WISCONSIN DEPARTMENT OF NATURAL RESOURCES
NOTICE OF FINAL GUIDANCE & CERTIFICATION

Pursuant to ch. 227, Wis. Stats., the Wisconsin Department of Natural Resources has finalized and hereby certifies the following guidance document.

DOCUMENT ID

WT-19-0007-C EGAD: 3800-2014-02

DOCUMENT TITLE

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

PROGRAM/BUREAU

Storm Water Program/Watershed Management Bureau

STATUTORY AUTHORITY OR LEGAL CITATION

Section NR 216.002(2), Wisconsin Administrative Code

DATE SENT TO LEGISLATIVE REFERENCE BUREAU (FOR PUBLIC COMMENTS)

08/26/2019

DATE FINALIZED

09/23/2019

DNR CERTIFICATION

I have reviewed this guidance document or proposed guidance document and I certify that it complies with sections 227.10 and 227.11 of the Wisconsin Statutes. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated. I further certify that the guidance document or proposed guidance document contains no standard, requirement, or threshold that is more restrictive than a standard, requirement, or threshold contained in the Wisconsin Statutes.

09/16/2019

Signature Date

BUREAU OF WATERSHED MANAGEMENT
PROGRAM GUIDANCE

Storm Water Management Program

Wisconsin Department of Natural Resources
101 S. Webster Street, P.O. Box 7921
Madison, WI 53707-7921

"Construction Site Definition" - Common Plan of Development"
Section NR 216.002(2), Wis. Adm. Code

Effective February 2015

3800-2014-02

This document is intended solely as guidance and does not contain any mandatory requirements except where requirements found in statute or administrative rule are referenced. Any regulatory decisions made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

A. Statement of Problem Being Addressed

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. This guidance clarifies when developers are required to install storm water management facilities for these subdivision parcels that they sell and whether these smaller parcels or lots are included within the "construction site" as part of a larger common plan of development. 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.

B. Background

Section NR 216.42(1), Wis. Adm. Code, requires that a Notice of Intent (NOI) be filed with the Wisconsin Department of Natural Resources (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 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 <u>common plan of development</u> 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. Common plan of development includes areas under the control of one landowner as defined in s. NR 216.002(15), Wis. Adm. Code, that individually disturb less than one acre but that collectively disturb one acre or more of land.

C. Discussion

The definition of "construction site" in s. NR 216.002(2), Wis. Adm. Code, 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 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.

The Department's storm water rules are based largely on the USEPA's storm water program under the Clean Water Act. The USEPA's storm water regulations are found at 40 CFR 122.26, but do not specifically define "common plan of development". However, on its "Stormwater Frequently Asked Questions" webpage, the USEPA describes "larger common plan of development or sale" as follows: (See http://water.epa.gov/polwaste/npdes/stormwater/Stormwater-FAQs.cfm)

> **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.

D. 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. 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 according 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.

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.

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. 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 others.

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. 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. 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.

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 which calculate storm water management practice removal efficiency.

2. Certain post-construction sites as listed under ss. NR 151.121(2) or 151.241(2), Wis. Adm. Code, are exempt from the post-construction performance standards of ss. NR 151.121 or 151.241, Wis. Adm.

The DNR has promulgated the following performance standards and has determined that they act as the uniform statewide standards:

- Construction sites where one or more acre of land will be disturbed:
  - Construction site pollutant control for non-transportation construction sites (i.e., erosion and sediment control practices, sediment performance standards, preventive measures): s. NR 151.11(6m)
  - Post-construction storm water management for non-transportation construction sites (i.e., total suspended solids performance standard, peak discharge performance standard, infiltration performance standard, protective areas performance standard, fueling and vehicle maintenance areas performance standard): ss. NR 151.122 through 151.126

    Note: Under s. 281.33(6)(b), Stats., a municipality may enact and enforce provisions of an ordinance that are stricter than ss. NR 151.122 through 151.126, Wis. Adm. Code, for redevelopment.
  - Construction site pollutant control for transportation construction sites (i.e., erosion and sediment control practices, sediment performance standards, preventive measures): s. NR 151.23(4m)
  - Post-construction storm water management for transportation construction sites (i.e., total suspended solids performance standard, peak discharge performance standard, infiltration performance standard, protective areas performance standard, fueling and vehicle maintenance areas performance standard): ss. NR 151.242 through 151.246

Uniform statewide Standards for WisDOT Transportation Projects

Chapter TRANS 401, Wis. Adm. Code, specifies the construction site erosion control and storm water management procedures for WisDOT directed and supervised transportation projects. The DNR will cooperate with the WisDOT through the existing interagency liaison process to incorporate the uniform statewide standards into all appropriate and applicable regulatory mechanisms for WisDOT transportation projects.

CREATED:

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10/3/14
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Runoff Management Policy Management Team approved on September 30, 2014.

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