

## **STAFF REPORT**

CONSIDERATION OF  
ADMINISTRATIVE CIVIL LIABILITY ORDERS  
FOR  
VIRGINIA L. DRAKE, TRUSTEE, DRAKE REVOCABLE TRUST  
DARWIN H. AND NINA R. SIMMONS, TRUSTEES, SIMMONS FAMILY TRUST,  
JAMES E. SIMMONS AND THE CITY OF CHICO  
HUMBOLDT ROAD BURN DUMP AREA 7, APN 018-390-018  
AND  
HUMBOLDT ROAD BURN DUMP AREA 8, APN 018-390-014  
BUTTE COUNTY

### **BACKGROUND**

The Humboldt Road Burn Dump (HRBD) is a contiguous collection of parcels of more than 157 acres containing waste from the historic (pre-1959) disposal and burning of municipal wastes (garbage) and/or commercial operations, including non-hazardous waste and hazardous materials. Studies conducted by City of Chico consultants indicated that the HRBD contained waste containing lead exceeding hazardous waste levels and significant other hazardous and non-hazardous waste constituents that pose a threat to human health and the environment, including waters of the state. The studies delineated the extent of contamination and confirmed the need for further remediation on several properties. The HRBD site has a long history of discharger and Water Board staff involvement dating back to 1987, including issuance of Cleanup and Abatement Orders (CAOs) in 1988 and 2003. (For additional site history refer to the November 2005 staff report included in Attachment A)

Two Administrative Civil Liability (ACL) Complaints were issued to Virginia L. Drake, Trustee Drake Revocable Trust (Drake Trust) in September 2005 for failure to remediate (excavate and dispose) hazardous burn dump wastes discharged or placed on two parcels for which the Drake Trust holds a 50 percent interest and which are known as HRBD Area 7 and Area 8. The complaints were issued by the Executive Officer to the Drake Trust (\$100,000 for Area 7 and \$125,000 for Area 8) for violations of the CAOs and other orders issued by the Executive Officer and were issued solely to the Drake Trust based upon the following factors:

- The Drake Trust informed Water Board staff that it was assuming lead status for cleanup of Areas 7 and 8 in 2004.
- The Drake Trust notified other property owners, James E. Simmons (25 percent interest) and Darwin H. and Nina R. Simmons, Simmons Family Trust (25 percent interest)(hereafter Simmons) of its intent to manage cleanup activities in Summer 2005.
- The Simmons offered financial support for cleanup of Areas 7 and 8.
- The City of Chico (City), named in the 1988 and 2003 CAOs as a responsible party due to placement of wastes on Area 8 only resulting from a City road extension project, also offered the Drake Trust capacity in the Chico Redevelopment Agency disposal cell for placement of Area 7 and 8 wastes. (Value estimated at \$560,000)

- The City also offered \$150,000 to excavate and transport Area 8 wastes to the Chico RDA disposal cell.
- Baldwin Contracting Company, Inc. (the contractor that transported the excess road construction wastes to Area 8) offered the Drake Trust \$75,000 to transport wastes to the RDA or adjacent privately owned disposal cell.
- Drake Trust initiated and continued to pursue actions to secure necessary federal, state and local agency permits for 2005 cleanup.
- Drake Trust notified Water Board staff of its intent not to pursue cleanup in 2005 on 15 April 2005, a point in time that precluded other responsible parties (Simmons and the City) from obtaining necessary permits for cleanup in 2005.

The Drake Trust requested a hearing regarding the matter. At a public hearing on 28 November 2005 the Water Board considered draft ACL Orders for Area 7 and Area 8 in the same amounts as the ACL complaints and heard testimony from staff, representatives for the Drake Trust, the Simmons and the City. The Water Board declined to adopt the Orders as proposed and continued the hearing for further consideration by the Executive Officer. The Water Board also encouraged the Drake Trust, the Simmons and the City to work together to develop a plan to achieve cleanup of Area 7 and Area 8 in 2006.

