

**Common Plan of Development or Sale  
National Pollutant Discharge Elimination System (NPDES) Permits for  
Stormwater Associated with Construction Activities**

**Frequently Asked Questions (FAQ)**

**Final, May 3, 2019**

**Version 1.0**

**Background**

According to the Department of Environmental Protection's (DEP's) regulations at 25 Pa. Code § 102.5(a), a person proposing an earth disturbance activity (other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting activities, or road maintenance activities) that involves at least one acre of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves at least one acre of earth disturbance, must obtain an individual NPDES permit or coverage under a general NPDES permit. This requirement is similar to the U.S. Environmental Protection Agency's (EPA's) regulations at 40 CFR 122.26(b)(14)(x) and 122.26(b)(15)(i).

This FAQ document was developed to clarify DEP's interpretation of the term "common plan of development or sale" for the purpose of NPDES permit requirements. Nothing in this document affects regulatory requirements. The interpretations herein are not an adjudication or a regulation. There is no intent on the part of DEP to give the interpretations in this document that weight or deference. This document provides a framework within which DEP and delegated county conservation districts (CCDs) will exercise administrative discretion in the future. DEP reserves the discretion to deviate from the interpretations in this document if circumstances warrant. Questions related to the interpretations in this document should be directed to the appropriate DEP Regional Waterways & Wetlands Program, who then may consult with DEP Bureau of Clean Water.

**FAQ #1: What is a common plan of development or sale?**

The term "common plan of development or sale" is not defined in federal or state regulations. EPA has defined the term in its General Permit for Discharges from Construction Activities, effective February 16, 2017, as follows:

"A contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one common plan. The '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.”

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 by separate, independent builders, this activity still would be subject to NPDES permitting requirements (regardless of the amount of disturbance on each individual lot) 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 sanitary sewer main construction. A permit is required if at least one acre of land will be disturbed, regardless of the size of any of the individually-owned or developed sites.

**NOTE 1.1** – The term “common plan of development or sale” applies to NPDES permits and associated earth disturbance activities and it does not apply to timber harvesting, road maintenance, or oil and gas activities, as defined in Chapter 102. However, the concepts contained within this FAQ will be applied to earth disturbance activities associated with timber harvesting, road maintenance, and oil and gas activities in order to determine the applicability of permits for those earth disturbance activities.

## **FAQ #2: Is a common plan of development or sale the same as a “phased project”?**

A “phased project” is a common plan of development or sale, but a common plan of development or sale is not always a phased project. A phased project is a project in which a plan is set forth to improve the same or contiguous lots at different times. This is also a common plan of development or sale. If the cumulative earth disturbance associated with the phased project will be at least one acre, an NPDES permit is required. However, a common plan of development or sale may be constructed at the same time and would not be considered a phased project.

For additional information related to phasing of permits, refer to DEP’s *Permit Guidelines for Phased NPDES Stormwater Discharges Associated with Construction Activity Permits, Chapter 102 Erosion and Sediment Control Permits and Chapter 105 Waterway Restoration Project Permits* ([DEP Document No. 363-2134-013](#)).

## **FAQ #3: What does the term “life of the project” mean?**

Life of the project is a term that is sometimes used to describe a common plan of development or sale from start to finish, including permanent stabilization and permit termination (if applicable).

**NOTE 3.1** – The term “life of the project” specifically applies under Chapter 102 to NPDES permits and to oil and gas activities and their associated earth disturbance activities. The concept of “life of the project” will also be applied to timber harvesting and road maintenance activities to determine the applicability of permits for those earth disturbance activities.

**FAQ #4: Is an E&S Plan needed for an NPDES permit application for a common plan of development or sale?**

Yes. An E&S Plan is required to be developed and submitted for approval as part of an NPDES permit application. The E&S Plan should cover any earth disturbance activity for which permit coverage is being sought.

**FAQ #5: Is a Post-Construction Stormwater Management (PCSM) Plan needed for an NPDES permit application for a common plan of development or sale?**

Yes. A PCSM Plan is required to be developed and submitted for approval as part of an NPDES permit application. The PCSM Plan should cover any earth disturbance activity for which permit coverage is being sought.

**FAQ #6: Can I phase my project to avoid requiring a permit under Chapter 102?**

No. A person cannot phase their project to circumvent the regulatory requirement of obtaining a permit under 25 Pa. Code § 102.5. If a person knows during the planning and/or construction of their project that the earth disturbance will be 1 acre or greater, then an NPDES permit is required prior to initiating any earth disturbance for that project.

*NOTE 6.1* – The DEP Regional Waterways and Wetlands Program, after consultation with the DEP Bureau of Clean Water may require an NPDES permit for any common plan of development or sale, regardless of any examples or information contained within this FAQ document.

*Example 6.A* – A landowner desires to build a house and driveway on a vacant lot. The landowner will construct a driveway in one year, which will include 0.8 acres of earth disturbance, and they will permanently stabilize the disturbance. The next year the landowner will grade and construct their house, which will include 0.7 acres of earth disturbance. The construction of the house and driveway are single common plan of development or sale, that involves 1.5 acres of earth disturbance. An NPDES permit is required prior to beginning earth disturbance for the driveway.

