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9 **BEFORE THE CALIFORNIA DEPARTMENT**  
10 **OF RESOURCES RECYCLING AND RECOVERY**

11 In the Matter of:

12 PALA BAND OF MISSION INDIANS,

13 **Petitioner,**

14  
15 SAN DIEGO COUNTY DEPARTMENT OF  
16 ENVIRONMENTAL HEALTH, SOLID  
17 WASTE LOCAL ENFORCEMENT  
AGENCY

18 **Respondent.**  
19

) APPEAL OF SAN DIEGO COUNTY LOCAL  
) ENFORCEMENT AGENCY HEARING  
) PANEL DECISION ON GREGORY CANYON  
) LANDFILL ISSUED SEPTEMBER 26, 2014

) **Case No. LEA-2014-2\_\_**

) **LOCAL ENFORCEMENT AGENCY'S**  
) **REBUTTAL ARGUMENT**

) Public Resources Code §§ 44307

20 **I. INTRODUCTION**

21 Petitioner's opening brief predicts disasters if CalRecycle does not negate the Public  
22 Resources Code statute of limitations in this case. We are told that applying that statute could  
23 "forever insulate an LEA from having to take a required action...." (Petitioner's Opening Brief  
24 at 11:14-16.) The state law scheme for regulating construction and demolition wastes would be  
25 undermined, rendering all CalRecycle CDI regulations "irrelevant." (Petitioner's Opening Brief  
26 at 3:23-4:1.) Violators would receive "get out of jail free" cards. (Petitioner's Opening Brief at  
27 12:3-5.) Moreover, all that would be needed to trigger these consequences would be the passage  
28 of 30 days' time after an inspection report was issued (Petitioner's Opening Brief at 10:26-

1 11:2.)<sup>1</sup>

2 Those predictions are nonsense. Petitioner's untimely petition can be set aside because it  
3 is untimely, without affecting the LEA's duties, or CalRecycle's oversight authority or direct  
4 enforcement authority. The LEA has not ignored the law, it has made a considered decision  
5 about what the law requires. If CalRecycle believes the LEA has misjudged the facts or  
6 misinterpreted the law, it can dismiss the petitions as untimely and address this situation directly  
7 with the LEA.

8 The only issue that CalRecycle should consider now is the issue the Hearing Panel ruled  
9 on, which is also the only issue on which CalRecycle directed briefing: whether the statute of  
10 limitation in section 44310(a)(1)(B) of the Public Resources Code bars these petitions.<sup>2</sup> That  
11 determination depends on whether Petitioner "discovered or reasonably should have discovered"  
12 two facts: that this debris was where it was, and that the LEA had not taken enforcement action.

## 13 **II. FACTS**

14 Petitioner's repeated failures to even assert that the Barrier Debris was not visible from  
15 SR 76 is telling. Instead, Petitioner's Opening Brief states incorrectly that "the only 'evidence'"  
16 that the debris was visible was Ms. Merlos' testimony (Petitioner's Opening Brief at 11:10-11).  
17 But LEA Supervisor Merlos' sworn declaration and sworn testimony (which were actual  
18 evidence) were corroborated by the sworn declaration and testimony of LEA inspector  
19 Henderson (which are also evidence). (LEA's Opening Argument, at 8:19-23.) There was no  
20 contrary argument by counsel for Petitioner at the panel hearing, and no contrary argument and  
21 no proffer of contrary evidence in Petitioner's Opening Brief. It is therefore undisputed that this  
22 debris was visible from SR 76 from 2009-2010 forward.

23 The passage of four years' time without LEA enforcement also gave Petitioner sufficient  
24 opportunity to discover that the LEA had not taken enforcement action.

## 25 **III. THE PUBLIC RESOURCES CODE**

26 Section 44310(a)(1)(B) uses clear language. It does not set out a requirement "that a

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27 <sup>1</sup> The LEA does not assert that such a simplistic trigger exists. LEA's Opening Argument at  
28 8:13-18.

<sup>2</sup> All further section references, unless otherwise designated, are to this Code.