The Water Board Acting Executive Officer, on 10 February 2006, issued two revised ACL complaints for violation of the CAOs and other orders. A revised ACL complaint for Area 7 was issued to the Drake Trust and the Simmons in the same amount as the original complaint (\$100,000). A revised ACL complaint for Area 8 was issued to the Drake Trust, the Simmons, and the City of Chico in the same amount as the original complaint (\$125,000). Based on comments and evidence presented at the November 2005 hearing and the administrative record, the Acting Executive Officer concluded that although the Drake Trust appeared to take responsibility for the cleanup, all the parties have responsibility for the failure of the cleanup to occur in 2005 and to comply with orders. Choosing to focus on one party is contrary to State Board orders that discourage the Regional Water Boards from apportioning liability.

No payment or “waiver of hearing” was received from any party for either complaint. The proposed ACL Orders for Area 7 and Area 8 would assess liability, without apportionment, consistent with State Board orders, against each of the parties listed in the respective orders.

## **ISSUE**

**Should the Water Board adopt the ACL Orders for Area 7 and Area 8 against the dischargers named in each order?**

## **HRBD CLEANUP STATUS**

### **Completed HRBD Cleanups**

Approximately 412,000 cubic yards of waste from 13 separate parcels have been excavated and

transported into two disposal cells at the HRBD site. The Thomas and Mary Fogarty Revocable Trust removed 180,000 cubic yards of waste from six parcels and placed the wastes in a privately owned and maintained disposal cell on the North side of Humboldt Road (Delineated as Fogarty Cell in Figure 1). The City, through its Redevelopment Agency (Chico RDA), remediated approximately 230,000 cubic yards of hazardous waste from an additional six parcels and placed the wastes in a disposal cell also on the North side of Humboldt Road. (Delineated as Chico RDA cell in Figure 1) New Urban builders removed 1,800 cubic yards of non-hazardous waste and transported it to Ostrom Road Landfill. Final Cleanup Certificates have been issued by the Executive Officer for 12 of the parcels and a "No Further Action Letter" issued for the other parcel remediated in 2005. The Fogarty cell is complete and cannot be re-opened to accept additional waste. The Chico RDA cell is complete with respect to final grade and placement of an impermeable cover and likewise cannot be economically or feasibly re-opened to accept additional waste. (Note: Figure 1 shows the relationship of Area 7 and Area 8 waste to the completed disposal cells)

### **Area 7 and Area 8 Cleanup**

No cleanup activities have occurred on either area to-date. The 500 cubic yards of waste in Area 7 and the 7,500 cubic yards of waste in Area 8 must be excavated and transported to an acceptable disposal site (the most likely site is 300 miles south) or placed in a properly constructed disposal cell on either parcel to comply with Water Code and Health and Safety Code requirements and requirements specified in existing Water Board orders.

### **RECENT COLLABORATIVE EFFORTS**

Water Board staff, in response to Water Board member comments at the November hearing, arranged two meetings between the Drake Trust, the Simmons, the City, and Baldwin Contracting Company, Inc. The meetings were scheduled as an attempt to facilitate improved cooperation amongst the responsible parties. The first meeting held at the Water Board Rancho Cordova Office on 14 December 2005 included all parties except the City of Chico, who's City Attorney was ill and unable to attend. An attempt was made prior to the start of the meeting to contact and include the attorney that represented the City at the hearing, but staff was told that he would not attend. Staff stated at the meeting its position that all parties should cooperate in remediation of wastes in Areas 7 and 8 this coming construction season, that efforts to secure necessary permits and develop a viable cleanup plan should start immediately, and that the two sites must be remediated by the end of the summer of 2006. A commitment was made by the property owners (Drake Trust and Simmons) to initiate efforts to secure permits necessary for cleanup in 2006. Baldwin Contracting restated that they are still considering some level of financial assistance with respect to actual cleanup activities. The City's position was not extensively discussed due to their absence.

