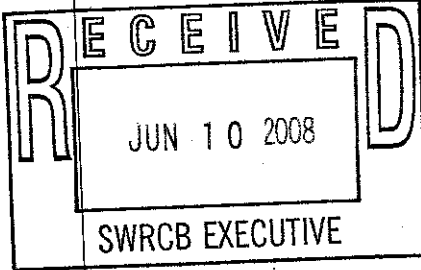




*Serving California Cemeteries Since 1931*

June 10, 2008



Ms. Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

Re: Comment Letter - Draft Construction General Permit ("Draft Permit")

Dear Ms. Townsend and Members of the Board:

On behalf of the Cemetery and Mortuary Association of California ("CMAC"), I appreciate the opportunity to provide the following comments on the State Water Resources Control Board's (the "Board") draft National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activities, dated March 18, 2008 (the "Draft Permit"). As discussed below, CMAC seeks significant revisions to the Draft Permit because, as presently stated, the Draft Permit does not easily apply to "construction" projects undertaken by those in the cemetery industry.

While largely land dependent, the cemetery industry has different business dynamics and land needs than that of other land dependent industries or builders. In light of these fundamental differences, which are discussed more fully below, CMAC urges the Board to revise the Draft Permit to reflect that the nature and scope of construction projects undertaken by the cemetery industry differ significantly from construction projects typically undertaken by real estate developers, industrial, commercial and retail operators and owners, and others. As a result, unless the Draft Permit is revised to alleviate its most onerous provisions, the Draft Permit will place severe and unnecessary burdens on the cemetery industry in California. The Board can incorporate the proposed changes specified in this letter without undermining the legitimate public purpose served by the Draft Permit.

1. **Cemetery Development Does Not Properly Fit Into the Draft Permit's Regulatory Scheme**

Many cemetery operators typically purchase and entitle large par-

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cels of land, but essentially "bank" much of the land until needed for foreseeable interment use. This means that certain land may remain completely undisturbed or only moderately affected (such as rough grading) for many years or even decades until needed for interment. For example, a cemetery may entitle a 150-acre master plan area in year 1, may complete a small portion of rough grading of the same 150-acre area in 5 years, leaving the remaining acreage of the site to be rough graded over the next 50 years. Finish grading and then installation of irrigation systems would most typically occur in .5 acre portions of the 150-acre area over the life of the cemetery - perhaps 75 to 100 years. Thus, the "development" of cemeteries is an extremely long-term and largely disjointed process. Cemetery development does not follow the path of a typical residential, industrial, or commercial construction project.

In order to ensure that it can adequately meet the ever increasing demand for interment sites and funeral resources in the geographic area which it serves, a typical cemetery will develop long-term master plans that usually include various construction projects. Although the specific array of construction projects at each property varies, typical operations include rough grading, finish grading, constructing structures, utility work, and installation of irrigation and sod. Under the current general construction permit for storm water discharges, cemeteries have filed one Notice of Intent relating to their overall long term construction plans, and have been issued separate Waste Discharge Identification ("WDID") for each of their properties. For each new construction project that falls within the scope of the existing permit, these cemeteries typically create a specific Storm Water Pollution Prevention Plan ("SWPPP").

**2. The Board Should Expressly Exempt Road Repairing/Repaving and Cemetery Construction Projects of Less Than 1 Acre**

CMAC understands that, at a recent public hearing, the Board stated that road repair or repaving conducted on behalf of governmental entities will be exempt from the permit. To the extent that this is true, non-public entities should benefit from the same exemption. Otherwise, the Draft Permit improperly favors governmental entities over the private sector.

Further, the Draft Permit maintains the existing permit's basic exemption scheme, including its incorporation of a "less than 1 acre" exemption, except where such small project is part of a "larger common plan of development." An immediate issue arises from the operational activities on the hypothetical 150-acre cemetery area referenced above since an argument can be made that installation of an irrigation system in a .5 acre area of a larger 150 acre master-planned area many years after rough grading is part of a "larger common plan of development." Under identical facts, the cemetery operator can also offer the practical argument that the small irrigation project is not part of the common plan of development of the original 150-acre area. This creates an immediate legal problem with the Draft Permit that should be rectified.

