CORRESPONDENCE/MEMORANDUM

State of Wisconsin

DATE: May 20, 2005

TO: Regional Water Leaders, Basin Leader & Experts
Storm Water Permit Staff (via Email)

FROM: Russ Rasmussen – WT/2

SUBJECT: "Construction Site" definition – "Common Plan of Development"
Section NR 216.002(2), Wis. Adm. Code

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Issue

Developers sometimes plan a subdivision, construct subdivision roads and install utilities, but don't grade or otherwise disturb the land surface within the subdivision's individual lots prior to selling the lots. The lot buyers subsequently disturb the land in their lots and construct impervious surfaces (driveways, homes, etc.) on the parcels. Some developers have questioned whether they have to install storm water management facilities to account for the runoff from the impervious surfaces that their customers (subsequent owners) will construct on the subdivision lots. Are developers required to install storm water management facilities for these subdivision parcels that they sell? Are these smaller parcels or lots included within the "construction site" because they are part of a larger common plan of development of the construction site?

Discussion

Section NR 216.42 (1), Wis. Adm. Code, requires that a notice of intent (NOI) be filed with the department or to an authorized local program by any landowner who intends to create a point source discharge of storm water from a "construction site" to waters of the state. "Landowner" is defined in s. NR 216.002(15), Wis. Adm. Code, as "any person holding fee title, an easement or other interest in the property that allows the person to undertake land disturbing construction activity on the property."

Prior to submitting the NOI, the landowner must develop a site-specific erosion control plan and a storm water management plan for each construction site. Under s. NR 216.46, Wis. Adm. Code, the landowner must implement and maintain all best management practices specified in the erosion control plan from the start of land disturbing construction activities until final stabilization of the construction site. The landowner also must, under s. NR 216.47, Wis. Adm. Code, develop a storm water management plan to address pollution caused by storm water discharges from the construction site after construction is completed, including roof-tops, parking lots, roadways and the maintenance of grassed areas. (For any permanent storm water management structures, provisions must be made for long-term maintenance with the municipality or other responsible party. A copy of the long-term maintenance agreement normally must be submitted to the

department with the notice of intent.)

"Construction site" is defined in s. NR 216.002(2), Wis. Adm. Code, as "an area upon which one or more land disturbing construction activities occur that in total will disturb one acre or more of land, including areas that are part of a larger common plan of development or sale where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules but under one plan such that the total disturbed area is one acre or more." (Underline added.) Section NR 151.002(7), Wis. Adm. Code, has a similar definition, but does not include the minimum acreage criterion.

What is a "common plan of development"? The administrative code definition of "construction site" explains that a "common plan of development" includes "areas . . . where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules but under one plan . . .", and s. NR 216.002(2), Wis. Adm. Code, explains that a long-range planning document that describes separate construction projects, such as a 20-year transportation improvement plan, is not a common plan of development. In addition, s. NR 216.42(11), Wis. Adm. Code, exempts certain individual projects within a larger common plan of development: Discrete construction projects within a larger common plan of development or sale that are located at least 1/4 mile apart may be treated as a separate plan of development or sale if the area between the projects is not being disturbed and any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed.

DNR's storm water rules are based largely on US EPA's storm water program under the Clean Water Act. EPA's storm water regulations are found at 40 CFR 122.26, but do not specifically define "common plan of development". However, EPA has issued program guidance on the meaning of this term, and DNR gives great weight to EPA's guidance.

US EPA Guidance

EPA guidance directs that development of individual parcels by separate landowners that are part of a planned subdivision are part of a common plan of development and are subject to federal construction site requirements for erosion control and storm water management. Given below are a few EPA "Frequently Asked Questions" and responses from its Internet site at: http://cfpub1.epa.gov/npdes/faqs.cfm?program_id=6

Construction: What is meant by a "larger common plan of development or sale?" A "larger common plan of development or sale" is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. For example, if a developer buys a 20-acre lot and builds roads, installs pipes, and runs electricity with the intention of constructing homes or other structures sometime in the future, this would be considered a larger common plan of development or sale. If the land is parceled off or sold, and construction occurs on plots that are less than one acre by separate, independent builders, this activity still would be subject to stormwater permitting requirements if the smaller plots were included on the original site plan. The larger common plan of development or sale also applies to other types of land development such as industrial parks or well fields. A permit is required if 1 or more acres of land will be disturbed, regardless of the size of any of the individually-owned or developed sites.