A second meeting was held in the City of Chico's council chambers on 4 January 2006. All parties and their respective counsels were present. Water Board staff explained that the Executive Officer is considering revising the ACL complaints to name other parties. The City responded that they are not responsible for waste placement on Area 7 or Area 8. The City further stated that they intend to pursue administrative remedy to clarify this position by

requesting that the State Water Resources Control Board review their petition regarding the 2003 Cleanup and Abatement Order (CAO). Water Board staff counsel explained that the City is considered a responsible party as the City caused or permitted the waste to be placed on Area 8 and is subject to cleanup and abatement and other orders pursuant to Water Code section 13267 and 13304. Water Board counsel agreed to prepare and distribute a memo summarizing the application of Section 13304 to the facts of this matter. (Attachment B) The property owners (Drake Trust and Simmons) indicated that they are working together to seek and pay for consulting services in order to plan for remediation activities and to commence the process to obtain necessary permits for 2006 cleanup. Because of the disagreement voiced at the second meeting regarding responsibility and the unlikelihood of a change in the City's position, no further meetings were scheduled and the ACL complaints were issued.

Water Board staff at the request of the attorney for Drake Trust will participate in a meeting, in Sacramento, with other state and federal permitting agencies and representatives of the property owners to request that all permitting agencies provide timely project review and permit issuance to allow cleanup this Summer. Based upon the current record of the Water Board, it appears that none of the named parties have submitted applications for the local, state and federal permits that must be obtained in order for cleanup to occur in 2006.

#### **DISCHARGER CORRESPONDENCE SINCE NOVEMBER HEARING**

The January 2006 Executive Officer's Report described the status of the progress with respect to cleanup of Areas 7 and 8. In response to drafts of that report, K. Greg Peterson, attorney for the Drake Trust, David R. Frank, Chico City Attorney, and Michael V. Brady, attorney for Baldwin Contracting, submitted letters to the Water Board commenting on the matter. (These letters are included in the agenda package as Attachments C through F) In summary, the correspondence expresses the positions of the parties, the ongoing disagreement between the City, Drake Trust, and Baldwin Contracting regarding liability for the City's road extension project wastes discharged on Area 8, and describes previous offers by the parties to assist in the failed cleanup effort.

#### **DISCHARGER VIOLATIONS, CONSIDERATION OF ACL FACTORS AND ECONOMIC BENEFIT**

A detailed description of the discharger violations and ACL factors and economic benefit is included in the November HRBD staff report (Attachment A) beginning on page 9 and concluding on page 17 and in a November staff report attachment. The nature of the violations has not changed since preparation of the November 2005 staff report. A detailed description of the violations and factors is also included in the draft ACL Orders for consideration at this hearing. The number of days that the dischargers are in violation of CAO and other order requirements has increased with the increased passage of time (approximately 80 additional days since November 2005). The maximum possible penalty was increased reflecting this additional time period and the discharger's failure to submit technical documents and progress reports. Similarly the economic benefit has increased with the increased passage of time. However, the discharger's ability to actually conduct remediation is restricted as construction activities

involving the excavation and transport of wastes are allowed only when the nearby Marsh Jr. High School is not in session (June through mid-August). The reference to and use of the term discharger has changed to not only include the Drake Trust but the City and the Simmons as well. The liability for failure to pay staff reimbursement costs has not increased as these costs have and are being paid by the Drake Trust and the Simmons.

## **REVISED ACL COMPLAINTS & DRAFT ACL ORDERS**

### **Revised ACL Complaints**

The Simmons were included in the revised ACL complaint and ACL Orders as they each own a 25 percent interest in the parcels that comprise Area 7 and Area 8 and they are also in violation of the orders. They were issued the orders and advised by staff of the steps necessary to achieve cleanup by August 2005, but they did not, independently, take the steps necessary to achieve such cleanup.

