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9 PALA BAND OF MISSION INDIANS

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

12 PALA BAND OF MISSION INDIANS,

13 Petitioner/Appellant,

14 v.

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

19 Respondent.

**STATEMENT OF ISSUES OF THE  
PALA BAND OF MISSION INDIANS  
TO SUPPORT ITS APPEAL OF THE  
DECISION BY THE SAN DIEGO  
COUNTY LEA HEARING PANEL  
ISSUED SEPTEMBER 26, 2014  
(PUBLIC RESOURCES CODE §  
45030)**

20 **I. INTRODUCTION**

21 This appeal concerns two Requests for Hearing filed by the Pala Band of Mission  
22 Indians ("Pala Band") submitted to the San Diego County Department of Environmental  
23 Health, acting as the local enforcement agency ("County" or "LEA"). In both of those  
24 Requests for Hearing, the Pala Band challenged the LEA's decision to not require that  
25 Gregory Canyon Ltd., LLC ("GCL") remove construction debris disposed in two areas on  
26 its land adjacent to but not within the area permitted for the proposed Gregory Canyon  
27 Landfill. That construction debris was generated during the installation of a natural gas  
28 pipeline in 2009-2010 to service the Orange Grove Power Plant ("OGPP") by the owners of  
the OGPP. The Pala Band's two Requests for Hearing were consolidated into a single  
hearing before the San Diego County Solid Waste Hearing Panel ("Panel") held on

1 September 22, 2014. The Panel's decision was issued on September 26, 2014, and is  
2 attached as Exhibit 1.

3 The Pala Band's appeal raises substantial legal issues that are based upon a set of  
4 generally undisputed facts that can be gleaned from the papers submitted in the matter. The  
5 first substantial issue concerns the Panel's conclusion that the Pala Band's Requests for  
6 Hearing were barred as untimely under Public Resources Code § 44310 because the LEA's  
7 inspection reports had mentioned the construction debris and it was visible for State Route  
8 76 ("SR 76"). But, the fact is that Pala Band timely filed Requests for Hearings after the  
9 LEA sent a letter to the Pala Band refusing to take action to require GCL to remove the  
10 construction debris, and after the LEA issued the "Official Notice" discussed below that  
11 also allowed the Barrier Debris to remain. The Pala Band's actions also were timely  
12 because the disposal of the solid waste on the GCL property is continuing and the LEA has  
13 a continuing legal obligation to enforce the law prohibiting the illegal operation of a solid  
14 waste disposal facility. CalRecycle should find that the Panel's broad and unworkable  
15 interpretation of when the 30-day period under Section 44310 is triggered was in error and  
16 that the Pala Band's Requests for Hearings were timely.

17 The second set of substantial issues concerns the LEA's arguments for why the  
18 continued disposal of the construction debris on the GCL property is legal. Specifically,  
19 the question is whether the LEA can allow GCL to retain the construction debris on its  
20 property indefinitely for possible use in the proposed landfill based on its factually and  
21 legally unsupported determination that the construction debris is not a "solid waste"  
22 because it is being used as a "vehicle barrier." As the discussion below and the documents  
23 submitted to the Panel show, not only is the "vehicle barrier" unnecessary and ineffective,  
24 there is no provision of law that allows such "reuse" and the LEA's position is directly in  
25 conflict with CalRecycle rules governing the management of debris generated during  
26 construction work and applicable storage times before debris is deemed disposed.

27 The fact is that the LEA's position that an alleged "reuse" as a "barrier" means that  
28 construction debris is not a "solid waste" subject to regulation creates a gaping hole in

1 CalRecycle's regulation of solid waste and flies in the face of existing law concerning  
2 construction debris. CalRecycle also needs to correct that error. As CalRecycle can rule on  
3 these issues based on the facts before it, pursuant to Public Resources Code § 45032(b),  
4 CalRecycle should direct the LEA to issue a cease and desist order to GCL requiring it to  
5 remove the illegally disposed solid waste.

## 6 **II. PROCEDURAL BACKGROUND**

7 The Pala Band's first Request for Hearing, dated July 28, 2014, sought to have the  
8 LEA require GCL to remove construction debris from the construction of the OGPP  
9 pipeline that GCL had (1) "stored" in a "bunker" on its property ("Bunker Debris"), and (2)  
10 had spread for approximately 2,075 linear feet along the route of the OGPP pipeline beside  
11 a road identified as Jamie's Lane allegedly to prevent access to certain areas of the GCL  
12 property ("Barrier Debris"). The Pala Band's Request for Hearing and the Statement of  
13 Issues supporting that request are attached as Exhibit 2.<sup>1</sup>

14 This Pala Band filed its first Request for Hearing after the County sent a letter dated  
15 June 30, 2014, which acknowledged that construction debris from the OGPP pipeline  
16 remained on the GCL site, but claimed that the debris was needed for "access control" and  
17 did not need to be removed. (Exhibit 3). The Pala Band filed its first Request for Hearing  
18 within 30 days of the LEA stating in the letter that it would not take any action to require  
19 GCL to remove the construction debris from its property.

