

Permitting Guidance

NPDES Construction Permitting Requirements for Ag Operations

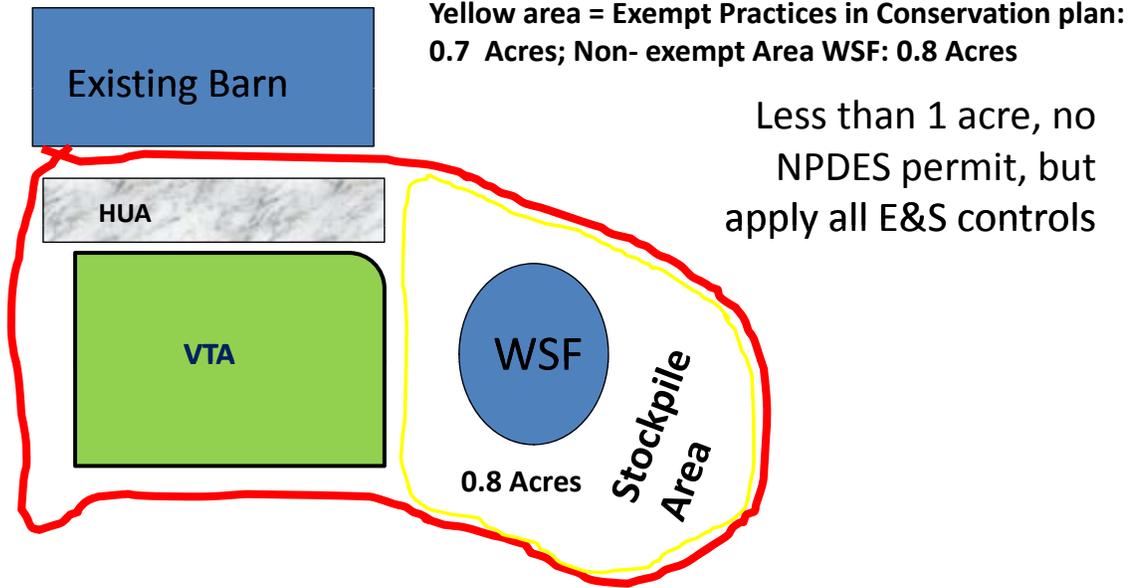
Activity	NPDES if 1 Acre or Greater of Disturbance	Have to Address Post Construction Stormwater Management	Subject to Riparian Buffer Requirements if in HQ/EV Waters
Building a house	yes	yes	yes
Building a barn	yes	yes	yes
Building chicken/hog houses	yes	yes	yes
Building manure storage facility	yes	yes	yes
Building bunk silos	yes	yes	yes
Installing swales, diversions, waterways, filter strips, terraces	no	no	no
Paving barnyard with associated BMPs	no, if covered in conservation plan	no, but must have BMPs to address the impervious area	no
Paving animal walkways	no, if covered in conservation plan	no, but must have BMPs to address the impervious area	no
Building roofs with associated BMPs	no, if covered in conservation plan	no, but must have BMPs to address the impervious area	no

*These activities could also require other permits as applicable
CAFO activities are subject to regulation under a CAFO NPDES permit*

2/20/11 Version

Exempt and Non-exempt Disturbed Areas for CH 102 Permitting

Red area = Total Disturbed Area: 1.5 acres needing E&S



Frequently Asked Questions (FAQs) for Chapter 102 Regulation Revisions

May 20, 2011*

* Check DEP website for most current version:

<http://www.portal.state.pa.us/portal/server.pt?open=514&objID=554331&mode=2>

I. General Permitting

1. **Projects that are 1 acre or greater but less than 5 acres of earth disturbance without a point source discharge [not involving agricultural plowing and tilling, animal heavy use areas, timber harvesting, road maintenance or oil and gas activities].**

Under the January 2000 Chapter 102 regulations, these projects did not need an NPDES permit. If such a project approved under the 2000 regulations has started earth disturbance work or has received an E&S plan acknowledgment prior to November 19, 2010, they will not be required to obtain an NPDES permit.