1 decision is made public” or that a “public action” by an LEA take place before the statute of  
2 limitation can begin to run. (See, Petitioner’s Opening Brief, at 11:14-20.) An objective trigger  
3 of that kind could easily have been specified by the Legislature; in fact, in subparagraph (A) of  
4 the same subsection, the Legislature applied a formal “notice” trigger (and a shorter statute of  
5 limitation) to challenges by persons affected by an LEA action. For this kind of petition,  
6 however, the stated trigger is whether facts were “discovered or reasonably should have  
7 discovered.”

8 Section 44307 also sets a legal standard for these petitions: Petitioner must show that the  
9 LEA failed to act as required by law. The LEA’s considered factual determination that the  
10 Barrier Debris was in use was a predicate to its decision not to take enforcement action.  
11 Petitioners argue vigorously that the LEA’s determination concerning “use” was incorrect. But  
12 a factual determination is not contrary to law merely because it can be disputed. A factual  
13 determination is contrary to law only if it is arbitrary, capricious, or lacks supporting evidence in  
14 the record. Section 44307 creates a broad right to petition, but it does not entitle petitioners to  
15 force their preferred version of disputed facts onto the LEA or CalRecycle.

16 Petitioner also asserts that they had no obligation to request a hearing at all, but could  
17 have gone directly to court, because section 44307 is in Chapter 4 (of Part 5, of Division 30) of  
18 the Public Resources Code, which is titled “Denial, Suspension or Revocation of Permits.”  
19 Petitioner asserts these procedures and limitations therefore only apply to hearings related to  
20 permits. (Petitioner’s Opening Brief, at 17:6-22.) However, the Chapter 4 procedures are also  
21 cross-referenced for hearings related to corrective action orders (Public Resources Code sec.  
22 45002(b)) and notices to comply (section 45003(e)). Section 45030 also provides that any party  
23 to a hearing under Chapter 4 procedures can appeal to CalRecycle, and section 45032(b)  
24 provides that enforcement orders and administrative penalties can be appealed. If hearings  
25 related to all of these kinds of enforcement actions are subject to Chapter 4, presumably a  
26 challenge alleging an LEA failure to enforce would be subject to Chapter 4 as well.

27 The LEA also notes that former section 45033, which disclaimed any administrative  
28 exhaustion requirement prior to a court challenge on these matters, was repealed in 2008 and

1 replaced with section 45040, which expressly conditions judicial filings on first obtaining a  
2 decision or order from CalRecycle. The Legislature has provided that this administrative  
3 remedy must be exhausted. Petitioner’s assertion that Chapter 4 does not apply here appears to  
4 be based solely on a chapter title, not on statutory text. Petitioner’s assertion is also contradicted  
5 by the other statutory provisions and history of amendments discussed above.

6 There is no need for CalRecycle to speak to these issues in this case, because a petition  
7 has in fact been filed. The issue is more properly an issue for a court when a timely petition was  
8 not filed. However, a reviewing court could be interested in CalRecycle’s interpretation of the  
9 scope of the petition opportunity (and by implication the exhaustion of remedies requirement)  
10 created by sections 44307 and 45040.

#### 11 IV. CASE LAW

12 Three cases cited by Petitioner in its Statement of Issues (*California Trout v. State Water*  
13 *Resources Control Board* 207 Cal.App.3d 585 (1989), *Santa Monica Municipal Employees*  
14 *Association v. City of Santa Monica* 191 Cal.App.3d 1538 (1987), and *Appalachian Voices v.*  
15 *McCarthy* 989 F. Supp.2d 30 (2013)) were addressed in the LEA’s Opening Argument, at  
16 Section V, at pp. 10-14. The additional cases discussed in Petitioner’s Opening Brief do not  
17 compel and should not persuade CalRecycle to set aside the “special” statute of limitations at  
18 issue here.

19 *Sustainability of Parks, Recycling and Wildlife Legal Defense Fund v. County of Solano*  
20 *Department of Resource Management* (2008) 167 Cal.App.4<sup>th</sup> 1350 was not a statute of  
21 limitations case at all, but concerned rules regarding indispensable parties. The decision in the  
22 case noted the importance of applying the plain language in statutes:

23 The primary rule of statutory interpretation is that the words are to be given their  
24 plain meaning. “In the first step of the interpretive process we look to the words of  
25 the statute themselves. [Citations.] The Legislature’s chosen language is the most  
26 reliable indicator of its intent because ‘it is the language of the statute itself that  
27 has successfully braved the legislative gauntlet.’” [Citation.] We give the words  
28 of the statute ‘a plain and commonsense meaning’ unless the statute specifically  
defines the words to give them a special meaning.” (*Id.* at 1361, citing to  
*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134  
Cal.App.4th 1076, 1082–1083.)