Nonetheless, the Draft Permit proposes a regulatory scheme significantly more complex and burdensome than the existing one, and contemplates a more severe penalty structure for permit violations. A number of cemetery operators operate multiple properties under the same discharge permit and implement projects of vastly different scopes within each of their properties over a period of many years. Thus, under the Draft Permit,

these cemeteries would incur significantly more burden than a developer of a typical commercial, residential or industrial construction/development project.

Under a literal interpretation of the Draft Permit, these cemetery operators could be required to file a Permit Registration Document (PRD), develop a SWPPP and undertake additional electronic reporting obligations for every "project" at their various properties, including numerous small-scale projects that are significantly less than 1 acre in size. For example, a small re-sodding or a minor irrigation project would appear to necessitate significant and unnecessary paperwork and electronic reporting solely because an argument could be made that the small scale project is part of a "larger common plan of development" (whatever that larger common plan may be). Since a cemetery operator may typically undertake as many as 30 to 40 such projects annually, the Board's proposed reporting obligations represent a significant additional cost and administrative burden that would provide virtually no commensurate benefit of enhanced protection of the State's water resources.

Additionally, the types of construction projects typically undertaken by cemetery operators present a significantly lower risk of generating contaminated storm water than typical non-cemetery construction projects. Cemeteries utilize few if any hazardous materials and generate minimal hazardous waste. As a result, scant risk exists of a discharge of hazardous pollutants from cemetery properties into receiving waters. Also, cemetery properties primarily consist of unpaved and absorptive land, much of it with vegetative cover, which vastly reduces that amount of storm water runoff and further minimizes the amount of contaminants that could possibly reach a receiving water. Similarly, many of the projects undertaken by cemetery operators involve creating and maintaining unpaved areas, which simply do not pose a significant storm water discharge threat.

Thus, cemetery operators should be exempt from the provision requiring projects encompassing less than 1 acre to be subject to the Draft Permit (or any enacted Permit) if the "project" is arguably part of a "larger common plan of development." CMAC understands that the U.S. EPA and the Board intended the "common plan of development" concept to prevent developers from escaping storm water permitting requirements during construction by splitting the overall development into smaller parcels. However, this concern does not apply to cemetery operators undertaking decades-long build-out projects on their properties.

In light of this crucial distinction, the Board should mitigate such burdens on cemetery operators by exercising its discretion to exempt cemetery operators from the "common plan of development" restriction, and expressly state that cemetery projects under 1 acre in size do not require coverage under the Draft Permit. Such a reasonable step would place benign, small-scale projects outside of the coverage of the Draft Permit, and would avoid the imposition on cemetery operators of an unnecessary and burdensome regulatory regime.

**3. The Board Should Expressly Exempt Irrigation and Sod Work at Cemeteries as Routine Maintenance**

The Draft Permit proposes to maintain the current general permit's exemption for "routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of the facility." As a practical matter, many of the construction projects undertaken by cemetery operators consist of irrigation and sod work to main-

tain and enhance the appearance and functionality of their properties, and prepare the land for long-term interment. This work is intended to maintain the "original purpose of the [cemetery] facility."

Additionally, irrigation and sod work projects do not utilize hazardous materials and, as a consequence, do not generate storm water discharges with characteristics that could pose a threat to the State's waters or to public health. For these reasons, the Board should expressly include irrigation and sod work projects at cemeteries, even those exceeding 1 acre, within the scope of the Draft Permit's "routine maintenance" exemption. Such a revision to the Draft Permit is reasonably justified as a modest interpretative extension of the exemption for work to maintain the original purpose of a facility.