If they have started earth disturbance work prior to November 19, 2010, and a routine inspection or inspection reveals violations at the site, the Department or conservation district may require the operator to apply for an NPDES permit based on the severity of the violations.

2. **Projects that are 1 acre or greater but less than 5 acres of earth disturbance with a point source discharge.**

These projects should have applied for an NPDES permit prior to November 19, 2010. If they do not have permit coverage they must apply and obtain an NPDES permit prior to commencing earth disturbance activity.

3. **Projects that propose to disturb 1 or more acres of earth disturbance after November 19, 2010.**

These projects must apply for and obtain NPDES permit coverage prior to commencing earth disturbance activity.

4. **Permit applications have been submitted to the conservation district office or the Department regional office prior to November 19, 2010 and are in the permitting process pipeline on the effective date of the new 102 regulations.**

If the application package has been submitted by November 19, 2010, and found to be administratively complete, the applicant may proceed under the previous requirements. This would include the permit fees to be paid. The applicant would not be required to pay additional permit fees, including the \$100.00 per disturbed acre fee.

If the permit application package has been submitted prior to November 19, 2010, but is found administratively incomplete, the Department or conservation district will provide the applicant 60 days to provide a complete application. If after 60 days the application remains incomplete, the Department will consider the application withdrawn, and the applicant must submit a new application that meets all new permit requirements and pay any additional base application and disturbed acre fees.

The applicant does not have to pay new fees for additional submissions requested in response to a deficiency letter unless the application is considered withdrawn and is returned.

5. **Phased projects approved prior to November 19, 2010.**

The applicant for a phased project must submit their permit application showing all planned future phases for the entire project site. The detailed E&S and PCSM plans must be submitted

for the initial phase of the project. If the application package was submitted prior to November 19, 2010, and found to be administratively complete, they do not need to meet any new requirements contained in the 102 regulations that did not exist prior to November 19, 2010 for the initial phase of the project.

However, future phases that are submitted after November 19, 2010 are considered new earth disturbance activities and are subject to all the requirements of the Chapter including all the post construction requirements in Section 102.8.

Applicants who believe they cannot meet the buffer requirements in future phases submitted after November 19, 2010 may request a waiver of the buffer requirements under 102.14(d)(2) (vi). This waiver may be granted by the Department or by the conservation district (after consultation with the Department) upon a demonstration by the applicant that there are reasonable alternatives for complying with this section that any existing riparian buffer is undisturbed to the extent practicable, and the action will otherwise meet the requirements of Chapter 102.

6. **A project was issued an erosion and sediment control plan approval letter prior to November 19, 2010, which did not require an NPDES permit (less than 5 acres and no point discharge). Are they exempt from the permit?**

If the project was issued an E&S plan approval letter prior to November 19, 2010, they will not need to get an NPDES permit on November 19, 2010. However, if in the future there are any compliance issues, then the conservation district/the Department could come back and require them to obtain an NPDES permit for the site.

7. **If a NPDES is set to expire but under the “old” regs, it would not need to be renewed because it is under 5 acres and no longer has a point source discharge, will that permit still be required once the new regs take effect because of the 1 acre threshold?**

If there is still 1 acre or more of disturbance remaining on that permit, it would need to be renewed. If the remaining disturbance is less than 1 acre, it would not need to be renewed.

II. Fees

1. **Why are Pennsylvania municipalities required to pay the permit application fees when they are exempt from application fees for other Department activities?**

The regulation does not exempt municipalities from the fee and therefore the fees are required.

2. **If an application is incomplete and considered withdrawn, does an applicant have to submit the entire fee again with its resubmission?**

Yes. The application will not be returned to the applicant. Both the administrative filing fee and the disturbed acre fee will need to be resubmitted.

3. **How are fees for phased projects to be handled?**

Phased projects will pay the initial base fee and fee for the disturbance area of the phase being proposed. Disturbed acre fees will need to be paid for additional phases as they are proposed. The initial base fee will not need to be paid with each subsequent phase submittal.

