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VIA E-MAIL

January 9, 2006

James C. Pedri, P.E.
Regional Water Quality Control Board
Central Valley Region
415 Knollcrest Drive, Suite 100
Redding, CA 96002

Re: Response to Draft Status Report for Regional Board re Humboldt Road Burn Dump Areas 7 and 8

Dear Mr. Pedri:

This letter responds to your email of January 6, 2006, requesting comments on the draft status report included in that email, and also replies to the response to the draft status report provided by Greg Peterson on behalf of Ginger Drake on January 8, 2006.

As to the draft status report, I suggest that the distinction drawn between Areas 7 and 8, as evidenced by the issuance of separate ACL's by the board's staff, should be clearly continued. There has never been any credible claim of any link of any kind between the contamination of Area 7 and any act or activity done by the city or any person or entity purportedly acting on its behalf.

As to Area 8, the sixth sentence of your second paragraph states: "Since the City of Chico and Baldwin Construction Company caused the waste to be discharged, they are subject to section 13304." This statement is factually incorrect.

The City of Chico hired Baldwin Contracting Company to construct the extension of Bruce Road northerly from its terminus at Humboldt Road to State Highway Route 32. Under the contract, Baldwin owned all of the excess soil resulting from that project, and Baldwin's ultimate use and disposition of that excess soil was solely for Baldwin to determine. It has been reported that the soil was ultimately used for the construction of a stock pond parcel on Area 8, pursuant to an agreement between Baldwin and Mr. Ed Simmons, acting on behalf of the Drake-Simmons partnership that owned Area 8.

The city had no agreement with either Mr. Simmons or Mr. Drake as to placement of any of the excess soil on Area 8, as the city had no ownership interest in that soil. The city did not contract with Baldwin Contracting Company to transport any of the excess soil from the right-of-way for the road project to Area 8, again because the city had no interest in the excess soil.

Rather, Baldwin's soil was reportedly transported to Area 8 pursuant to the above-referenced agreement between Mr. Simmons and Baldwin. The city had no interest in the soil and hence could not benefit from any agreement between Baldwin and Mr. Simmons. The city issued no permit for the construction of the stock pond on Area 8, nor did the city in any way inspect or improve that work.

In short, at no time was Baldwin acting for or on behalf of the city, and at no time did the city attempt to control or direct the manner in which Baldwin disposed of its soil. In fact, the city simply had no role in the contamination of Area 8 by Baldwin and Mr. Simmons using what was then Baldwin's soil.

Hence, for purposes of determining whether to attempt to issue and enforce an ACL against the city, a critical fact needs to be determined, which is the manner in which the city can be lawfully designated as a discharger under Water Code section 13304. As you know, that section authorizes the issuance of a cleanup and abatement order against any person "who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance . . . ." As the city has consistently advised all concerned for many years, there are no facts currently available to the city that brings the city within the reach of this section.

In addition, the city has repeatedly extended invitations to the Regional Board's staff and, in particular, to Mrs. Drake and her attorney, to provide any evidence of such facts. Again, no such evidence has been produced to date. For that reason, the city is unable to concur in the proposed expansion of the reach of the ACL to reach the city with respect to Area 8, because that could inadvertently lead the Regional Board to conclude that the city is a discharger.

As to Mr. Peterson's response to your draft status report, it is enough to note that in September of 2004, former city manager Tom Lando provided a written offer of $150,000 toward the cleanup costs for Area 8 by letter to Mrs. Drake, explaining that while the city was not legally liable for the cleanup of Area 8, the city wanted to help resolve the matter and ensure that the site was cleaned up. (The offer was made while an offer of $75,000 by Baldwin was also on the table.) The city has never received the courtesy of a response to its offer and presumes that it has been rejected. (As you note, whether the offer can revived is currently unknown.)

Coupled with the city's offer was the invitation extended by the Chico RDA in December 2004 by letter to Mrs. Drake's attorney to allow Mrs. Drake to deposit all of the waste on both Areas 7 and 8 across Humboldt Road on the RDA's site (i.e., the old city landfill) at no cost to her, other than the cost of acquiring whatever permits are required, the cost of transporting the soils, and the cost of her share of the annual O&M costs for the RDA site, determined by her

share of the total volume of material on the RDA site. That offer was not met with even a counteroffer but was instead flatly reject.

Then, at the meeting of January 4, 2006 in Chico, Mrs. Drake advised all present that she will not agree to permanent disposal in place of the soil, even though it can be safely encapsulated below a passive surface use, such as a parking lot or a drainage detention pond, either of which could serve the residential development she envisions for the remainder of the adjoining Drake-Simmons lands.

In short, Mrs. Drake, for reasons unknown to the city, has simply repeatedly refused to cooperate in proposals for remediating, or assisting with the remediation of, Areas 7 and 8. The remediation of the city's old landfill is nearly complete, and all of the waste on that site is now compacted, configured and capped pursuant to a remedial action plan approved by Regional Board staff. That the soils from Areas 7 and 8 are not included within it reflects a unilateral decision by Mrs. Drake not to participate in the RDA's project, even though that project provided a solution for her last year that was literally a stone's throw away from Areas 7 and 8 and far cheaper than the other option(s) for which she now belatedly seeks financial contribution from others.

Thank you for the opportunity to comment on the draft status report. I trust the draft report can be readily modified to reflect the above realities.

Very truly yours,

David R. Frank
City Attorney

DRF:sb