http://www.epa.gov/region6/6en/w/sw/hottopcommon.htm
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Region 6 Compliance Assurance and Enforcenent

Compliance and Enforcement Quick Finder

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Storm Water - Common Plan of Development or Sale

N.B.: The following information was written prior to Phase 2 storm water regulations, which became effective on March 10, 2003. The information is accurate except that the 5 acre threshold has been reduced to 1 acre.

Common Plan of Development or Sale: 40 CFR 122.26(b)(14)(x) requires operators of construction or demolition projects disturbing 5 or more acres of earth, or less than 5 acres if part of a "larger common plan of development or sale" that cumulatively disturbs 5 or more acres to obtain an NPDES permit. Many people inquire as to what constitutes a common plan of development or sale and is there ever a time when this plan ends. A common plan of development or sale comes into being upon the time when there is documentation showing plans to disturb earth irregardless of how many phases or how long it will take. Common documents used in EPA investigations to confirm such a plan include plats, blue prints, marketing plans, and contracts. Sometimes a new operator will want to perform some earth disturbing activities at facility that originally was a common plan of development or sale, but wants to know if it still is a common plan of development or sale for which they would need to apply for permit coverage even if under 5 acres. EPA Region 6 has used a 2 prong test to determine if a facility is no longer a common plan of development or sale:

1. Was the original plan, including modifications, ever substantially completed with less than 5 acres of the original "common plan of development or sale" remaining (e.g., <5 acres of the "common plan" were not built out at the time)?
2. Is there a clearly identifiable period of time where there is no on-going construction, including meeting the criteria for final stabilization (e.g. couple of years or more)?

If the new operator at a facility evaluates his project and determines that the original facility meets the two criteria above, then the original common plan of development or sale has ended and the operator should evaluate only their new construction plans. If the new plans are less than 5 acres and not part of another common plan of development or sale, then they would not need a permit.

- Example 1: A residential subdivision was started in the 1980's. 97 of 100 houses were built at that time. A new operator comes along and wants to build the last 3 houses

and they are less than 5 acres. Does the builder need a permit? Using the 2 criteria test above, the original purposes was substantially completed (there are less than 5 acres total remaining from the original "common plan") and there has been a clearly identifiable period of time of no on-going construction. So the new operator would not need a permit.

- Example 2: A residential subdivision was started in the early 1980's. Due to bankruptcy, only 40 of the 100 lots were ever completed. There has been no earth disturbing since the mid 1980's. Does this facility need a permit if a new operator wants to come build 2 new houses on 0.5 acre lots? Yes, the new operator needs a permit no matter how few of acres he's disturbing because the original common plan of development or sale was never substantially completed. To build out the remaining 60 lots from the original "common plan" would disturb more than 5 acres.
- Example 3: A large mall was started last year and finished last month. At the last minute, the developer is able to buy 2 acres of adjacent property and wants to add some additional parking spaces to the new parking lot. He hires a new general contractor to build this parking lot. Does this new 2 acre parking lot need permit coverage? The original purposes may have been substantially completed, but there is no clearly identifiable time of no on-going construction. So the operators of the new parking lot would need a permit.
- Example 4: A large industrial plant covering 15 acres was competed 2 years ago. The company has grown, so the owners have decided to expand the facility and bought 4 acres adjacent to the facility to add a new building, parking, etc. that will disturb 3 of the 4 acres. He hires a new general contractor to build this expansion. Does this facility expansion need permit coverage? The original purposes was substantially completed, there is a clearly identifiable time of no ongoing construction, and the expansion will disturb less than 5 acres. The expansion projects will not need a permit.

REMINDER: The same "common plan of development or sale" approach will be used for Phase II when permits for construction projects disturbing 1-5 acres start needing permits March 10, 2003. You will then need to look at the remainder from a "common plan" to see if 1 or more acres would be disturbed.

The preamble of the 1998 EPA Construction General Permit includes a description about common plans of development or sale. The following is that description as found at 63 Fed. Reg. No. 128, July 6, 1998, p 36491:

My Project Will Disturb Less Than Five Acres, 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 five or more acres (e.g., you are building on six half-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.

For some situations where less than five acres 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 five acres 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 five acres, a permit would be needed.

When Can You Consider Future Construction on 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 five (5) 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 five (5) acre cutoff for storm water permitting.