III. Agriculture

1. **An agricultural operation expands its agricultural plowing and tilling activities or animal heavy use areas by cutting down woodland and removing the trees and stumps from that area.**

No permit is required as agricultural plowing and tilling and animal heavy use areas are exempt from NPDES permit coverage. The implementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation. If the earth disturbance will exceed 5,000 square feet or more of land, a written erosion and sediment plan is required for the activity. In addition the owner of the agricultural operation must revise their conservation plan to reflect the change in the operation with the additional plowing and tilling fields or animal heavy use areas.

2. **An agricultural operation is proposing to construct a new farm building.**

The construction of a farm building is not part of an agricultural plowing and tilling activity or an animal heavy use area and would be subject to the same permitting requirement thresholds as other construction activities.

3. **102.4(a)(4)(ii)- Does it mean 25% uniform coverage over the entire field, or simply 25% of the field covered, or 100% coverage 25% of the time? Is the cover to be vegetative cover or crop residue cover?**

Cover includes crop residue and vegetation. The percentage of cover means at least 25% cover over the entire field at any given time.

4. **Define the timeframe for which the 25% cover is required. When will 25% cover be measured? Is 25% cover 365 days per year? One could work a field after corn silage to have less than 25% cover, drill a cover crop of rye and in 3-4 weeks have a greater than 25% cover. Please define 25% cover.**

Cover includes vegetation and crop residue. The percentage of cover means at least 25% cover over the entire field at any given time. The use of 25% cover is also found in the setbacks and buffer requirements in Chapter 83 regulations (Chapter 83.294(f)(5)). A method of calculating cover is found in NRCS guidance (503.43) for estimating crop residue cover.

5. **In Section 102.4(a)(1), are there specific agricultural BMPs? If so, where can they be found?**

The regulations specifically identify several BMPs for animal heavy use areas listed in 102.4(a)(4)(iii), which also includes a reference to the NRCS Conservation practice standards. In addition, other technical standards and guidance documents for agricultural activities may be used when approved by the Department.

6. **102.4(a)(4)(i) would create an E&S plan requirement that limits soil loss to T. NRCS conservation plans can allow for two times T within their alternative cropping system.**

To meet the requirements of this regulation an E&S plan must meet T over the rotation. An NRCS written plan allowing for two times T over the rotation would not meet the requirements of this regulation.

IV. Non-agricultural E&S Plans

1. **Section 102.4(b)(5)(iii)- The E&S plan is to contain drawings and narrative describing the characteristics of the past earth disturbance activity, including past land uses. This must define how far back in the past this requirement extends.**

The Department's application requires applicants to designate existing land uses for the project site for the preceding 5 years, and the previous land use for the past 50 years or longer if known.

V. Post Construction Stormwater Management General

1. **102.8(a) would require a PCSM plan for many small repair activities that do not generate post-construction stormwater management issues of any type.**

On minor projects where there is little or no change in the runoff characteristics from the site, the PCSM plan may only be a sentence or two describing the situation.

2. **102.8(g)(2)- If there is a conflicting criteria in the Act 167 plan and Chapter 102, which one controls?**

The expectation is that an approved and current Act 167 plan needs to be at least as stringent as the state regulatory requirements. If the Act 167 Plan includes an alternative requirement that identifies a more stringent requirement that protects and maintains water quality and existing and designated uses, then the more stringent requirement of the Act 167 Plan would apply.

3. **102.8(h)(2)- What year storm does non-discharge relate to? If non-discharge alternatives are utilized, does the PCSM Plan have to include ABACT? (Is there such a thing as an E&S non-discharge alternative?)**

Non-discharge relates to the 2 year/24 hour storm event. If no net change in rate, volume, or water quality from the site can be met simply by implementing non-discharge alternatives, the PCSM plan would not need to include ABACT BMPs. Non-discharge alternatives for PCSM include the following: alternative siting,

low impact development, vegetated riparian buffers, infiltration, oil and grease and grit removal, and water reuse. Non-discharge alternatives for E & S control include the following: alternative siting, limiting area of disturbance, limiting extent and duration of disturbance, and vegetated riparian buffers.

