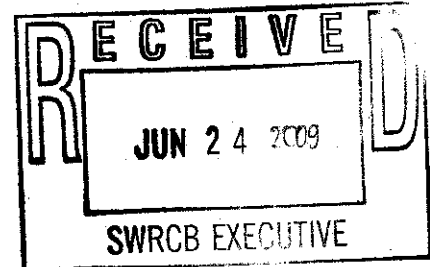


Serving California Cemeteries Since 1931

June 24, 2009

VIA FACSIMILE AND U.S. MAIL

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"), we 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 April 22, 2009 (the "Draft Permit"). Despite certain positive revisions made in response to public comments to a prior version of the Draft Permit issued March 18, 2008 ("2008 Draft Permit"), the Draft Permit remains problematic as it continues to mandate the imposition of severe and unnecessary burdens on "construction" projects undertaken by cemetery industry operators.

As explained in the June 10, 2008 letter from the Cemetery and Mortuary Association of California ("2008 Comment Letter"), the cemetery industry has significantly different business dynamics and land needs than that of other land-dependent industries or builders. In light of these fundamental differences, CMAC urges the Board to revise the Draft Permit to reflect the fact 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.

Unless the current version is revised appropriately, the Draft Permit will significantly increase the cost and difficulty of operating cemetery facilities throughout California, with little or no commensurate benefit to the public or the environment. We continue to stress that the Board can

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incorporate the proposed changes specified in this letter, and as a result, lessen the unnecessary burdens that would otherwise be imposed on cemetery operators, 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 parcels 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 50-100 years. Finish grading and installation (and operation) of irrigation systems would most typically occur in approximately .5 acre increments over the life of the cemetery, perhaps 75 to 100 years. Thus, cemetery development clearly does not follow the development path of most residential, industrial, or commercial construction projects, which are the obvious focus of the Draft Permit's regulatory scheme. In contrast, the "development" of cemeteries is an extremely long-term and segmented process, typically disturbing only small areas of land at any given time.

In an effort to adequately meet 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, cemetery operators 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 cemetery properties. For each new construction project that falls within the scope of the existing permit, the cemetery operator typically creates 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**

In its 2008 Comment Letter, the CMAC urged the Board to expressly exempt from the permit, road repairing or repaving by private entities, rather than just provide an exemption for such projects conducted on behalf of governmental entities. Unfortunately, the Draft Permit continues to unfairly favor governmental entities over the private sector, even in light of the fact that cemetery operators often have to maintain a large network of private roads within their cemetery properties.

Further, the Draft Permit continues to maintain the 2008 Draft Permit's basic scheme of exempting "less than 1 acre" projects, except where such small projects are part of a

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"larger common plan of development." Using the hypothetical 150-acre master-planned cemetery referenced above, an immediate issue arises in light of the typically, segmented development of less than 1-acre at a time. For example, despite no connection with water quality or public health issues, the simple installation of an irrigation system in an approximately .5 acre area after many years of rough grading could be deemed to be part of a "larger common plan of development." While a cemetery operator could plausibly argue that the small irrigation project is an isolated project, and not part of the common plan of development of the original 150-acre area, uncertainty would result. The Board should clarify this uncertainty by creating an express exemption for cemetery construction projects involving less than 1 acre of disturbance. Thus, the Permit would not unfairly impose regulatory obligations on cemetery operators.

**3. A Permit Exemption For Road Repairing/Repaving and Cemetery Construction Projects of Less Than 1 Acre Should Also Simplify the Permitting Process With No Adverse Environmental Consequences**

Additionally, the Draft Permit continues to propose 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 cemetery operators will be faced with a significantly greater regulatory burden than a developer of a typical commercial, residential or industrial construction/development project.

Under a literal interpretation of the Draft Permit, cemetery operators would 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, as discussed above, an argument could be made that the small scale project is part of a "larger common plan of development." Since a cemetery operator may typically undertake as many as 30 to 40 such projects annually, the Board's proposed reporting obligations continues to represent a significant additional cost and administrative obligation that would provide virtually no commensurate benefit of enhanced protection of the State's water resources.

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

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involve creating and maintaining unpaved areas, which simply does not pose a significant storm water discharge threat.

Thus, in light of the uniquely low risk to surface waters posed by cemeteries, operators should be exempt from the provision requiring projects encompassing less than 1 acre to be subject to the Draft Permit, even if arguably part of a "larger common plan of development." CMAC understands that the U.S. EPA and the Board intends to retain 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 should not be rigidly applied to the projects typically undertaken by cemetery operators, who engage in decades-long, small-scale, low-risk, build-outs on their properties.