20 About a week later, the LEA issued GCL a document titled "Official Notice,  
21 Compliance Schedule and Notice of Compliance Status (No. 2014-04)", dated August 7,  
22 2014 ("Official Notice"). (Exhibit 4). In that Official Notice, the LEA stated that (1) the  
23 "Bunker Debris" was no longer outside the scope of state regulations, citing 14 C.C.R.  
24 § 17380(g)), and (2) GCL was in violation of state law for "[o]perating a solid waste  
25 operation without proper notification," citing 14 C.C.R. § 17381.1(h) and Public Resources  
26 Code § 44000.5(a). The LEA directed GCL to "immediately cease and desist all disposal

27 <sup>1</sup> The Pala Band incorporates by reference the arguments made in its Statement of Issues and other  
28 submissions to the Panel, and does not repeat all of those arguments in this Statement of the Issues.

1 activities” at the site and to “remove and properly manage the inert debris stockpile” by  
2 September 1, 2014. However, the Official Notice also allowed GCL the option of keeping  
3 the construction debris “for further use on site” if it “submitted an application for an inert  
4 debris recycling center” by September 2, 2014.

5 The Official Notice also confirmed that the LEA would not require GCL to address  
6 the Barrier Debris, stating that the County agreed that the “large pieces of concrete debris  
7 used to create a barrier parallel to SR 76 are in use, and are not waste.” Because the  
8 Official Notice did not rectify the LEA’s continuing failure to require GCL to cease the  
9 illegal disposal of solid waste on the property, the Pala Band was forced to file a second  
10 Request for Hearing and Statement of Issues challenging the LEA’s action. A copy of the  
11 second Request for Hearing and the Statement of Issues are included as Exhibit 5.

12 The LEA filed a single response to the Pala Band’s Statement of Issues dated  
13 September 5, 2014, (“LEA Response”) indicating that GCL had removed the Bunker  
14 Debris from the site, but confirming that the Barrier Debris could remain on the site. The  
15 LEA argued that the Pala Band’s actions were untimely but that even if they were not, the  
16 Barrier Debris could remain on the GCL site because it was being “used” as a barrier and  
17 thus was not a “solid waste” under state law. The LEA’s Response provided a number of  
18 photographs and declarations to allegedly support its arguments.

19 The Pala Band’s September 15, 2014, reply to the LEA Response clearly showed  
20 that the exhibits in the LEA’s Response actually proved that the “barrier” allegedly created  
21 by the disposal of the Barrier Debris was both (1) unnecessary because there were other  
22 existing barriers that limited access, and (2) ineffective because the areas allegedly being  
23 protected by the Barrier Debris could be accessed by simply going around or through the  
24 Barrier Debris. The Pala Band’s Reply also showed that its Requests for Hearing were  
25 timely because (A) the Requests for Hearing had been filed (i) within 30 days of the LEA’s  
26 June 30, 2014, letter and (ii) within 30 days of the issuance of the Official Notice, which  
27 both allowed the Barrier Debris to remain on site, and (B) because the LEA has a  
28

1 continuing duty to stop the illegal disposal of solid waste so that the 30-day period is  
2 triggered daily. The LEA filed a supplemental letter brief raising the timeliness issue again.

3 After the consolidated hearing on the two Requests for Hearing, the Panel issued a  
4 one-page written Minute Order. That Minute Order stated simply that the “claims  
5 regarding the vehicle barrier on GCL property are time-barred based on the party’s written  
6 submissions to the Panel and testimony as well as evidence presented at the hearing.” The  
7 Minute Order stated that the LEA had presented “evidence and testimony to support this  
8 finding, including public inspection reports dating back to 2008 that identified the concrete  
9 vehicle barrier and evidence that the barrier could be seen from State Route 76.” In effect,  
10 the Panel seemed to say that the mere mention of the construction debris in an Inspection  
11 Report, or the fact that a portion of the construction debris may be visible from SR 76 was  
12 sufficient to trigger the 30-day period under Public Resources Code § 44310. Also, the  
13 reference in the Minute Order to inspection reports from 2008 is illogical because the  
14 Barrier Debris was not generated until 2009-2010 when the OGPP pipeline was installed.

### 15 **III. FACTS NOT IN DISPUTE**

16 Based on the documents filed as part of the Panel proceedings, there are a number of  
17 relevant facts that do not appear to be in dispute. Appellant believes that the following  
18 facts are not in dispute.