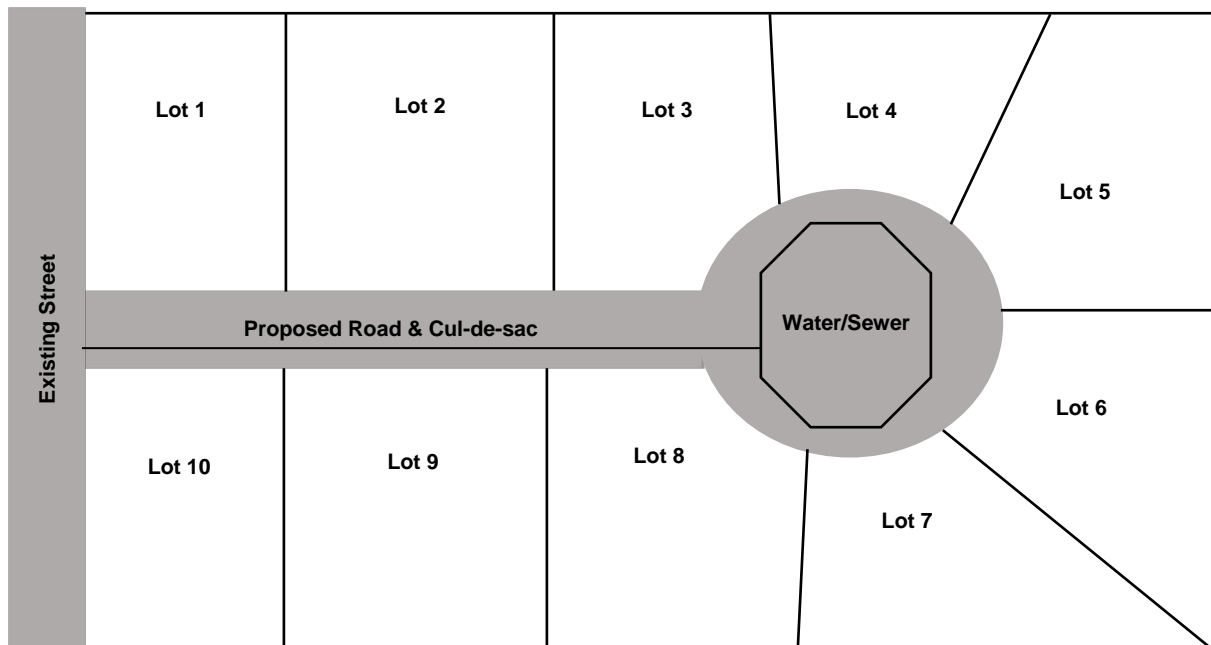
*Example 6.B* – A landowner owns a 15-acre property without a means of access. The landowner desires to construct a driveway for means of access their property for recreational purposes, which will include 0.4 acres of earth disturbance, and has no plans to construct a house. Two years after the construction of the driveway and its permanent stabilization, the landowner is financially able to construct a house on the 15-acre property, which will include 0.8 acres of earth disturbance. The construction of the driveway and house are two separate common plans of development or sale. An NPDES permit is not required.

**FAQ #7: What are examples of a common plan of development or sale in which an NPDES permit is required?**

*Example 7.A* – A developer plans a residential subdivision for construction of 100 condominiums in Phase 1, 200 single-family homes in Phase 2, and a park and clubhouse in Phase 3 over a period of 5-10 years on 300 acres. This is a common plan of development or sale. An NPDES permit is required.

*Example 7.B* – A developer purchases a 20-acre lot and submits a subdivision plan to the municipality to create 10 lots (see Figure 7.B). The developer plans to build a road with a cul-de-sac and install common utilities to serve future residences. After completion of the cul-de-sac, the developer plans to market the lots to individual buyers who will hire their own builders. Individual buyers will have the responsibility to submit development plans to the municipality for their approval, as the subdivision plan does not identify lot improvements. The road and utility work will comprise 0.5 acre of earth disturbance. The builder does not know what amount of earth disturbance will occur on the 10 lots. Nevertheless, because of the development intent of the common plan of development or sale is to perform an earth disturbance activity on the individual lots to construct dwellings and the cumulative earth disturbance will result in at least one acre of earth disturbance, an NPDES permit is required.

**Figure 7.B**



**NOTE 7.B.1** – In general, and unless evidence is presented to the contrary, DEP/CCD will assume that at a minimum one-half of a lot will be disturbed for residential development. For the example above, of the 19.5 acres remaining in the subdivision, it will be assumed that at least 9.75 acres will be disturbed (for a total of 10.25 acres of disturbance) for the purpose of determining whether NPDES permit requirements apply. For other types of land development, judgment should be used.