The City maintains that it is not responsible for the discharge of wastes in Area 7 and Area 8. With regards to Area 7, Water Board staff agrees with the City that it is not responsible for that waste. Staff can find no link that the City was connected to activities that resulted in wastes being present on Area 7. Wastes contained on Area 7 were caused by discharge activities, by unknown private parties, operating a “battery breaker” recycle business on a portion of the parcel in the 1940s, 1950s and early 1960s. The City was not named in the ACL complaint or draft Order for Area 7.

With regards to Area 8, Water Board staff disagrees with the City with respect to its liability. The City owned the waste discharged at Area 8, which consisted of excavation materials from the Bruce Road Extension project conducted by Baldwin Contracting Company under contract to the City. A memorandum from the Office of Chief Counsel summarizes the liability issue as follows: (see Attachment B, page 1 and 2)

*“The City is a responsible party pursuant to Water Code section 13304 because it “caused and/or permitted” waste to be discharged to Area 8 when it hired contractors to excavate material on a City-owned right-of-way for a road construction project and those contractors deposited the material at Area 8. The City is responsible pursuant to Water Code section 13267 because it “discharged waste” within the Region. Drake Trust and Simmons are responsible parties pursuant to Water Code sections 13267 and 13304 because, among other reasons, they own the land on which the discharge of waste has occurred. Of the parties named in the cleanup and abatement and other orders, only the City contests those orders.”*

The City challenged the 2003 CAO by filing a petition with the State Board requesting review. That petition was dismissed without prejudice. The City did not file a petition with the State Board contesting the Water Code section 13267 orders. The time to file such petitions has passed and the City may not challenge those orders by contesting the ACL orders. The City has failed to comply with the CAOs and 13267 orders. The City’s position is contrary from its

determination in 1997 that it was a responsible party for Area 8 when it applied as a responsible party to the Site Designation Committee.

Baldwin Contracting Company, Inc. was not named in either ACL complaint and in the draft ACL Orders as the company was not named in the CAOs or other orders issued by the Executive Officer. In general, the Water Boards do not typically name contractors in cleanup orders because owners are responsible for the actions taken with respect to the owner's land.

### **Draft ACL Orders**

Considering the above discussion of discharger violations and ACL factors, the draft ACL Order for Area 7 proposes the \$100,000 liability as the specified in the revised ACL complaint and as considered at the November 2005 hearing. Similarly, the draft ACL order for Area 8 proposes the \$125,000 liability as specified in the revised ACL complaint and as considered in November 2005.

**Note: The named discharger's individual or collective failure to implement and complete required cleanup activities this coming summer (2006) construction season would be cause for issuance of another ACL complaint.**

### **SUMMARY**

Approximately 412,000 cubic yards of wastes have been effectively remediated at the 157-acre HRBD site. Approximately 8,000 cubic yards of waste containing hazardous levels of lead remain on two parcels designated as Area 7 and Area 8. The failure to complete cleanup of Area 7 and Area 8 prior in 2005 has serious consequences. Area 7 and Area 8 have remained in their current state for an additional six months and will continue to pose a threat to human health and the environment for at least another six months (if cleanup efforts are completed in summer 2006). Waste disposal options are now limited to more costly off-site disposal (closest acceptable site is 300 miles away) or on-site disposal on one of the affected parcels by creation of a disposal cell that complies with Water Board requirements. There continues to be disagreement among the various responsible parties and it is unclear whether the wastes on Area 7 and Area 8 will be remediated in 2006. The draft ACL Orders proposed for issuance to the Drake Trust in November 2005 have been replaced with a draft ACL Order for Area 7 naming the Drake Trust, James Simmons and the Simmons Trust and a draft ACL Order for Area 8 naming the Drake Trust, James Simmons, the Simmons Trust and the City of Chico. The naming of additional dischargers in the draft ACL Orders will hopefully convince the named parties of their respective responsibilities for wastes in HRBD Area 7 and Area 8 and of the Water Boards expressed desire for these wastes to be remediated in 2006.

### **RECOMMENDATION**

Staff recommends adoption of the draft ACL Order for both Area 7 and Area 8.