#### **4. The Board Should Exempt Cemeteries from Risk Level Calculations**

The current general permit does not differentiate projects by risk level. In contrast, the Draft Permit proposes a calculation that results in assignment of each project covered under the permit to one of four Risk Levels (1-4). Under this scheme, the discharger calculates the risk level by determining the site specific sediment risk level and the receiving water risk level, then combining the two to get an overall Risk Level, which dictates the stringency of compliance. Projects falling within Risk Levels 1-3 will be covered under the Draft Permit, while Risk Level 4 projects require an individual discharge permit from the Board.

This proposed scheme does not fit with the nature of cemetery projects. As described above, almost all cemetery projects consist of benign elements of differing types and scopes, undertaken over a period of many years. Typically, these project elements are individually and collectively benign, such as small scale irrigation and sod work. The Board's proposed risk level assignment plan will impose significant new costs and administrative burdens on cemetery operators without adding any significant benefit to water quality.

Additionally, the Board's risk level scheme does not adequately reflect risk level variability that may occur within a particular property, which is subject to only one WDID, nor does it instruct a potential discharger how to account for risk level variability within this single property. For example, if only one of every 10 contemplated projects at a particular cemetery calculates out at Risk Level 3 (and the other 9 out of 10 rank lower than "3"), the other 9 projects should not be subjected to the Level 3 requirements. Review of the Draft Permit does not reveal a method or opportunity to reflect such risk variability. Also, the Draft Permit does not reflect the change in risk level that may occur over time in terms of one or more projects at a single cemetery.

In light of these valid concerns regarding the validity and usefulness of assigning cemetery construction projects to a risk level, CMAC urges the Board to exempt cemeteries from the Draft Permit's risk calculation requirements. To the extent that that Board, nonetheless, moves forward with the risk level scheme, the permit should incentivize permittees to implement BMPs. According to the Draft Permit, a site could be 100% covered in mats/blankets or bonded fiber matrix, but would have the same risk level as a completely denuded, bare site. This is poor public policy and unfair. Thus, upon implementation of BMPs, risk levels should decrease. The Board should revise the Draft Permit to grant credit or risk reduction for dischargers who implement BMPs.

Moreover, significant logistical and implementation problems will exist with the proposed risk scheme. For example, completing multiple worksheets for Sediment Loss risk and yet more worksheets for Receiving Water risk is an overly tedious, complicated exercise. At the very least, the Board should simplify the process with a single straightforward worksheet. As another example, several uncertainties exist related to worksheet factors. The "K" value internet site referenced is next to impossible to navigate. Further, the derivation of the length of slope (LS) and slope grade for large, complex sites with many areas and projects covered under one WDID is impossible. This is another example of how the Draft Permit does not function for cemeteries.

**5. The Board Should Not Include Numerical Effluent Limits ("NELs") In the Next Construction Permit**

CMAC understands that many stakeholders have repeatedly urged the Board to implement NELs in the next-generation construction general permit. However, it remains premature to propose NELs for the Draft Permit. No empirical data exists to suggest that NELs for different types of construction sites are feasible that dischargers can comply with same. Myriad of differences among various sites, which likely render any NELs unworkable. Instead of imposing an unobtainable "command and control" type limit, the Board, and stakeholders, should use next permit term to study and collect scientifically valid data to determine whether uniform NELs are truly feasible for different types of construction sites.

**6. Additional Concerns**

**A. Turbidity**

The Draft Permit suggests an Action Level (AL) and Numeric Effluent Limit (NEL) on turbidity, neither of which are elements of the existing General Permit. The AL for turbidity under the Draft Permit is site specific, while the NEL for turbidity is proposed at 1000 NTU (or potentially much lower depending on applicable receiving water limitations or background levels). CMAC believes that the Draft Permit's proposed turbidity standards, and particularly the proposed turbidity AL calculation, adds significant additional complexity and compliance costs on to the discharger without receiving much benefit in return. To alleviate this burden, the Board should set the turbidity AL level based on limits prescribed by the Board to receiving waters, if they exist, rather than on site specific calculations determined by the discharger.