CMAC recognizes that the Draft Permit has been revised to include language providing for the Regional Water Boards to exercise regulatory discretion in providing a "common sense interpretation" of this scheme, apparently reflecting the Board's recognition that an overbroad interpretation would render "meaningless" the 1 acre project threshold. While this language represents a step in the right direction, CMAC urges the Board to expressly mitigate burdens on cemetery operators by exercising its discretion to expressly exempt cemetery operators from the "common plan of development" restriction, and unambiguously 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.

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

The Draft Permit continues to include 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 maintain 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, and to avoid future legal uncertainty, 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 based on the exemption for work to maintain the original purpose of a facility.

**5. The Board Should Exempt Cemeteries from Risk Level Calculations**

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The current general permit does not differentiate projects by risk level. In contrast, the Draft Permit continues to propose a calculation that results in assignment of each project covered under the permit to one of three Risk Levels (1-3). 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.

This proposed scheme does not fit with the nature of cemetery projects. As described above, most cemetery projects disturb only small areas of land, and involve only benign construction or landscaping activities, collectively undertaken over a period of many years. Typically, these project elements are both 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 Draft Permit's risk level scheme continues to reflect risk level variability that may occur within a particular property, which, according to the current version of the Draft Permit, is subject to only one WDID. This will create confusion and be difficult to enforce. For example, this provision provides the regulated community with no instruction whatsoever as to how to account for risk level variability within a single property. If, hypothetically, 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. The Draft Permit does not appear to contain 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 significant concerns regarding the validity and usefulness of assigning cemetery construction projects to a risk level, CMAC reiterates its request to the Board to expressly 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.

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

CMAC understands that, in response to comments to the 2008 Draft Permit, the Board has decreased the Risk Level requirements so that only Risk Level 3 projects will be subject to the NELs. This constitutes a step in the right direction. However, CMAC remains concerned that no empirical data exists to suggest that NELs for different types of construction sites

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are feasible or that dischargers can comply with same, even under the more limited scheme currently proposed. Instead, myriad differences exist among various sites, which likely render the imposition of any NELs unworkable. Rather than 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.

**7. Additional Concerns**

**Receiving Water Sampling**

In apparent response to public comments, the Draft Permit now limits the requirement to sample receiving waters to Risk level 3 projects, and only where such locations "can be safely accessed." This revision represents an appropriate limitation. However, in some instances, access to receiving waters is prohibited (e.g., by flood control channel owners) by law, or other practical constraints to access exist. As a result, the Board should still consider mandating that only state and local agencies or municipalities be allowed to engage in receiving water monitoring to ensure that useful data is collected in a safe and efficient manner.

**B. Self Monitoring**

CMAC continues its skepticism of the quality of data that will be generated by dischargers under the Draft Permit's proposed self-monitoring requirements, particularly given the amount of collection and sampling variability. If the Board intends these sampling requirements to be 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. As a result, we continue to have serious concerns that the currently proposed "self monitoring" proposal has the potential to 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.

**C. SWPPP Requirement for Soil Cover**

The Draft Permit's proposed SWPPP requirements continues 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 15 days). CMAC requests that the Board carefully evaluate 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 ex-

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tend construction into the wet season. We trust that the Board does not intend to impede the implementation of BMPs.

D. 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." In the 2008 Comment Letter, CMAC requested that the Board expressly clarify that this "self-sustaining" requirement should not be construed as implying that a vegetated area cannot be irrigated. Unfortunately, CMAC's reasonable request has not been incorporated into the Draft Permit. As a result, ambiguity continues to exist regarding the interpretation of this requirement.

E. Determination of NEL or Numerical Action Level (NAL) Exceedance

The Draft Permit continues the practice of determining exceedance of NEL and NAL levels by using a single discharge sample. CMAC believes that comparing the average of all samples taken during a particular period (e.g., a day) would provide a more accurate picture of a project's true discharge. The accuracy of individual samples can be impacted by the particular location of the sample or the occurrence of elevated or reduced discharge that exists for a brief period of time. Averaging samples across a period of hours ensures that certain time-limited variations from a project's average discharge do not skew analysis of a project's impact.

F. 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, exceedance 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 different sites. The Board should continue to evaluate means to streamline reporting requirements and eliminate unnecessary administrative burdens on dischargers.

G. Timeline for Construction General Permit Implementation

Irrespective of the particular provisions included in the final Permit, CMAC members will need time to transition their activities to ensure compliance with any new regulations. As such, CMAC requests that the effective date of the final Permit not occur until after the coming wet season.

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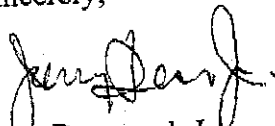
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While the Board has made some modest improvements to the 2008 Draft Permit, in its current form, the Draft Permit still has specific, unworkable provisions for the cemetery industry. The Draft Permit also continues to represent a significant increase in the complexity of the State's storm water regulatory regime. Implementation of the Draft Permit's regulatory regime 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.

Sincerely,



Jerry Desmond, Jr.  
Executive Vice-President  
Cemetery and Mortuary Association of California