- 19 • The construction debris (Bunker Debris and the Barrier Debris) was  
20 generated in 2009 or 2010 during the construction of a natural gas pipeline  
21 for the OGPP by the operator of that plant and not by GCL.
- 22 • The Barrier Debris remains piled for approximately 2075 feet along the  
23 OGPP pipeline route and Jamie’s Way.
- 24 • The area where the Barrier Debris is located is not within the permitted area  
25 under GCL’s solid waste facility permit.
- 26 • GCL retained the Barrier Debris (and the Bunker Debris) on the site for use in  
27 the proposed landfill.

28

- 1 • GCL has never applied to the County or the LEA for any approvals to retain  
2 the Barrier Debris (or the Bunker Debris) on the property or to become an  
3 inert debris recycling or other approved facility under state law regulating  
4 construction and/or inert debris.
- 5 • The last mention by the LEA of the Barrier Debris prior to its June 30<sup>th</sup> letter  
6 was in a May 7, 2010, Inspection Report in which the inspector stated that the  
7 construction debris from the pipeline was considered by GCL to be a “base  
8 material” for the proposed landfill and was being stored mainly in a “staging  
9 area” but that some of the debris was being used as a “barrier” and that there  
10 were “[n]o issues noted with this material.”
- 11 • In the Official Notice, the LEA rejected GCL’s argument that the Bunker  
12 Debris was not subject to regulation because it “has construction value and is  
13 not classified as solid waste.”
- 14 • In the Official Notice, the LEA stated that the Barrier Debris was in use and  
15 was not a solid waste.
- 16 • Based on the LEA’s own exhibits included with the LEA Response, there is  
17 access to the area south of the Barrier Debris through a gap in the Barrier  
18 Debris along Wild Road and along a dirt road that runs south of the Barrier  
19 Debris just to the west of the Barrier Debris.
- 20 • Based on the LEA’s own exhibits included with the LEA Response, a  
21 concrete lip in front of the Barrier Debris and metal fences serve as barriers to  
22 entry into the same area that the Barrier Debris allegedly prevents access.
- 23 • The Barrier Debris was placed and remains in an area designated as critical  
24 habitat under the Federal Endangered Species Act for four endangered  
25 species and containing suitable habitat for the endangered arroyo toad.
- 26 • The LEA has never conducted any environmental review to assess the  
27 potential environmental impacts of allowing the Barrier Debris to remain on  
28 the GCL site.

1 **IV. APPELLANT'S REQUESTS FOR HEARINGS WERE TIMELY**

2 **A. The Pala Band's Two Requests for Hearings Timely Followed the**  
3 **LEA's Refusal to Require the Removal of the Barrier Debris**

4 The Panel's Minute Order stated that the Pala Band's action was untimely because it  
5 had not been brought within 30 days of the date when the Pala Band "discovered or  
6 reasonably have discovered the facts on which the allegation is based." The Minute Order  
7 referred to the fact that inspection reports "dating back to 2008" identified the "concrete  
8 vehicle barrier" and the barrier could be seen from SR 76. The one-page Minute Order did  
9 not make clear if the preparation of the inspection report alone would trigger the 30-day  
10 period or the visibility of some of the debris from SR 76 (or of other potential illegal  
11 activity) also is needed.

12 While there are a number of reasons why the Pala Band's action was timely, at the  
13 outset CalRecycle should reject the Panel's conclusion that the mere preparation of a  
14 document that could become a public record (such as an Inspection report), is sufficient to  
15 trigger the 30-day period under Section 44310. That is a nonsensical interpretation of that  
16 provision and it places an undue burden on the public to monitor an LEA's activities or lack  
17 of action. In effect, if an inspection report notes an illegal activity and the LEA takes no  
18 action, under the Panel's interpretation, an interested person must request a hearing to force  
19 the LEA to take proper legal action within 30 days of the date the inspection report is  
20 completed. That is the case even if the illegal activity is continuing. Likewise, the  
21 statement that the alleged visibility of the Barrier Debris from SR 76 insulates GCL and the  
22 LEA from taking action also should be rejected.

23 The idea that the LEA needs to take some public action to trigger the 30-day period  
24 in Section 44310 is bolstered by the fact that both Sections 44307 and 44310 are found in a  
25 Chapter titled "Denial, Suspension or Revocation of Permits." As the court in *Sustainability*  
26 *of Parks, Recycling and Wildlife Legal Fund v. County of Solano Department of Resource*  
27 *Management* (2008) 167 Cal.App.4th 1350 found, Section 44307 allows a permit applicant  
28 to challenge inappropriate conditions in a permit, but only allows a non-applicant to

1 challenge the LEA's action if it is a violation of law. (*Id.* at 1360-61). Specifically, the  
2 court stated that to get a hearing under Section 44307, a person "must allege the agency did  
3 not process an application in the manner required by law." (*Id.* at 1362). That interpretation  
4 indicates that some final agency action that violates the law is required.