Additional problems exist with the proposed ALs and NELs. Any turbidity AL and NEL should be correlated to a designated design storm, with the occurrence of rainfall above that threshold affording the discharger some measure of immunity from additional compliance activities and violations/penalties. As a practical matter, if a storm is large enough, a discharger could take every possible step to comply with the Draft Permit and still exceed the turbidity NEL. However, under the Draft Permit, these "violations" will automatically be subject to mandatory minimum penalties (MMPs). For example, based on the amount of sampling required, a significant three-day storm could result in 9 violations, or about \$18,000 in mandatory penalties even after the three "freebies" allocated in the Board's MMP policy. This proposed structure will arbitrarily penalize good corporate citizens that

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diligently attempt to comply with a complex and burdensome regulatory program without targeting the most egregious violators.

CMAC suggests a procedure that would account for storm size in connection with NELs and ALs. For example, one grab sample from one storm should not trigger an exceedence of an action level (AL) or effluent limit (EL). A discharger should at least have the ability to collect all required samples during a storm event and average the results to determine sort of exceedence. This procedure would help defer penalties in the MMP policy if a discharger would otherwise have one "violation" per storm. Then, a discharger would not incur penalties for Category 2 violations until at least the fourth storm in a six month period.

Additionally, the proposed turbidity scheme does not adequately reflect variability that may occur within a particular property, subject to only one WDID. At any one cemetery, the turbidity AL calculations could be quite different depending on the area of the site sampled.

B. Receiving Water Sampling

The Draft Permit's requirement to sample receiving waters is potentially dangerous and cumbersome. In some instances, access to receiving waters is prohibited (e.g., by flood control channel owners) by law. Accessibility is diminished and danger is heightened particularly during storm events. Only state and local agencies or municipalities should engage in receiving water monitoring to ensure that useful data is collected.

C. Self Monitoring

CMAC is skeptical of the quality of data that will be generated by dischargers, particularly given the amount of collection and sampling variability. If these sampling requirements are intended by the Board to be a determining factor in decisions as to appropriate uses of particular Best Management Practices (BMPs), a more thorough (i.e., scientific) approach appears warranted. As a parallel example, many "groups" have abused and violated with immunity the "group monitoring" provision of the existing general industrial storm water permit. For example, certain group members, who coincidentally may have unpaved sites and scant BMPs, simply do not sample as required by the permit. CMAC has serious concerns that the "self monitoring" proposal could be similarly abused. A Board-sponsored construction storm water sampling program, funded in part by dischargers, would likely generate higher quality data that could be used to maximize the protection of receiving water quality.

D. SWPPP Requirement for Soil Cover

The Draft Permit's proposed SWPPP requirements appear to apply during the entire year, and not just during the wet season months (e.g., requirement of soil cover for inactive areas left for more than 14 days). The Board should carefully consider whether this scheme creates disincentives for scheduling and implementing BMPs during the dry season. CMAC believes the proposed approach might actually slow projects down and extend construction into the wet season. We trust that the Board does not intend to impede the implementation of BMPs.

E. Conditions for Termination—Stabilization Criteria

For a discharger to terminate coverage for a construction project, the Draft Permit would require a discharger to demonstrate that, among other things, final stabilization has been achieved. One of the three methods to make this showing is that "the vegetative cover is self-sustaining and at least 70% of the soil on each individual parcel is uniformly covered by live, actively growing plant matter in contact with the soil." This "self-sustaining" requirement could be construed as implying that a vegetated area cannot be irrigated. The Board should expressly clarify that this is not the case.

F. SWPPP Training Requirements

The Board should clarify the Draft Permit's SWPPP qualification timing and certification requirements. In particular, the Draft Permit should more clearly state the required timeframes within which "Qualified SWPPP Developer" and "Qualified SWPPP Practitioner" requirements must be met. For example, to qualify for either tier, a person must, within 2 years, complete "State Board training." However, the Draft Permit is silent as to the timeframe for obtaining the specified certifications from the entity called "Certified Professional in Erosion and Sediment Control, Inc." ("Certified"). Must such certification be obtained prior to doing any work on the SWPPP? If so, the potential exists for a shortage of qualified personnel, assuming dischargers have only 100 days within which to comply with the new general permit, once adopted. The Board should expressly specify a significantly longer period (for example, at least 2 years) for obtaining required SWPPP training certifications.