My Project Will Disturb Less Than One Acre, But it May Be Part of a "Larger Common Plan of Development or Sale." How Can I Tell and What Must I Do? In many cases, a common plan of development or sale consists of many small construction projects. For example, an original common plan of development for a residential subdivision might lay out the streets, house lots, and areas for parks, schools

and commercial development that the developer plans to build or sell to others for development. All these areas would remain part of the common plan of development or sale until the intended construction occurs.

If your smaller project is part of a larger common plan of development or sale that collectively will disturb one or more acres (e.g., you are building on 6 half-acre residential lots in a 10-acre development or are putting in a fast food restaurant on a 3/4 acre pad that is part of a 20 acre retail center) you need permit coverage. The "common plan" in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. You must still meet the definition of operator in order to be required to get permit coverage, regardless of the acreage you personally disturb. As a subcontractor, it is unlikely you would need a permit.

However, where only a small portion of the original common plan of development remains undeveloped and there has been a period of time where there is no ongoing construction activities (i.e., all areas are either undisturbed or have been finally stabilized), you may re-evaluate your individual project based on the acreage remaining from the original "common plan." If less than one acre remains of the original common plan, your individual project may be treated as part of a less than one-acre development and no permit would be required.

When Can You Consider Future Construction on a Property to be Part of a Separate Plan of Development or Sale? After the initial "common plan" construction activity is completed for a particular parcel, any subsequent development or redevelopment of that parcel would be regarded as a new plan of development. For example, after a house is built and occupied, any future construction on that lot (e.g., reconstructing after fire, adding a pool or parking area for a boat, etc.), would stand alone as a new "common plan" for purposes of calculating acreage disturbed to determine if a permit was required. This would also apply to similar situations at an industrial facility, such as adding new buildings, a pipeline, new wastewater treatment facility, etc. that was not part of the original plan.

What if the Extent of the Common Plan of Development or Sale is Contingent on Future Activities? EPA recognizes that there are situations where you will not know up front exactly how many acres will be disturbed, or whether some activities will even occur with certainty. If you are not sure exactly how many acres will be disturbed, you should make the best estimate possible and may wish to overestimate to ensure you do not run into the situation where you should have a permit, but don't.

If you have a long range master plan of development where some portions of the master plan are a conceptual rather than a specific plan of future development and the future construction activities would, if they occur at all, happen over an extended time period, you may consider the "conceptual" phases of development to be separate "common plans" provided the periods of construction for the physically interconnected phases will not overlap. For example, a university or an airport may have a long-range development concept for their property, with future development based largely on future needs and availability of funding. A school district could buy more land than needed for a high school with an indefinite plan to add more classrooms and a sports facility some day. An oil and gas exploration and production company could have a broad plan to develop wells within a lease or production area, but decisions on how many wells would be drilled within what time frame and which wells would be tied to a pipeline would be largely driven by current market conditions and which, if any, wells proved to be commercially viable.

What if the "Common Plan of Development or Sale" Actually Consists of Non-Contiguous Separate Projects? There are several situations where discrete projects that could conceivably be considered part of a larger "common plan" can actually be treated as separate projects for the purposes of permitting:

A public body (e.g., a municipality, State, Tribe, or Federal Agency) need not consider all their construction projects within their entire jurisdiction to be part of an overall "common plan." For example, construction of roads or buildings in different parts of a state, city, military base, university campus, etc. can be considered as separate "common plans." Only the interconnected parts of a single project would be considered to be a "common plan" (e.g., a building and its associated parking lot and driveways, airport runway and associated taxiways, a building complex, etc.)