**NOTE 7.B.2** – The developer must seek and maintain or transfer NPDES permit coverage for the entire development. The responsibility of permit coverage for the entire common plan of development or sale cannot be avoided. For example, the permittee cannot conduct earth disturbance activities to build the road, then sell the lots to individual buyers, and then try to terminate permit coverage because the developer does not have a vested interest in the remaining earth disturbance activities. By obtaining permit coverage for the entire common plan of development or sale, the permittee is responsible for all earth disturbance activities included in the permit. Also see FAQ #3 regarding life of the project.

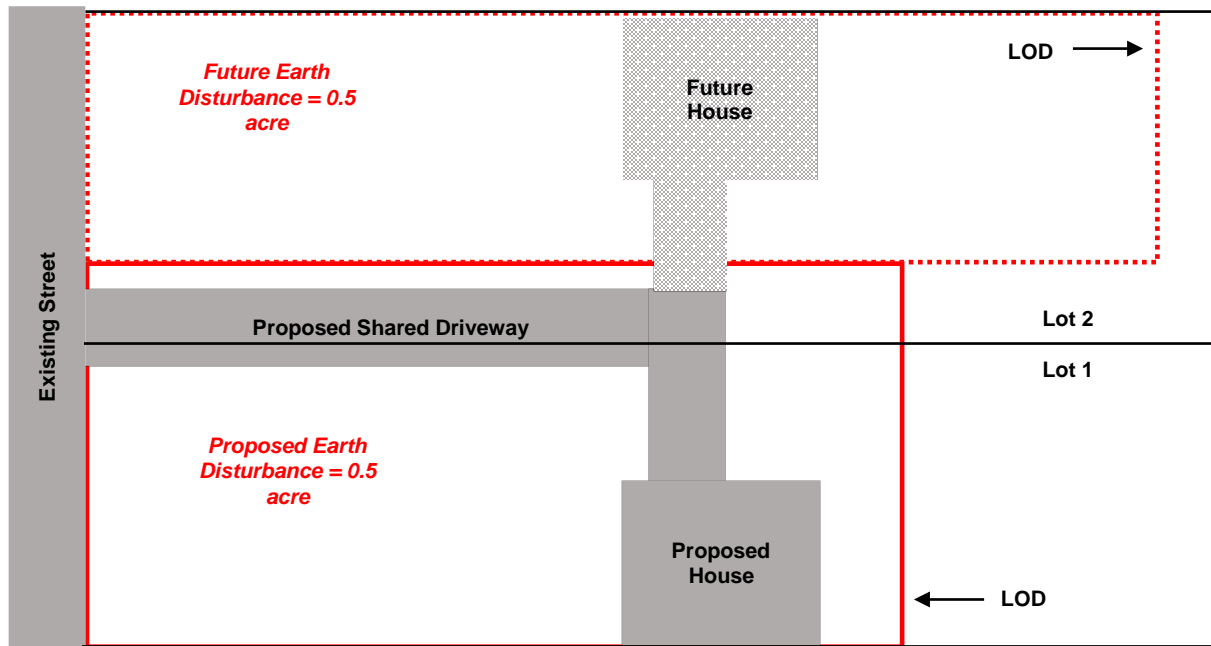
**Example 7.C** – The owner of a residential property plans to build a single-family home first, then a patio, pool, and shed on the same lot after the home is completed. All of this is documented on a development plan that is submitted to the municipality (i.e., development intent). This is a common plan of development or sale. If the cumulative earth disturbance will be at least one acre, an NPDES permit will be required.

**NOTE 7.C.1** – If construction of the patio, pool, and shed had not been shown on the development plan for construction of the home, but proposed on a new plan that is submitted following permanent stabilization of earth disturbance associated (and permit termination, if applicable) with the home, then construction of the patio, pool, and shed may be treated as a new common plan of development or sale. This is because the development intent of the construction of the home did not include the patio, pool, and shed.

**NOTE 7.C.1.a** – If a new common plan of development or sale affects the function or operation of a PCSM BMP installed related to a previously Chapter 102 permitted activity, then the person proposing the new common plan of development or sale will have to coordinate any revisions to the PCSM BMP with the DEP Regional Waterways and Wetlands Program. For additional information related to this, refer to DEP’s *Instructions for Notice of Termination for a General (PAG-02) or Individual NPDES Permit, ESCP, or ESCGP for Stormwater Discharges Associated with Construction Activities* ([DEP Document No. 3800-PM-BCW0229b](#)) or contact the appropriate DEP Regional Waterways and Wetlands Program.

**Example 7.D** – A person owns two contiguous lots and decides to build a single-family home on each lot with a shared driveway to serve both lots (see Figure 7.D). Construction on the first lot is expected to begin immediately upon approval and will involve 0.5 acre of earth disturbance. Construction on the second lot is not expected to begin until the lot is sold and is expected to also involve 0.5 acre of earth disturbance. This is a common plan of development or sale. Since the earth disturbance will be at least one acre, an NPDES permit will be required prior to construction on the first lot.