In addition, the Board purports to prescribe Certified as the only entity that can certify either "Qualified SWPPP Developers" or "Qualified SWPPP Practitioners". It would appear more even-handed, fair, democratic, and transparent if additional entities can provide the necessary certification.

Also, CMAC requests that the Board allow people to qualify as a Qualified SWPPP Practitioners through verified direct field experience in SWPPP implementation and storm water practices, as an alternative to the actual certifications proposed in the Draft Permit.

The Board should consider adding a third SWPPP personnel tier (e.g., "SWPPP Trainee"), or simply allow others to work and be trained under the Qualified SWPPP Practitioner to perform useful tasks, like sampling and inspections. Such an addition would provide necessary flexibility to allow dischargers to comply with the SWPPP's multiple requirements.

G. Electronic Filing

The Draft Permit requires comprehensive electronic filing, including of permit registration documents (which must be updated within 30 days of acreage changes), site maps, SWPPPs and SWPPP updates, exceedence reporting and annual reports (by February 1 of each year, including all inspections, sampling results, lab reports, and all corrective actions taken). Meeting these multiple reporting obligations will be burdensome and expensive for many regulated entities, especially those with multiple and varied projects at dif-

ferent sites. The Board should streamline these reporting requirements and eliminate unnecessary administrative burdens on dischargers.

As reflected in the Draft Permit, the timing of the annual reports makes little sense. A due date of February 1 each year makes little sense since that date falls squarely in the middle of the Wet Season, when dischargers should be focused on their sites and potential BMPs— not preparing paperwork. CMAC suggests a July 1st due date for the previous year's annual report, giving dischargers the opportunity to focus on their sites during the Wet Season, develop and implement BMPs, and then prepare the necessary reports.

The Draft Permit allows the public to view of all of a discharger's electronically filed documents. Under the proposed scheme, the public can submit comments and request a hearing regarding a discharger's compliance, with discretion to hold such a hearing reserved to the Board. While CMAC appreciates the potential benefits of public participation in important environment areas, it must be balanced against the interests of the regulated community and their need for regulatory certainty. For example, the proposed process would strongly incentivize one business competitor to challenge and administratively stifle another competitor's storm water compliance efforts. Many industries subject to the Draft Permit are highly competitive and this proposed process could promote methods to undermine competitors' businesses. This Board should alter this aspect of the Draft Permit so as to eliminate the possibility of "business sabotage". At the very least, the Board should impose a deadline for public comments, beyond which a public hearing cannot be triggered.

Additionally, the Draft Permit proposes that a discharger is required to electronically submit an updated SWPPP to the Board in the event of a "significant" change. However, "significant" is not defined, and thus, a discharger is left with little guidance as to what level of change warrants such reporting. The Board must clarify or drop this provision.

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In its current form, the Draft Permit represents a significant increase in the complexity of the State's storm water regulatory regime, and would impose heavy administrative burdens on storm water dischargers, particular those with multiple properties who undertake multiple small-scale construction projects at each property. Clearly, the primary focus and structure of the Draft Permit does not fit well with long-term development plans of cemetery operators. As explained above, the Board should exempt cemetery operators from several of the Draft Permit's requirements, which, if left unchanged, would impose a severe and unnecessary burden on these operators without creating commensurate benefit to water quality or public health. The Board should also carefully evaluate the Draft Permit to make compliance more straightforward and efficient. The Board should revise the Draft Permit to ameliorate its many potentially severe and unnecessary burdens.

CMAC appreciates the Board's consideration of these comments.

Very truly yours,

*Jerry Desmond, Jr.*

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