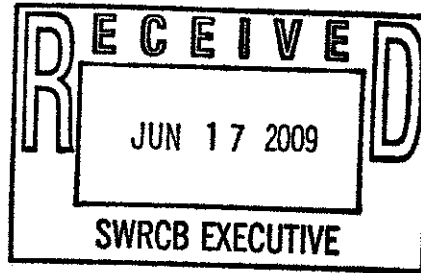




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June 17, 2009

VIA HAND-DELIVERY

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

Dear Ms. Townsend:

This comment letter is submitted on behalf of the American Council of Engineering Companies of California ("ACEC-CA"). ACEC-CA is a professional association of consulting engineering and land surveying firms practicing throughout the state of California. At the current time, there are approximately 1,000 firm members. This comment letter is in addition to other comment letters submitted by ACEC-CA regarding different issues. It is requested this letter be made a part of the rulemaking file.

The draft Order "Training Qualifications and Certification Requirements" in Subdivision VII.B defines a qualified SWPPP Developer and a qualified SWPPP Practitioner. These requirements state that the person responsible for preparing and amending SWPPPs and REAPs shall comply with the requirements of Paragraph VII. Those requirements of Section VII include the SWPPP certification requirements. Basically, a qualified SWPPP developer ("QSD") must be either a California registered professional civil engineer; a California registered professional geologist or engineering geologist; a California registered landscape architect; a professional hydrologist registered through the American Institute of Hydrology; a certified professional in erosion and sediment control registered through Certified Professional in Erosion and Sediment Control, Inc. or a certified professional in storm water quality registered through Certified Professional in Erosion and Sediment Control, Inc.; a certified professional in erosion and sediment control registered through the National Institute for Certification in Engineering Technologies, Inc.; or must have a minimum of five years experience in developing SWPPPs for construction sites to



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comply with NPDES permits. Additionally, effective two years after the adoption date of the General Permit, a QSD shall have attended a State Water Board-sponsored or approved QSD training course.

The training qualifications and certification requirements under Paragraph B.4. then define a Qualified SWPPP Practitioner. First, the definition requires that BMPs required by the General Permit are implemented by a Qualified SWPPP Practitioner or "QSP." A QSP is then required either to be a QSD or have one of the alternative following certifications: (a) A certified erosion, sediment and storm water inspector registered through Certified Professional in Erosion and Sediment Control, Inc. or (b) A certified inspector of sediment and erosion control registered through Certified Inspector of Sediment and Erosion Control, Inc. The QSPs also are required to take a State Water Board-sponsored or approved QSP training course within a two-year period.

There is a serious problem with the Water Board's effort to provide a range of practitioners available to meet the training, qualification and certification requirements. The Professional Engineers Act (Bus. & Prof. Code § 6700, et seq.) defines engineering practices. The practice of civil engineering is defined in Business and Professions Code Section 6731, et seq. Civil engineering embraces activities in connection with drainage, flood control, and grading, among other activities. The definition includes the preparation or submission of designs, plans and specification and engineering reports as part of the practice of civil engineering. More specifically, the preparation of a SWPPP involves activities that are civil engineering, as it is design work intended to control storm and non-storm discharge from the project site. Further, some pollution prevention activities may require quantification of run-off constituents by numerical limitation, and those activities are civil engineering. Such activities clearly fall within the statutory definition of civil engineering (Bus. & Prof. Code § 6731).

The only people in California who may legally practice civil engineering and render civil engineering services to the public are registered or licensed civil engineers. As a result, the only persons in California who may legally practice those activities are registered or licensed civil engineers. There may be some overlap between a civil engineer and a professional geologist or engineering geologist, but we do not believe that a California registered landscape architect can practice civil engineering; nor can a professional hydrologist; nor can a certified professional in erosion and sediment control; nor can a certified professional in storm water quality; nor can a certified professional in erosion and sediment control registered in accordance with Paragraph VII, unless they are also registered or licensed civil engineers. Further, the alternative specified in Paragraph VII.B.h. of the minimum of five years experience cannot satisfy the legal requirements of the Professional Engineers Act.