Figure 7.D



**Example 7.E** – A roadway widening project is proposed for a stretch of three miles. One mile will be widened in the first year of the project, followed by two miles in the second year of the project. The earth disturbance associated with the three-mile widening project will be just over one acre. This activity will require an NPDES permit.

**NOTE 7.E.1** – Roadway widening is not considered a road maintenance activity in accordance with 25 Pa. Code § 102.1; therefore, it is subject to NPDES permitting.

**Example 7.F** – There are two existing, developed and contiguous lots in an urbanized area. A developer purchases both lots with plans to demolish all structures and redevelop. On lot 1 the developer plans to develop a restaurant, which will involve 0.5 acre of disturbance. On lot 2 the developer plans to develop a convenience store and gas station, which will also involve 0.5 acre of disturbance. The developer submits a single land development plan for both lots to a reviewing agency (e.g., County Conservation District, municipality, etc.) for approval. This is a common plan of development or sale that requires an NPDES permit.

**NOTE 7.F.1** – If the developer submitted development plans for each lot independently, an NPDES permit would not be required unless there is a shared or common interest or infrastructure (e.g., utility, BMP (E&S and/or PCSM), parking lot, driveway, etc.).

**Example 7.G** – The construction of a gas distribution line would be considered a common plan of development or sale.

**NOTE 7.G.1** – Refer to FAQ #3 above for information regarding oil and gas activities, including transmission facilities.

**FAQ #8: What if a project involves discrete earth disturbance activities on different areas of the same or contiguous lots – would this constitute a common plan of development or sale?**

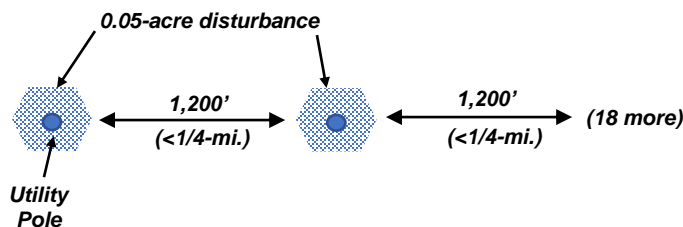
In accordance with EPA guidelines, discrete construction projects within a larger common plan of development or sale that are located at least 1/4-mile apart (from the limits of disturbance) may be treated as a separate plan of development or sale if the area between the projects is not being disturbed and any interconnecting road, pipeline, or utility project that is part of the same “common plan” is not concurrently being disturbed.

If a separate and discrete earth disturbance is within 1/4-mile of another separate and discrete earth disturbance, then those disturbances are considered to be part of the same common plan of development or sale. Therefore, for linear projects, each separate and discrete earth disturbance has to be evaluated individually for determining whether NPDES permit requirements apply (refer to Examples 8.A – 8.E).

**NOTE 8.1** – If a project obtains coverage under an NPDES General Permit, and then the contractor wants to utilize an off-site support facility within 1/4-mile of the original permitted activity (i.e., limit of disturbance), but the off-site support facility requires coverage under an NPDES Individual Permit, the entire project (original permitted activity and off-site support facility) would require coverage under the NPDES Individual Permit.

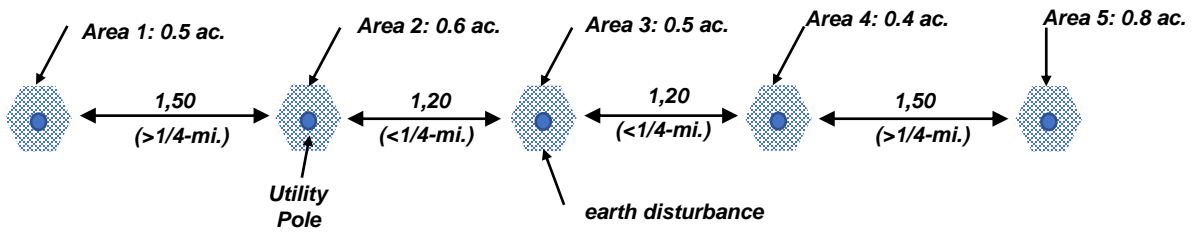
**Example 8.A** – A utility company is planning to replace 20 electric poles, with no earth disturbance between the pole sites. Poles are spaced 1,200 feet apart (less than 1/4-mile). Earth disturbance associated with each replacement will be approximately 0.05 acre (see Figure 8.A). Since the disturbance within 1/4-mile on each side of a singular pole is less than one acre, an NPDES permit is not required.

**Figure 8.A**



**Example 8.B** – A utility company is planning to replace electric towers, with no earth disturbance between the tower sites. Towers are not regularly spaced; some are spaced less than 1/4-mile, while some are spaced at least 1/4-mile. Earth disturbance associated with each replacement will vary based upon the uniqueness of each tower’s location (see Figure 8.B).