Where discrete construction projects within a larger common plan of development or sale are located at least 1/4 mile apart and the area between the projects is not being disturbed, each individual project can be treated as a separate plan of development or sale provided any interconnecting road, pipeline or utility project that is part of the same "common plan" is not concurrently being disturbed. For example, two oil and gas well pads separated by 1/4 mile could be treated as separate "common plans." However, if the same two well pads and an interconnecting access road were all under construction at the same time, they would generally be considered as part of a single "common plan" for permitting purposes. If a utility company was constructing new trunk lines off an existing transmission line to serve separate residential subdivisions located more than 1/4 mile apart, the two trunk line projects could be considered to be separate projects.

DNR Guidance

A landowner, such as a subdivision developer, is required by ch. NR 216, Wis. Adm. Code, to plan and implement erosion control and storm water management facilities to control pollution from the construction site. The "construction site" is defined in the code to include areas that are part of a common plan of development or sale where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules but under one plan.

Under ss. NR 216.46, and 216.47, Wis. Adm. Code, the landowner must develop and implement a site-specific erosion control plan for the construction site, and a storm water management plan that addresses pollution caused by storm water discharges from the construction site after construction is completed, including roof-tops, parking lots, roadways and the maintenance of grassed areas.

The Department agrees that it is not reasonable to require the developer's site-specific erosion control plan to address each land-disturbing construction activity that will occur over the life of the common plan of development, such as those that may be carried out by purchasers of undisturbed lots within the developer's planned subdivision. But at a minimum, the developer's erosion control plan must control storm water pollution from all land disturbing construction activities carried out under the direction or control of the developer.

In contrast, the developer's storm water management plan can reasonably address the entire construction site, as fully developed under the developer's common plan of development. For example, the conveyance system associated with the developer's constructed roadways must have proper storm water management. If the developer's storm water management system is not designed to account for additional runoff entering the system under the fully developed condition, the storm water management system would be undersized and would not provide adequate water quality treatment. Like US EPA, the Department recognizes that there are situations where a developer will not know up front exactly how much impervious area will be developed by subsequent purchasers, or whether some activities will even occur with certainty. Thus, an estimate of the

future development by future parcel owners must be made as appropriate. Some local ordinances require that 3500 sq. ft. of impervious surface be assumed for residential lots.

Section NR 216.47(5), Wis. Adm. Code, requires a long-term maintenance agreement for any permanent storm water structures. Storm water management practices and protective areas must be included in the maintenance agreement and a developer may utilize protective covenants and deed restrictions to foster implementation of the storm water management plan. Future landowners (parcel owners) will also be responsible for erosion control and storm water management associated with the land disturbing construction activities that they conduct on their parcels and if they disturb more than one acre, they will need to obtain permit coverage.

If the landowner develops a commercial building site, the developer is subject to regulation by the Department of Commerce under s. Comm 61.115, Wis. Adm. Code, and one and two-family home building sites are regulated by the Department of Commerce under s. Comm 21.125, Wis. Adm. Code. However, if a one or two-family home construction site results in one acre or more of land disturbance, construction site permit coverage is required from DNR at this time.

Note: The Department of Commerce has indicated that it intends to create a new ch. Comm 60, Wis. Adm. Code, which is to regulate commercial building sites with respect to erosion control and storm water management in a manner which is equivalent to ch. NR 216, Wis. Adm. Code.

There are two related topics that are clarified below:

1. Disconnecting impervious surfaces is beneficial in that it reduces the volume of runoff and the pollutant load carried in runoff. However, disconnecting impervious surfaces generally does not eliminate the need for storm water management devices in a development but it does reduce the size of such devices. The level of disconnection is an input variable in water quality models, such as SLAMM, which calculate storm water management practice removal efficiency.

2. Certain post-construction sites as listed under s. NR 151.12 (2), Wis. Adm. Code, are exempt from the post-construction performance standards of s. NR 151.12. However, this exemption does not eliminate the need to develop and implement a storm water management plan required under s. NR 216.47, Wis. Adm. Code.

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