The plain meaning of the words used by the Legislature in section 44310 a)(1)(B) should control

1 here as well: Petitioners are required to file within 30 days after they discovered or reasonably  
2 should have discovered the facts on which their petition is based. Nor did this case state that a  
3 final agency action was necessary to trigger a statute of limitation. The case instead only said  
4 that if a challenge is to an action on a permit, the petitioner must be able to allege the agency did  
5 not process that application in the manner required by law. (*Id.* at 1362.)

6 *Aryeh v. Canon Business Solutions* (2013) 55 Cal.4<sup>th</sup> 1185 (“*Aryeh*”) addressed the four-  
7 year statute of limitation in the Unfair Competition Law (“UCL”), which refers to “accrual” of  
8 the cause of action. Based on the legislative history of the UCL, the court determined that  
9 common law and equitable principles of accrual applied. Applying that law and those  
10 principles, the court determined that a UCL deceptive practices claim should accrue when a  
11 reasonable person would have discovered the factual basis for a claim. (*Id.* at 1195.) Based on  
12 this reasonable person discovery test, absent an exception, a claim based on the deceptive  
13 practices of the defendant would have been time barred. (*Id.* at 1197.) But the plaintiff alleged  
14 recurring wrongful acts: improper charges on recent invoices. Based on that, the court  
15 determined that the “continuous accrual” prong of the “continuing wrong” equitable exception  
16 applied. The court’s analysis of “continuous accrual” is lengthy, but its introductory summary  
17 contains the key points:

18 ...under the theory of continuous accrual, a series of wrongs or injuries may be viewed as  
19 each triggering its own limitations period, such that a suit for relief may be partially time-  
20 barred as to older events but timely as to those within the applicable limitations period.  
(*Id.* at 1992, citing *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th  
809.)

21 *Aryeh* is not dispositive of the current dispute for several reasons. First, *Aryeh* involved a  
22 commercial dispute between private actors, one of whom had (allegedly) submitted improper  
23 invoices for years. The equitable exception to “should have discovered” accrual was applied  
24 there to prevent a potential inequity. There is no similar equitable component to this dispute:  
25 Petitioner comes before CalRecycle as a private attorney general, not as an individual or entity  
26 who has been defrauded.

27 Second, the *Aryeh* court provided specific reasons for applying common law and  
28 equitable principles to the UCL statute of limitations. These included a history of confusion

1 over whether differing statutes of limitation for violations of other laws (which could form the  
2 basis for a UCL claim) would be subject to the statutes of limitation that applied to each other  
3 law. In addition, the court noted that the Legislature had used the most general legal term  
4 possible to describe how the UCL statute of limitations would trigger: “accrual.” The use of  
5 that term implied reliance on the common law and equitable principles to define “accrual.”  
6 Petitioner offers no reasons, based on legislative history of other specifics, that an overlay of  
7 equitable exceptions should also modify the much more specific language of section  
8 44310(a)(1)(B).

9 Third, the current dispute does not involve a “continuing or recurring obligation.” (*Aryeh*  
10 at 1999.). The LEA determined in 2010 that the Barrier Debris was in use, and decided then not  
11 to take enforcement action. Petitioner could have challenged that determination and resulting  
12 inaction with a timely petition, and CalRecycle can still intervene at any time. But the LEA has  
13 no continuing or periodically recurring obligation to revisit its 2010 determinations.

14 Fourth, because CalRecycle can intervene at any time, this case does not involve a risk of  
15 immunizing a recurring wrongful act or failure to act.

16 Finally, *Aryeh* did not set aside the statute of limitations, but only defined when “accrual”  
17 occurred. The court then stated that the four year statute would apply to limit the time period for  
18 which the plaintiff could collect damages. In the present case, the statute of limitation itself  
19 states its accrual rule, using a “should have discovered” trigger. Petitioner cannot rely on *Aryeh*  
20 as support for the more radical rule they propose in this case: that the statute of limitation should  
21 never trigger when an agency has decided that enforcement action is not warranted.