**Figure 8.B**

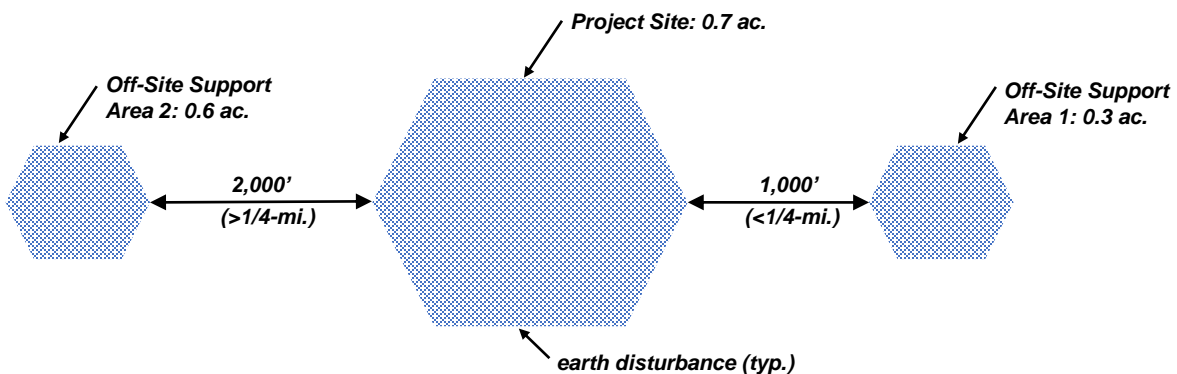


In this example, all of the electric tower replacements are all being accomplished under a single project by the utility company; however, all of the electric tower replacements are not considered to be part of the same common plan of development or sale for NPDES permitting purposes. Area 1 is separated from Area 2 by at least 1/4-mile; therefore, Area 1 is not part of the same common plan of development or sale as Area 2. Area 2 is separated from Area 3 by less than 1/4-mile; therefore, Area 2 and Area 3 are considered part of the same common plan of development or sale. Because Area 2 (0.6 ac.) and Area 3 (0.5 ac.) are at least 1 ac. of earth disturbance, an NPDES permit is required for Areas 2 and 3. Area 3 is separated from Area 4 by less than 1/4-mile; therefore, Area 3 and Area 4 are considered part of the same common plan of development or sale. However, because Area 3 (0.5 ac.) and Area 4 (0.4 ac.) are less than 1 ac. of earth disturbance, Area 4 is not required to be included in the NPDES permit. Area 5 is separated from Area 4 by at least 1/4-mile; therefore, Area 5 is not part of the same common plan of development or sales as Area 4. All Areas are, however, subject to the requirement to develop and implement an E&S Plan.

**NOTE 8.B.1** – If there are multiple non-contiguous earth disturbance areas that require an NPDES permit (e.g., Areas 2 and 3) for the same project, then all of the areas requiring NPDES permit coverage can be included in the same NPDES permit (i.e., separate NPDES permits are not required). In other words, if Area 5 in the example above required permit coverage due to disturbance of at least one acre, it may be included in the permit for Areas 2 and 3.

**Example 8.C** – A land development plan for a commercial office building is proposing an earth disturbance of 0.7 ac. However, there is not enough space on the subject property for the required contractor staging areas and laydown yards. Off-Site Support Area 1 will have 0.3 acres of non-contiguous earth disturbance with the Project Site, and Off-Site Support Area 1 is located less than 1/4-mile from the Project Site. Off-Site Support Area 2 will have 0.6 ac. of non-contiguous earth disturbance with the Project Site, and Area 2 is located at least 1/4-mile from the Project Site (see Figure 8.C).

