

**State of Wisconsin  
Department of Natural Resources**

**Responses to Comments  
Construction Site Definition – Common Plan of Development  
Guidance #3800-2014-02**

**February 2015**

On October 27, 2014, the Wisconsin Department of Natural Resources (Department) proposed the *Construction Site Definition – Common Plan of Development* program guidance. The Department received several comments on the proposed guidance. This document represents the Department's response to the written comments on the guidance. To facilitate the responses, the Department may have paraphrased, rephrased, condensed, or consolidated comments. Thank you to all for taking the time to review and comment on the proposed guidance.

**PUBLIC COMMENTS**

**Comments by Davy Inc.**

Comment 1: What happens when a property owner owns three adjacent lots? Lot 1 is 0.9 acres and is substantially developed with development starting in 1960 but may need some modifications from time to time. Lot 1 is 50% impervious and plans for future modifications are unknown and may or may not occur in the next 5 years. Lot 2 is 0.9 acres and is 20% developed and has some impervious surface. Adjacent lot 3 is also 0.9 and had no impermeable surface in 2004. Lot 2 is between lots 1 and 3. The owner has owned Lots 2 and 3 for over 10 years. This owner is not a “developer” but is an urban property owner that will from time to time need to modify the adjacent sites to improve or diversify business. None of the following would involve a “sale where multiple separate and distinct land disturbing construction activities may be taking place at different times on different schedules”. In addition, there is no “one plan” (151.002(7)).

The “common plan of development” was to build on Lots 2 and 3. The owner was permitted to build on Lots 2 and 3 with approximately 1.1 acre of disturbance. We told this owner that lots 2 and 3 are part of a common plan even though 75% of lot 2 was originally not developed and after the development 25% of the lot remains undeveloped but is continued to be used for storage. The storage area has an earth surface. Undeveloped in this case means no gravel or paved surface, although the site was graded prior to 2004. There is no proposed development for the undeveloped 25% of Lot 2. The local government required that lots 2 and 3 be combined into one parcel. What happens when the owner wants to grade and modify the other 25% of this parcel in 2 years or 6 years or 15 years?

It appears from the guidance that Lot 1 could improve their property with less than one acre of disturbance and not be part of the “common plan of development” since plans for development at this site are unknown and when the lot was developed the “common plan of development” did not include lots 2 and 3. However, it could also be interpreted that development within a certain time period of the Lot 2 and 3 development could be part of the “common development” even if it was the widening of an existing driveway. Please define such a range of time. I suggested that the owners develop a “common plan of development” to provide clarity to this but such a plan would become more like a 20 year plan that is not part of a “common plan of development”. Also, there is no requirement that every parcel create a “common plan of development”. More simple, since Lot 1 is less than 1 acre and a separate lot that happens to be owned by the same owner at a recently developed lot, said lot 1 should does not need to meet NR 151.121. Is this correct? Please have the guidance clarify this.

Response: The basis for Common Plan of Development is for the landowner to look at the overall plan of what the landowner intends to do. The example in the comment above includes lots which are in various levels of development and at various times. The Department cannot address in the guidance all the nuances of the potential situations that may arise. However, to clarify the intent of the guidance, the

following language has been added to the first paragraph under **D. Guidance** on page 3: *A common plan of development does not require the landowner to consider 2, 5 or 20 year plans if they are not related in time or concept, but just by the land that will be disturbed that the landowner owns. The size and the timeline of the project should be taken into account and grouped accordingly to what the landowner intends to disturb in a given time period. The common plan of development concept applies most often to subdivision and commercial/institution development and less often to an individual lot or lots that are no longer owned by the landowner undertaking the land disturbance for the original development.*

**Comments by Neumann Companies, Inc.**

Comment 1: While the “Statement of Problem Being Addressed” seems to address storm water design for a site, it does not represent and address stabilization of area under the developer’s NOI; comments are below.

I see a few issues with the description of the “problem”:

- The “problem” is outlined as the building of a subdivision and “don’t grade or otherwise disturb the land surface...prior to selling lots.” The description continues to outline that “developers have questioned whether they have to install storm water management facilities...on the subdivision lots”.
  - It seems obvious that the storm water management facilities need to be constructed for all planned lots/roads/common spaces in the subdivision.
  - In practice, mass-grading is needed for the entire site to make the storm water facilities function; leaving un-disturbed land parcels within a site rarely happens due to topo requirements for the storm water management system.
- The outline of the “problem” fails to state a key topic of restoration and NOI termination but addresses some of these topics in the body of the document. What happens when a single-family home developer obtains the NOI for the entire site, grades the project and achieves stabilization and/or sells lot(s) to other parties for construction of structure(s).
  - Do the third-party lot/home owners operate under the current NOI, even though there are different landowners?
  - When can the developer terminate the NOI (issue a NOT) even when other landowners are disturbing previously stabilized lots within the original development?