4. **PCSM Requirements - (f) Plan Content Item # 7: Additional guidance will be needed regarding “a schedule of inspections for critical stages of PCSWM BMP Installations. Will all BMP’s have a need for inspections or only infiltration facilities?**

The regulation only specifies that the licensed professional be on site for inspections for critical stages (which include the installation of underground storage facilities, the installation of structurally engineered facilities, and anything else identified as critical by either the plan designer, Department or the conservation district). However, there is nothing to say that the plan designer, Department or the conservation district can’t identify other parts of the PCSM BMP installation as being critical and require inspections at those stages as well.

VI. Post Construction Stormwater Management – Exceptions and Waivers to Buffering

1. **Additional clarification and discussion is requested regarding the scope of post-construction stormwater management for projects where the project site is restored to pre-construction conditions. This is specifically germane to the utility industry and certain oil and gas activities (underground pipelines), the site is restored to its original condition. In such a situation, there are no new or specific PCSM BMPs because the post construction site is restored to its condition prior to earth disturbance.**

The requirements of a post construction stormwater management plan are met when the person conducting the earth disturbance activity for pipelines or other utilities restores or reclaims the site back to natural conditions.

2. **Do PennDOT bridge projects need to fully comply with riparian buffer guidelines since many of their projects inherently need to cross and traverse riparian areas?**

Generally no. There are both exemptions and waiver provisions that apply to PennDOT bridge projects. The exemption allows for road maintenance activities to occur without requiring a riparian buffer so long as the existing riparian buffer is protected to the greatest extent possible. The waiver allows for linear projects such as roadways to occur without requiring a riparian buffer so long as the existing riparian buffer is protected to the greatest extent possible and provided that the Department or conservation district (after consultation with the Department) may grant the waiver request.

VII. Post Construction Stormwater Management – Long-Term Operation and Maintenance

1. **Section 102.8(f)(10)- This requirement states that a PCSM plan must provide for a long-term O&M schedule that provides for the inspection of the PCSM BMPs. Who is doing the inspection?**

The conservation district inspects the PCSM BMPs during construction. The applicant or another party identified as the person responsible as part of their PCSM O&M plan, is required to inspect the BMPs to ensure that they are working adequately.

2. **102.8(m)(2) How do we ensure that a PCSM O&M instrument has been recorded?**

The Notice of Termination will include a section that will require the applicant to show proof of filing the instrument for PCSM O&M with the recorder of deeds. This may take the form of an attachment to the NOT, a checkbox, a receipt of recording with the recorder of deeds, or some other way. Notations in plan notes are not sufficient.

3. **Long-term maintenance of many of the BMP’s will be lot owners... Will each lot owner need to be identified and sign an agreement that they are responsible for LONG-TERM Maintenance.**

Yes, each lot owner will need to provide for long-term O&M of the BMPs that are on their property. They can choose to use a third party (such as a homeowners association, etc.) to do the O&M for them.

4. **What if the permittee sells a lot and the lot is sold by the new owner prior to the NOT being filed? Would it be sufficient that the Recorder of Deed instrument records the responsible party for maintenance of PCSM BMP's.**

Yes, if the paperwork associated with the NOT lags behind because of quick sales, it would be sufficient that the instrument is recorded so that the responsibility transfers with the property (although we would want the process to eventually be finished with the submission of the NOT). The important thing is that the new owner understands that they have a responsibility for structures on their property.

VIII. Riparian Buffers

1. **Is Section 102.14 applicable only if the earth disturbance activity requires an NPDES permit? If only a Chapter 105 permit is required, does Section 102.14(a) (2) provide the Chapter 105 program with the authority to require forested riparian buffers? If so, please explain under what circumstances. Will PennDOT be required to increase the length of bridges, which are adequately designed hydraulically in order to accommodate a new buffer area? If a project located in an EV watershed abuts a stream for a mile and approximately 0.25 miles of roadway work will involve significant disturbance, would the buffer be applied from one end of the project to the other or only in the vicinity of the earth disturbance?**

The buffer requirement does not carry over into Chapter 105 regulations unless the activity requires a permit (either E&S or NPDES) under Chapter 102.