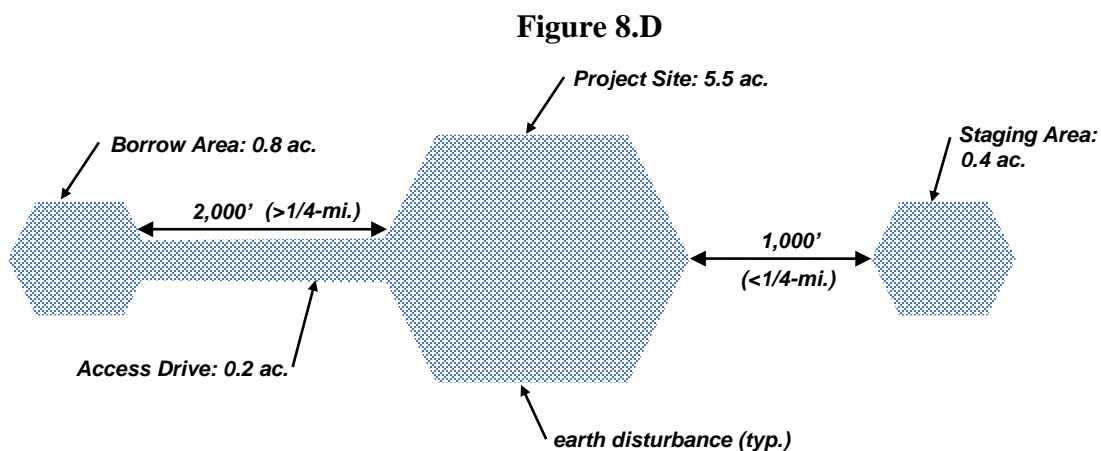
**Figure 8.C**





The Project Site and Off-Site Support Area 1 are considered part of the same common plan of development or sale, because Off-Site Support Area 1 is separated by less than 1/4-mile from the Project Site. Because the Project Site (0.7 ac.) and Off-Site Support Area 1 (0.3 ac.) are at least 1 ac. of earth disturbance, an NPDES permit is required for the Project Site and Off-Site Support Area 1. However, Off-Site Support Area 2 is at least 1/4-mile away from the Project Site; therefore, Off-Site Support Area 2 is not considered part of the same common plan of development or sale with the Project Site. Off-Site Support Area 2 is not required to be included as part of the NPDES permit.

**Example 8.D** – A developer is constructing a small logistics center that includes an earth disturbance activity of 5.5 acres (Project Site). A borrow area (Borrow Area) is required for fill material for the project. This borrow area will be 0.8 acres of earth disturbance and located more than 1/4 mi. away from the main earth disturbance but located on the same property. However, an access drive (Access Drive) will have to be constructed for the contractor access the borrow area, and this will include 0.2 acres of earth disturbance. The earth disturbances for the Project Site, Borrow Area, and Access Drive are all contiguous. Additionally, the contractor must grade a staging area (Staging Area) for their equipment, which is 0.4 acres of earth disturbance (which is not contiguous with the earth disturbance for the main area) and located less than 1/4 mi. from the main earth disturbance. All of the earth disturbances identified area the same common plan of development or sale, and an NPDES permit is required to cover the 6.9 acres of earth disturbance (see Figure 8.D).



**Example 8.E** – A utility company is constructing new trunk lines off an existing transmission line to serve two residential subdivisions. The limits of disturbance for the two trunk lines will be 0.75 acres each and will be at least 1/4-mile apart. An NPDES permit is not required.

**Example 8.F** – A farmer is seeking to build a new barn, which will involve an earth disturbance of 0.6 acre. Approximately 1,000 feet (i.e., less than 1/4-mile) from the limit of disturbance for the barn, the farmer is seeking to construct a new manure storage facility (where the earth disturbance for the manure storage will occur at the same time as the earth disturbance for the

barn), which will involve an earth disturbance of 0.4 acre. This is a common plan of development and an NPDES permit would be required.

**NOTE 8.F.1** – If the limit of disturbance of the manure storage facility was more than 1/4-mile from the limit of disturbance of the barn, an NPDES permit would not be required unless an earth disturbance activity connects the two locations (e.g., construction of an access drive, manure transfer pipe, etc.).

**Example 8.G** – A state highway will be improved over a three-mile stretch, which will include resurfacing and the widening of entrance and exit ramps. The widening part of the project will involve 0.9 acre of disturbance. A material staging area is planned 1/4-mile from the limit of disturbance, adjacent to the resurfacing project, with an earth disturbance of 0.1 acre. An NPDES permit is not required because the material staging area is at least 1/4-mile from the limit of disturbance associated with highway widening (note that the resurfacing is a road maintenance activity, not subject to NPDES permit requirements).

**FAQ #9: I am selling or developing existing road frontage lots, in which there are no shared utilities, and each lot will have its own separate BMPs. Is an NPDES permit required if the total earth disturbance is at least one acre?**

DEP would not consider existing road frontage lots to be part of the same common plan of development or sale if there are no shared utilities or BMPs (E&S and/or PCSM BMPs), regardless of who owned and developed the lots. An NPDES permit would be required for any lot where the earth disturbance on that individual lot will be at least one acre.

However, if the municipality were to require curbing, road widening, sidewalk installation, etc. (i.e., a common interest) to be constructed across all lots at one time (as opposed to constructing at the time of each lot's development), then all earth disturbance (including each lot) would be considered part of the same common plan of development or sale, subject to NPDES permit requirements if the total disturbance is at least one acre. The developer would be required to seek NPDES permit coverage on behalf of individual lot owners, if the lots will be or have been sold.

**NOTE 9.1** – If a utility (water, sewer, etc.) is extended, whether by the developer, authority, or municipality, to only serve the proposed site development, then the utility extension is considered part of the same common plan of development or sale as the site development. However, if a municipality or authority is extending a utility (water, sewer, etc.) to serve a larger area, which includes the proposed site development, then the utility extension is not considered part of the same common plan of development or sale as the site development.

**NOTE 9.2** – If the grading for any lot would require an earth disturbance activity on an adjacent lot, then these two lots would be considered part of the same common plan of development or sale.

**FAQ #10: I am selling or developing existing road frontage lots in which all structures will be connected to the public sewer that has to be extended to serve the project and there will be a common BMP to manage stormwater. Is an NPDES permit required?**

Yes, if the total earth disturbance for all lots will be at least one acre. If there is at least one shared utility, BMP, or other interest amongst lots planned for construction, those lots are considered part of the same common plan of development or sale and subject to NPDES permit requirements.