Response: In response to the first bullet in the comment above, the main purpose of the guidance when it was originally issued in 2005 was to address the situation where a developer may construct subdivision roads and install utilities without grading the individual lots before they are sold. However, the guidance does provided a broader description of the common plan of development concept and how the Department interprets it. In response to this comment, the following sentence has been added to the end of the paragraph under **A. Statement of Problem Being Addressed** on page 2: *Also, this guidance provides clarification on the Department’s interpretation of the common plan of development concept and how it applies to construction sites in general.*

In response to the second bullet in the comment above, the permit coverage applies to the landowner as defined in s. NR 216.002(15), Wis. Adm. Code. If a third party becomes a subsequent landowner and disturbs one acre or more of land, that subsequent landowner requires permit coverage and cannot operate under the permit coverage granted to the previous landowner. A landowner is only responsible for regulated land disturbing construction activities under the landowner’s control during the time period of permit coverage. If a landowner follows the procedures in s. NR 216.55, Wis. Adm. Code, when a regulated site qualifies for termination of permit coverage and the Department terminates that coverage, that landowner is not responsible for future land disturbing construction activities by a different landowner. Again, the main purpose of the guidance when it was originally issued in 2005 was to address the situation where a developer may do work without grading the individual lots before they are sold. Therefore, the guidance directs a developer in that situation to provide post-construction storm water treatment for anticipated full build-out. However, to clarify the guidance in response to this comment, the third paragraph under **D. Guidance** on page 3 has been amended as follows: *It is not reasonable to require the developer’s site-specific erosion control plan to address subsequent land-*

*disturbing construction activity that will occur in the future after permit coverage has been terminated, such as those in areas that may be carried out by purchasers of undisturbed or stabilized lots within the developer's planned subdivision. A developer is only responsible for regulated land disturbing construction activities under the developer's control during the time period of permit coverage. Therefore, 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. If a developer follows the procedures in s. NR 216.55, Wis. Adm. Code, when a regulated construction site qualifies for termination of permit coverage and the Department terminates that coverage, that developer is not responsible for future land disturbing construction activities by future landowners.*

Comment 2: The guidance does more clearly state that independent builders/landowners would still be subject to storm water permitting – assuming this is regarding erosion control rather than storm water facilities. The guidance section also states the developer should not be responsible for erosion control for the life of the development but it falls short because it then ties this sentence into “such as those that may be carried out by the purchaser of undisturbed lots...” This sentence should state “undisturbed or stabilized lots” to help a concern with being tied into third-party land disturbance.

Response: The recommended change in this comment has been made. (See response immediately above.)

Comment 3: The description of the problem states “areas that are not disturbed” but there should be no difference if the disturbed area is there-after restored per DNR guide lines.

Response: The phrase in quotations of this comment does not appear in the guidance, so it is not clear what the comment is specifically referring to for a recommended change for the Department to consider.

Comment 4: The last paragraph re-states landowners disturbing more than one acre will need permit coverage but it does not address the timing of these disturbances; it is at any point in time? What if 2 lots (.90 total acres) have homes under construction and almost ready to spread topsoil. A third lot is scheduled for a dig, is a permit needed even though the prior 2 lots will be stabilized in a matter of weeks? The amount of disturbed land can change on a weekly/monthly basis; is the intent to track total disturbed area over a ¼ mile by each landowner?

Response: The Department believes that longer term timing is addressed in the response to the Davy Inc. comment above. For shorter term timing, such as in a single construction season, where the landowner may be disturbing land for the construction of single or two-family homes, the landowner should anticipate the situation where multiple areas will be disturbed that will trigger the one acre or more threshold. If the instances of land disturbance will be on a “rolling” basis that will extend beyond a single construction season, the landowner should consider maintaining permit coverage until all such work is complete. However, under s. NR 216.42(11), Wis. Adm. Code, areas of land disturbance that are located at least 1/4 mile apart may be considered separately in the calculation of the total area disturbed. For example, 3 areas of land disturbance of 1/2 acre each located at least 1/4 mile from each other do not require permit coverage even though a total area of 1.5 acres is disturbed. In response to this comment, the following language has been added to the end of the 5th paragraph under D. **Guidance** on page 4: *Where land disturbing construction activities will occur for the construction of single or two-family homes under single ownership, the landowner of those parcels should anticipate the total area of land disturbance in a single construction season to calculate the area that may trigger the one acre or more threshold. If the land disturbance for the construction of single or two-family homes will be on a “rolling” basis that will extend beyond a single construction season, the landowner should consider maintaining permit coverage until all such work is complete. Ultimately, if at any time one acre or more of land will be disturbed, the landowner will be responsible for being aware of that and apply for or maintain permit coverage as appropriate. However, under s. NR 216.42(11), Wis. Adm. Code, areas of land disturbance that are located at least 1/4 mile apart may be considered separately in the calculation of the total area disturbed.*

The final guidance was approved on February 5, 2015.

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