• Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration.</li> <li>• 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.</li> </ul>
<b>Minor Modifications to individual NPDES Stormwater Construction permits</b>	There are no changes created by the Act.	There are no changes created by the Act.
<b>Major modifications to individual NPDES Stormwater Construction permits</b>	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"> <li>• Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration.</li> <li>• 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.</li> </ul>

grandfathering carries through the life of the permit. For all other BMPs, grandfathering of existing regulatory requirements is grandfathered for one permit cycle only.

	<b>Submitted Prior to 12/21/2014</b>	<b>Submitted On or after 12/21/2014</b>
<b>Phased individual NPDES Stormwater Construction permits</b>	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.	<p>Must be consistent with Act 162.</p> <ul style="list-style-type: none"> <li>• Either implement a riparian buffer or a riparian forest buffer OR provide an equivalency demonstration.</li> <li>• 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.</li> <li>• Equivalency demonstration guidance and offsetting guidance will be tools to assist in these demonstrations</li> </ul>

Pending individual 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 individual NPDES Stormwater Construction permit application and submit a new revised individual NPDES Stormwater Construction permit application after December 21, 2014, should the applicant wish to pursue the options provided by Act 162 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, unless the area of earth disturbance is increased.

Act 162 does not provide any exceptions or waivers from the § 402(c)(2) replacement riparian buffer offsetting requirement. Further, if the applicant chooses not to implement a riparian forest buffer, under § 402(c)(1)(ii), the applicant does not benefit from the antidegradation presumption provided in *25 Pa. Code* § 102.14(e).

To implement Act 162, DEP is developing the additional following materials:

1. Riparian Buffer, Riparian Forest Buffer Equivalency Demonstration technical guidance document (310-2153-002)
2. Riparian Buffer, Riparian Forest Buffer Offsetting technical guidance document (310-2153-003)
3. Frequently Asked Questions

DEP also is evaluating a minor rulemaking to amend to *25 Pa. Code* § 102.14 to incorporate the Act 162 requirements.