**FAQ #11: Are public plans considered common plans of development or sale?**

A public entity (e.g., municipality, state, or federal agency) need not consider all construction projects within their jurisdiction to be part of a larger common plan of development or sale. For example, construction of roads or buildings in different parts of a state, county, or city could be considered separate common plans. Only the interconnected parts of a project would be considered to be a larger common plan of development or sale (e.g., a building and its associated parking lot and driveways, an airport runway and associated taxiways, etc.).

**FAQ #12: Are long-range development plans considered common plans of development or sale?**

Long-range development plans or “master plans” often include conceptual plans for future development. Master plans may contain both conceptual and specific development plans. Where future development activities would happen over an extended period of time, the conceptual phases of development can be considered separate common plans of development or sale (i.e., not part of a larger common plan of development that includes specific development plans) provided that the periods of construction for physically interconnected phases will not overlap. This applies to public entities (e.g., airport authorities, universities, school districts, etc.) that largely rely upon future needs and available funding for their proposed development and construction.

*NOTE 12.1* – Long-range development plans or “master plans” are not applicable to private residential, commercial, and/or industrial land developments or subdivisions.

*NOTE 12.2* – The “master plan” exclusion to a common plan of development or sale would be discontinued if two separate projects were submitted to a reviewing agency as part of the same land development plan (as described in Example 6.F above). Additionally, if the combined earth disturbance for that common plan of development or sale is at least 1 acre and are within 1/4-mile of each other (as described in FAQ #8 above), then an NPDES permit would be required.

*Example 12.A* –An airport authority has developed an Airport Layout Plan which identifies potential long-range development of the airport property. The Airport Layout Plan would not be considered a larger common plan of development or sale (i.e., each project would be its own common plan of development or sale).

**Example 12.B** – A school district buys more land than needed for a new school, to be constructed in the short-term, with an indefinite plan to add more classrooms and a sports facility in the future. The indefinite plan would be its own common plan of development or sale separate from the common plan of development or sale for the new school building.

**FAQ #13: Does the timing of construction matter when considering a common plan of development or sale?**

In some circumstances the timing of construction will matter. DEP recognizes that development plans evolve over time. An owner of two lots may generate plans to develop one of these lots, while the other sits idle waiting for investment or other opportunities to materialize. Another example could be that a residential property owner may wish to include a pool on their building plans while a home is under construction, but not construct the pool until after the home is built. Development intent is the overriding principle determining when NPDES permit coverage may be required for a common plan of development or sale (see FAQ #6). DEP/CCD may consult with local municipalities to evaluate development intent.

If a person (or others with a business relationship with the person) decides to pursue construction that will result in earth disturbance activities on the same or a contiguous lot after original construction is complete (i.e., the site is permanently stabilized and NPDES permit coverage is terminated, if applicable), the additional construction is treated as a new common plan of development or sale for NPDES permit purposes. If, however, a plan for additional construction is presented to a municipality before original construction is complete, then the additional construction is considered part of a single common plan of development or sale.

**NOTE 13.1**– If future development on a property/parcel (that does not require coverage under an NPDES permit) will utilize existing PCSM BMPs that were installed under an NPDES permit; then authorization to modify the existing recorded instrument for the PCSM BMPs will have to be obtained from DEP in order to utilize and/or modify the PCSM BMPs.

**Example 13.A** – The owner of a business park plans to expand the footprint of the building, resulting in 0.9 acre of earth disturbance. A development plan is submitted to the municipality that reflects the building expansion. An NPDES permit is not required, but an E&S Plan must be developed and implemented. Following completion of construction and permanent stabilization of the project site, the owner decides to expand the parking lot, which will result in an additional 0.6 acre of earth disturbance. A separate and distinct plan is submitted to the municipality for this expansion. An NPDES permit is not required for the parking lot expansion, but an E&S Plan must be developed and implemented. This is because the original development intent of the first building expansion did not include the parking lot expansion.

**Example 13.B** –After a house is built and occupied and the earth disturbance has been permanently stabilized, any future construction on that lot (e.g., reconstruction after a fire, adding a pool or additional parking area, etc.), would be considered as a new common plan of development or sale.

**Example 13.C** – A property owner submits a development plan to the municipality, which includes the construction of a dwelling, driveway, pool, and detached garage. However, prior to or during

construction, the property owner decides to scale back their building plans and does not construct the pool or detached garage. Nonetheless, the pool and detached garage would be considered part of the same common plan of development or sale with the dwelling and driveway, because they were included in the documentation to the municipality. An NPDES permit would be required if the total disturbance will be at least one acre. If the property owner amends the plans submitted to the municipality, future construction of the pool and detached garage could be considered a new common plan of development or sale.

**Example 13.D** – A development project consisting of 15 acres of earth disturbance has an area of contaminated soils, and these soils will have to be remediated, which will involve 0.75 acres of earth disturbance, prior to the construction of the development. The earth disturbance activity to remediate the contaminated soils is considered part of the common plan of development or sale for the development project. Therefore, NPDES permit coverage is required to be obtained prior to beginning the earth disturbance activity to remediate the contaminated soils.