2. **102.14(a)(1)(i)- Does the description here include Exceptional Value wetlands? Example, the site is along a stream which is classified as CWF, but is on the list of trout producing streams. An area of wetlands tributary to that stream would be EV, but the actual watershed would be CWF...).**

There is no buffer requirement for wetlands within this regulation.

3. **102.14(d)(1)- If a project site abuts a stream, clarify whether a riparian buffer on "both sides" if the project site is**

not on both sides of the stream. Or, if the site is on both sides of a stream, but earth disturbance is proposed on one side, is a buffer required on both sides? Or, what if the project site is within the required riparian buffer distance, however, there is another property between the proposed project site and the stream?

Riparian buffers would be required on property controlled by the applicant and would not be required on adjacent property. The definition of project site includes "the entire area of activity, development, lease or sale..." therefore, if the site is on both sides of a stream, an appropriate buffer would be required on both sides of a stream.

4. **The Chapter 102 regulations require riparian buffers if earth disturbance activity is within an EV watershed. Must the entire activity fall within the EV watershed to trigger the buffer requirements? What if only a portion is in an EV watershed? Must the entire project, even the non-EV portion then incorporate the buffer requirements?**

The specific portion of the proposed activity that falls within 150 feet of an EV or HQ watershed requires buffer.

5. **Will work done to develop or enhance buffer zones require 105 permits?**

Not unless the work would require changes to the course, current, or cross section of the watercourse, floodway, or wetlands.

6. **102.14 - Does anything need to happen with respect to riparian buffers in a special protection watershed that is attaining its uses if the project is at least 150 feet away from waters of the commonwealth?**

Riparian buffers are only required if the project site contains or is within 150 feet of the water. If the project site is greater than 150 feet away from the special protection water, the person proposing the activity is not required to implement the buffer. Applicants still have to comply with all other regulatory requirements, including antidegradation provisions.

7. **102.14 - Who will qualify the validity of the standards listed in 102.14(b)? (i.e. composi-**

tion, zone width, etc.) Burden on the applicant to document in the application via site plans? Any expectation for the Department/conservation district staff to verify on site?

Since riparian buffers are a type of PCSM BMP, the answer will vary depending on if the conservation district is delegated to do post-construction stormwater management. If the conservation district is delegated, verification would be part of their delegated duties. If the conservation district is not delegated, these determinations would be done by the Department Regional Office. The burden will be on the applicant to provide accurate information via their riparian buffer management plan. The riparian buffer management plan will contain an inspection schedule, so the applicant will need to conduct routine inspections for the site. However, the Department or conservation district can choose to inspect the riparian buffer at any time and during the normal course of a site compliance inspection.

8. Does potential earth disturbance associated with a mandatory buffer factor into the acreage for purposes of determining whether or not a permit is required?

No. A mandatory buffer would not be considered until a permit is triggered for a project. However once a permit is triggered then any disturbance in the area of the riparian buffer necessary for bringing the buffer into compliance must be included in the earth disturbance calculations, including calculations for fees. A separate E&S plan for the riparian buffer is not required as a buffer management plan is included as part of the PCSM plan.

9. What about tree planting projects not associated with land development projects but that are greater than 1 acre (such as a TreeVitalize project or Growing Greener grant)? Is an E&S plan required to be submitted and approved for the project? And if the project area is 1 acre or greater, does the NPDES permitting requirement apply, including that a PCSM plan be submitted?

Tree planting projects alone do not trigger NPDES requirements whether or not 1 acre or more is disturbed since this type of project is considered a silvicultural activity. An E&S plan would not need to be submitted for review.

IX. Municipal coordination

1. What types of approvals would a municipality need to withhold approval of until an NPDES permit is issued?

The types of approvals for which municipalities would need to withhold approval would include those that allow for the commencement of earth disturbance activities. This would include preliminary subdivision or land approvals, or building permits. It would not include long-term planning approvals including zoning approvals, planning approvals or sewage planning modules.