22 *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 is not similar  
23 to the present case because that case involved both a general statute of limitations (Code Civ.  
24 Proc., § 338, subd. (a)), and a recurring wrong--the periodic collection of taxes. This case  
25 involves a special statute of limitations, and there is also no similar recurring wrong.

26 Finally, *City of Fontana v. Atkinson* (1963) 212 Cal.App.2d 499 is relevant, but it applies  
27 to Gregory Canyon, Ltd (“GCL”) not the LEA. The LEA agrees that GCL does not obtain “a  
28 vested right to violate the law” based on the LEA’s decision not to take enforcement action

1 against the Barrier Debris. If the presence of the Barrier Debris on this site is illegal disposal of  
2 a solid waste, enforcement action can be taken, by the LEA or CalRecycle against GCL.

### 3 **V. OTHER ISSUES**

#### 4 **1. Remand or Further Briefing?**

5 If CalRecycle finds that the statute of limitation does not bar these petitions, CalRecycle  
6 could either remand the matter to the hearing panel, or address other aspects of the dispute itself.  
7 Petitioner argues against remand, asserting that the factual record was adequately developed  
8 below. Petitioner also notes that the hearing panel would likely rule against Petitioner on the  
9 factual question of whether the Barrier Debris was in use. Finally, Petitioner argues that hearing  
10 panels lack the expertise to make the decisions that have been put into their hands by the Public  
11 Resources Code.

12 The LEA offered extensive evidence on the “use” issue below, much of which Petitioner  
13 ignores or denigrates with quotation marks in its opening brief. It is therefore a bit unclear what  
14 Petitioner is acknowledging as the records. Moreover, Petitioner has objected to parts of the  
15 declarations and testimony of LEA staff. There is no clear record of rulings on those objections,  
16 because the transcript of the hearing below is inaudible in key places.

17 If those declarations and testimony of LEA staff are accepted into evidence—but not  
18 otherwise--the LEA agrees that the factual record below on the issue of “use” has been  
19 adequately developed.

20 Finally, if CalRecycle determines that the statute of limitations does not bar these  
21 petitions, and does not remand the dispute to the hearing panel, the LEA should be afforded an  
22 opportunity to file an additional Response. Unlike Petitioner, the LEA has confined its briefing  
23 to the statute of limitations issue, as directed by CalRecycle.

#### 24 **2. Use of Debris in 2008**

25 Petitioner asserts that the hearing panel decision is “non-sensical” because it refers to  
26 debris being used as a barrier in 2008, while the pipeline project debris was not generated until  
27 2009. (Petitioner’s Opening Brief at 10:3-6.) However, the records show that other concrete  
28 debris was used by GCL for barrier purpose as early as 2008. (Transcript, testimony of

1 Henderson, at 26:10-23.) GCL's use of available and suitable concrete debris in this manner  
2 was an established practice before the pipeline project debris was generated. The vehicle barrier  
3 was not a sham to disguise disposal.

4 **VI. CONCLUSION**

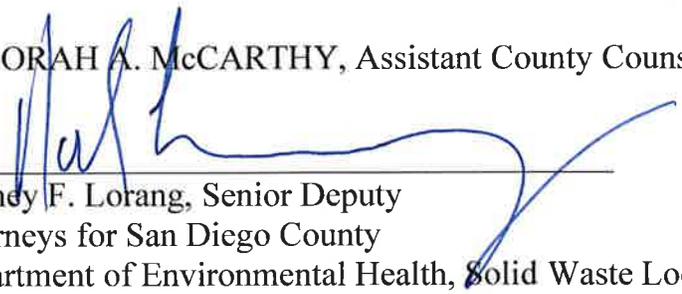
5 Petitioner's claim is time barred. It was readily apparent in 2010 that the LEA had not  
6 ordered the removal of the Barrier Debris from this site. The Public Resources Code allowed  
7 Petitioner 30 days from when they knew or should have known that fact to file their petition.

8 CalRecycle should apply the Public Resources Code as written, and find that these  
9 petitions were time barred. If CalRecycle has concerns about the LEA's decisions concerning  
10 the Barrier Debris, it can and should take those concerns up directly with the LEA.

11  
12 Dated: November 20, 2014

13 Respectfully submitted,

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15  
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