**FAQ #14: How are undeveloped lots that were part of a common plan of development or sale under an NPDES permit considered if they are developed in the future?**

A developer may decide not to develop lots that were originally planned for development, or a developer may sell off lots in a common plan of development that sit idle, possibly for a long time. Here are general guidelines for this situation when an NPDES permit was issued for the common plan of development or sale:

1. Permit coverage should remain active until all planned construction activity (e.g., phases) is complete. Permit coverage should be renewed (either by the original developer or by a person that permit coverage has been transferred to) as needed until full build-out is complete.
2. However, DEP recognizes that plans may change during construction, and therefore may authorize approval of a Notice of Termination (NOT) for a common plan of development or sale under the following conditions:
  - a. The construction activity has ceased for at least 90 days; and
  - b. The permittee certifies as part of the NOT that it has revised its plan and will no longer construct the remaining phases or components of the common plan; and
  - c. The permittee demonstrates that the installed PCSM BMPs are adequate to manage the post-construction stormwater runoff; and
  - d. All other provisions of 25 Pa. Code § 102.7 have been implemented.
3. If an application to renew permit coverage is not submitted and the permit expires, any additional earth disturbance associated with the common plan of development or sale is a violation of environmental laws and regulations and enforcement by DEP/CCD may be pursued. Coverage under a new permit may need to be obtained (consultation with the appropriate DEP Regional Office is recommended). In addition, if an NOT is not submitted prior to the expiration date to terminate coverage in compliance with 25 Pa. Code § 102.7, enforcement by DEP/CCD may be pursued.

4. If, prior to complete buildout of the common plan of development or sale, multiple lots are sold to a new developer with the intention of developing those lots consistent with the original common plan of development or sale, the new developer must seek or maintain permit coverage (regardless of the planned earth disturbance) because these lots are considered part of the original common plan.

**NOTE 14.1** – The term “consistent with” in this context means a lot improvement that is similar to the original common plan (e.g., residential construction will occur on a lot slated for a single-family home under the original common plan, commercial construction will occur on a lot slated for a bank under the original common plan, etc.).

5. If, prior to complete buildout of the common plan of development or sale, a single lot is sold to a new developer with the intention of developing the lot consistent with the original common plan of development or sale, the new developer must seek or maintain permit coverage, UNLESS 1) PCSM BMPs have been installed that adequately manage all stormwater from the lot, and 2) earth disturbance will be less than one acre.
6. If, prior to complete buildout of the common plan of development or sale, single or multiple lots are sold to a new developer(s) with the intention of changing the development plan, it may be considered a new common plan of development or sale for NPDES permitting purposes (e.g., commercial construction that is planned for a lot that was previously part of a common plan of development for residential construction may be considered a new common plan).

**NOTE 14.2** – If a portion of a common plan of development or sale is constructed and the NPDES permit is allowed to expire, the remaining portion of that common plan of development or sale is still considered part of the larger original common plan of development or sale (i.e., if an NPDES permit is allowed to expire, the remaining earth disturbance activity is not viewed as a new or separate common plan of development or sale because the permit was not properly terminated).

#### **FAQ #15 – What if it is determined that I should have applied for and received an NPDES permit prior to developing a common plan of development and sale?**

It may be discovered, during or after construction, that a person should have applied for and received an NPDES permit prior to developing a common plan of development or sale but did not. Depending on the circumstances, the result could be:

- The person is required to cease earth disturbance activities until an NPDES permit is applied for and received;
- The person is required to install BMPs to address post-construction stormwater, without requiring an NPDES permit; or
- Either of the above, and the person may be required to pay a civil penalty.

It is important, therefore, to contact your local CCD or regional office of DEP to help you understand when a permit may be required.

**FAQ #16 – What is a municipality’s or county’s obligation under 25 Pa. Code § 102.43 as it relates to people who are not the permittee, a co-permittee, or an operator?**

In accordance with 25 Pa. Code § 102.43, a municipality or county may not issue a building or other permit or approval, except for local stormwater approvals or authorizations, to those proposing or conducting earth disturbance activities until an NPDES permit (or other Chapter 102 permit) has been issued or authorized for said earth disturbance activity. This regulatory requirement applies to the project/earth disturbance activity as a whole, and not to an individual lot or property owner.

*Example 16.A* – A developer obtains an NPDES permit for a residential subdivision. The developer then sells Lot 2 to an individual, who then hires their own contractor to perform the earth disturbance activity on Lot 2. The municipality may issue a building permit for Lot 2 prior to the property owner or contractor being added as a co-permittee to the NPDES permit. This is because the regulatory requirement is satisfied because the common plan of development or sale and its earth disturbance is covered by an NPDES permit.

## Version History

<b>Date</b>	<b>Version</b>	<b>Revision Reason</b>
05/03/2019	1.0	Original