JCP: sae

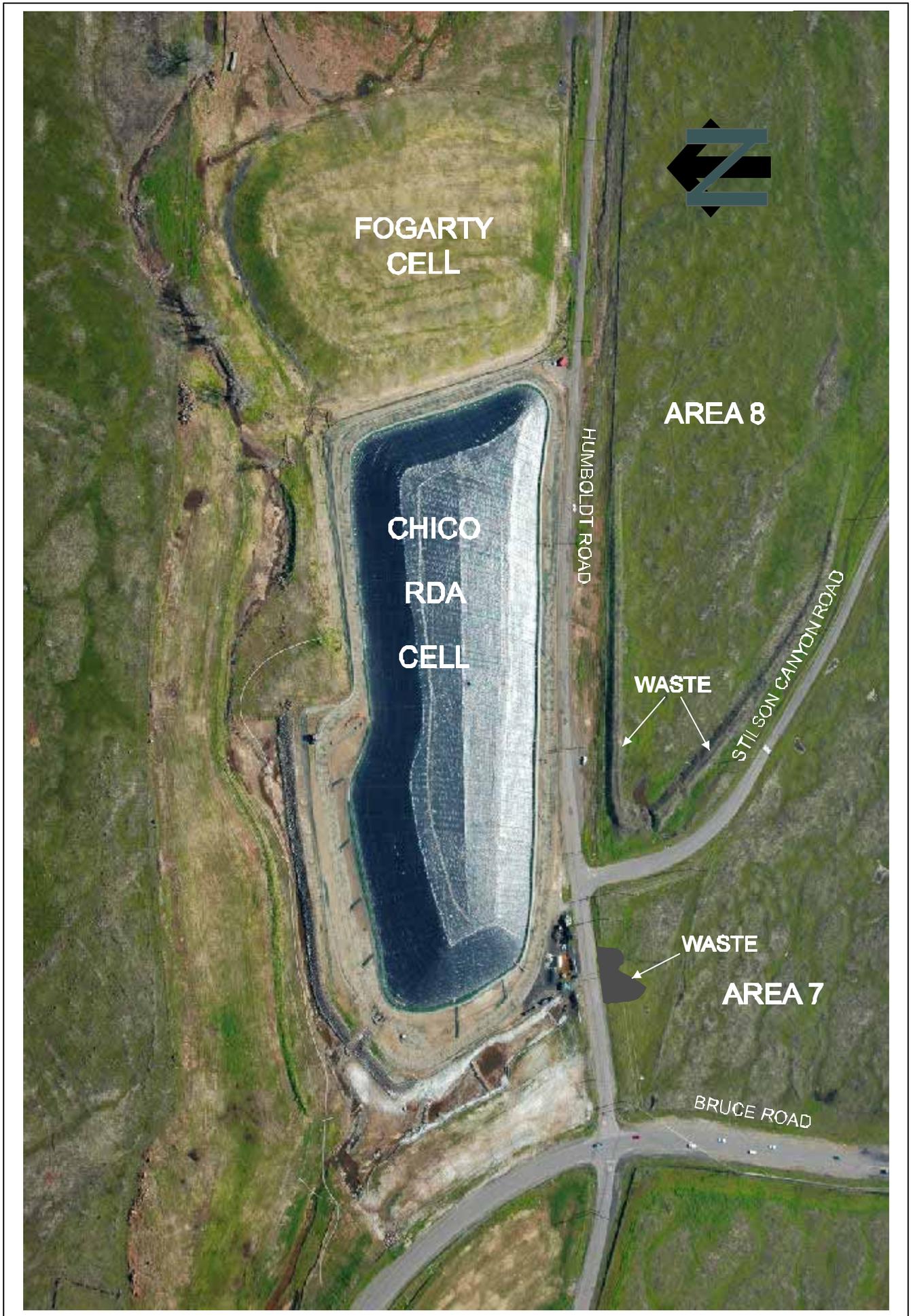


FIGURE 1