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Pursuant to provisions of the California Administrative Procedure Act commencing at Section 11340 of the Government Code, all regulations must be consistent with, and not in conflict with, statutes and must be reasonably necessary to effectuate the purpose of the statute. (Gov. Code §11342.2.) Further, regulations are required to meet the Administrative Procedure Act definitions of "necessity," "authority," clarity," "consistency," "reference," and "non-duplication." (Gov. Code § 11349.) The provisions of the Order that allow non-registered persons to perform engineering functions as defined in Business and Professions Code Section 6731 violate the definitions of necessity, authority, and consistency and violate Government Code Section 11342.2.

The State Water Resources Control Board does not have the legal authority to adopt regulations or an order which explicitly authorizes the practice of civil engineering by persons who are not registered as civil engineers. Further, the statutory mandates require any regulation to pass the "necessity" requirement. There is no showing that there are not enough registered civil engineers available to perform this work. Civil engineers have been performing grading and drainage design, inspection and construction management for many years and there simply is no unavailability of engineers properly qualified and trained to provide the services which are the subject of the General Permit.

Even if the Board's order were determined not to be a regulation, the order may not be inconsistent with statutory provisions such as the Professional Engineers Act and may not authorize persons not registered as professional engineers to practice civil engineering.

Three further issues require comment. The proposed Order, in Paragraph VII.B.4., requires that Best Management Practices required under the General Permit must be implemented by a QSP and within two years from the date of adoption of the General Permit the QSP must be certified as an erosion, sediment and storm water inspector or a certified inspector of sediment and erosion control through two different certification groups.

Registered civil engineers, under provisions of the Professional Engineers Act, act in "responsible charge" of the engineering services rendered to clients. As with most professional service groups, many of the functions and activities that are performed which culminate in their rendition of professional services under the responsible charge of a registered civil engineer, are performed by non-registered employees of consulting engineering firms and those employees are not necessarily certified by either of the professional associations referenced in the regulations. Nor, under the Professional Engineers Act are they required to be. The Professional Engineers Act contains a definition in Section 6740 of a subordinate to a civil, electrical or mechanical engineer and exempts them from licensure, insofar as they act under the responsible charge of an



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appropriately registered engineer. So, engineering "subordinates acting under the responsible charge of a registered professional engineer" are not required to meet the additional requirement of a QSP in the proposed Order, yet the Order improperly disqualifies engineering firm subordinates from performing as QSPs.

The next issue arises because of Paragraph VII.B.1., which requires that, effective two years after the adoption of the General Permit, a QSD must attend a State Water Board-sponsored or approved QSD training course. Registered professional civil engineers are already qualified to perform the engineering functions defined in Business and Professions Code Section 6731. Most all registered civil engineers have at least a Bachelor's degree and many have additional Master's and Doctorate levels of education, coupled with the experience requirements in the Professional Engineers Act, and they must pass statewide and national tests before they are registered as civil engineers. That registration scheme exists autonomously from the proposed regulations developed by the Board, but because this Order imposes additional qualifications on civil engineers in addition to those in the Professional Engineers Act, they are inconsistent with the purpose, intent and statutory provisions in the Professional Engineers Act.

The third issue involves Paragraph IV.I, Electronic Signature and Certification Requirements, which require that permit registration documents and notices of termination be electronically certified. The certification requirement is contained in Subdivision J. The certification is too broad and contains opinions that are not a proper subject of certification under penalty of perjury.

Additionally, for the engineering community, any "certification" raises issues regarding their malpractice insurance. Virtually all errors and omissions policies or professional liability policies have an exclusion for "certification." So, the use of the word "certify" triggers an exclusion in the insurance. Neither engineering firms nor their clients are well served by language which triggers an exclusion from coverage in their malpractice insurance. Therefore, the word "certify" should be deleted and the word "state" inserted in its place. Further, the scope of any statement under penalty of perjury needs to be limited to facts, not opinion. The scope of the statement should be limited to factual representations. For example, the language in subdivision J asserts that all documents were prepared under direction or supervision "in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted." That is largely a legal opinion; not a factual representation. That language of Subdivision J continues that the person signing the certification must represent that he or she has made inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information and that based upon that inquiry, the information submitted is true, accurate, and complete. Again, those are largely opinions; not factual representations. A much simpler and more efficacious statement would be, "I state under



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penalty of law that this document and its attachments were prepared under my direction or supervision.”

Thank you for considering the comments of ACEC-CA. We trust you will make appropriate changes to the order to conform to the existing provisions of the Professional Engineers Act.

Very truly yours,



James P. Corn

JPC:mws

cc: Paul Meyer, Executive Director, ACEC-CA
Keith Dunn