



NPDES CONSTRUCTION PERMIT STORM WATER POLLUTION PREVENTION

City of Kearney

November, 2009

Small Lot Coverage Determination.

This memo provides documentation interpretation of the “larger common plan of development or sale” which will influence the City of Kearney stormwater ordinances. It is my understanding that the City should proceed with developing authority over all land disturbance activities of an acre or more as well as those that are part of a larger common plan of development or sale that will ultimately disturb an acre or more. This is based on the following interpretation.



Question 1: Does a 1/3 acre lot within a platted subdivision which will ultimately disturb an acre of soil or more require a State NPDES permit?

In almost all cases, Yes. EPA enforcement personnel are directed to consider two exemption criteria which are explained below.¹ Beyond these criteria, in depth explanation was provided in the Federal Register / Vol. 63, No. 31 / Tuesday, February 17, 1998 / Notices.²

First, consider if less than one acre of the original common plan remains to be completed. The regulation taken literally could exempt the last remaining lots if all other lots had been built out and new construction would occur on the remaining lots totaling less than an acre if everything else is stabilized.

Second, consider if a new 1/3 acre addition to a completed common plan (i.e. parking lot, industrial track, amended subdivision) would be included in the same common plan if it is proposed after a clearly identifiable period of time where there is no on-going construction. (An addition of less than an acre to a previously permitted and completed common plan would not require a permit given final stabilization of the final intended use of the plan was achieved.)

Neither of these criteria provide valid exemptions for stabilized subdivisions that are built one lot at a time. For homebuilding in particular, EPA considers that the individual lot would not have been built if it had not been part of a larger common plan to begin with. The common plan was to build houses, not to just grade the land. Until the ultimate goal of that subdivision plan is completed (i.e. homes), the larger common plan status is in effect. Mass grading and stabilization before selling the lots is just one step in the common plan development process.





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This comprehensive approach was resultant from the 9th Circuit Court lawsuit against EPA³ that found them at fault for not sufficiently enforcing the terms of the Clean Water Act to a small enough activity. EPA explored ½-acre, 1-acre, 2-acre etc. and settled on the 1-acre threshold for the Phase II Regulations.

Question 2: Is the original developer of a subdivision required to be the permit holder for all individual lots built within the subdivision?

No. Unless the developer remains the owner of that lot, the new lot owner is responsible for applying for the State permit, but the State permit does not automatically transfer to the new owner. It is in the developer's interest to require the builder to obtain NPDES Construction Stormwater Permit coverage. The State permit provides a Notice of Transfer form. If the developer completely stabilizes the subdivision, they may terminate the permit and avoid the transfer process all together. The original developer is no longer responsible for any NPDES Construction Stormwater Permit requirements placed upon the new owner.

Question 3: Does a 1/3 acre lot that was platted as part of that subdivision which disturbed an acre of soil or more require coverage under the local MS4 Construction Stormwater enforcement authority?

Yes. The same citation⁴ explains the extent of actions small MS4s like Kearney must take. The same interpretation of larger common plan of development or sale applies to the MS4 program as would apply to the State construction stormwater program. Nationally, this is accomplished through any combination of local grading permits, utility permits, building permits, stormwater permits, development review and approval process, etc. depending on the individual compatibility of the local MS4.

¹ <http://www.epa.gov/earth1r6/6en/w/sw/hotspotcommon.htm>

² **Federal Register** / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations (The original Phase I five-acre threshold has been updated to the Phase II one-acre threshold in the text below.) *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?*

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 two third-acre residential lots in a 10-acre development or are putting in a parking lot in a large retail center) you need permit coverage. The "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.





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For some situations where less than one acre of the original common plan of development remain undeveloped, a permit may not be needed for the construction projects “filling in” the last parts of the common plan of development. A case in which a permit would not be needed is where several empty lots totaling less than one acre remain after the rest of the project had been completed, providing stabilization had also been completed for the entire project. However, if the total area of all the undeveloped lots in the original common plan of development was more than one acre, a permit would be needed.

When Can You Consider Future Construction on a Property To Be Part of a Separate Plan of Development or Sale?

In many cases, a common plan of development or sale consists of many small construction projects that collectively add up to one (1) or more acres of total disturbed land. 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. After this initial plan is completed for a particular parcel, any subsequent development or redevelopment of that parcel would be regarded as a new plan of development, and would then be subject to the one acre cut-off for storm water permitting purposes.

³ *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992)

⁴ **Federal Register** / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations Today's rule requires operators of regulated small MS4s to develop, implement, and enforce a pollutant control program to reduce pollutants in any storm water runoff from construction activities that result in land disturbance of 1 or more acres (see § 122.34(b)(4)). Construction activity on sites disturbing less than one acre must be included in the program if the construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The construction runoff control program of the regulated small MS4 must include an ordinance or other regulatory mechanism to require erosion and sediment controls to the extent practicable and allowable under State, Tribal or local law. The program also must include sanctions to ensure compliance (for example, non-monetary penalties, fines, bonding requirements, and/or permit denials for noncompliance). The program must also include, at a minimum: requirements for construction site operators to implement appropriate erosion and sediment control BMPs, such as silt fences, temporary detention ponds and diversions; procedures for site plan review by the small MS4 which incorporate consideration of potential water quality impacts; requirements to control other waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may adversely impact water quality; procedures for receipt and consideration of information submitted by the public to the MS4; and procedures for site inspection and enforcement of control measures by the small MS4.