5 The court also addressed the fact that the addition of the right to a hearing for any  
6 purpose appeared to stem from the "need to *strengthen* local and state enforcement of state  
7 minimum standards for solid waste handling." (*Id.* at 1363). The court rejected the idea  
8 that the intent of the provision was "to restrict challenges to enforcement agency  
9 procedures or decisions." (*Id.*)

10 But if the intent was to expand public involvement, using the 30-day period to bar  
11 claims where an activity continues in violation of the law and the LEA has taken no public  
12 action can severely limit public involvement. This reading of the statute by the  
13 *Sustainability of Parks* court, and the fact that the hearing provision is located in the  
14 "permit" chapter of the Act shows that an LEA needs to take a public action that can be  
15 challenged, not simply create a document that could be a public document. The preparation  
16 of an inspection report should not be a "get-out-of-jail-free" card that bars a complaint.

17 In this case, the LEA's June 30, 2014, and its issuance of the Official Notice that  
18 both allowed the Barrier Debris to remain provided public notice to the Pala Band of the  
19 LEA's legal and factual position as to the Barrier Debris. As the Pala Band filed a Request  
20 for Hearing within 30 days of each of those LEA actions, both of those Requests were  
21 timely.

#### 22 **B. The LEA Has a Continuing Obligation to Enforce the Law**

23 CalRecycle also should reject the idea that an LEA can simply ignore ongoing  
24 violations by claiming a person should have told the agency about the violation sooner.  
25 That is especially true when the violation is clear and the remedy straightforward and  
26 prospective in nature.

27 The decision in *California Trout, Inc. v. State Water Resources Control Board*  
28 (1989) 207 Cal.App.3d 585 shows why this continuing duty exists. In that case, writs of

1 mandate were sought to have the State Water Resources Control Board (“Water Board”)  
2 rescind two licenses to appropriate water it had issued in 1974. The petitioners argued that  
3 those licenses needed to contain conditions requiring compliance with statutory mandates  
4 governing the release of water from dams to protect fish. (*Id.* at 592). But because the  
5 petitions had been filed years after the licenses had first been issued in 1974, the Water  
6 Board demurred on the grounds that the action was untimely.

7 The trial court rejected that argument, finding that the petitions had alleged facts  
8 “showing a continuing duty of the Water Board” to require the conditions sought. The  
9 appellate court stated “we agree.” (*Id.* at 626). It held that the Water Board “must view its  
10 1974 action of issuing the licenses as open to a *present* correction to bring them into  
11 conformity” with the statutory license conditions. (*Id.*) The court reached that conclusion  
12 even though the licensing process is public, unlike the actions taken by the LEA here.

13 After agreeing with the trial court’s determination that the statute of limitations did  
14 not apply because the Water Board had a continuing duty, the appellate court addressed  
15 each of the Water Board’s arguments. It rejected the argument that Water Code § 1360,  
16 which allows a person to file a writ of mandate challenging a permit application “within 30  
17 days after final action by the Board,” barred the claim. (*Id.* at 627). That was because the  
18 claims concerned conditions in licenses and not the propriety of a permit application, and  
19 different sections of the Water Code governed those processes. (*Id.* at 627-28). That is the  
20 situation here as well as Sections 44307 and 44310 are in a Chapter dealing with the denial,  
21 suspension or revocation of permits, and there is no permit at issue here.

22 The appellate court then returned to the continuing duty analysis to reject the Water  
23 Board’s claim that statutory statute of limitations barred the claims. Here the court likened  
24 the Water Board’s failure to impose the conditions in the licenses as being “similar to that  
25 which arises when a nuisance has been maintained for a protracted period of time.” (*Id.* at  
26 628). As the court put it, if a nuisance “is the sort of ongoing conduct that can be  
27 discontinued by an order to stop acts or omissions it is viewed as ‘continuing’ and hence  
28 ‘abatable,’ despite the fact that the acts or omissions have been conducted for a period

1 beyond that of the pertinent statute of limitations. (*Id.*) The court cited other cases where  
2 the principle had been applied. (*Id.* at 628-29; *see also Santa Monica Municipal Employees*  
3 *Association v. City of Santa Monica* (1987) 191 Cal.App.3d 1538, 543 fn. 2 (upholding the  
4 trial court’s rejection of the City’s statute of limitations defense because the City’s non-  
5 compliance with the provision “has been and is a continuing violation”); *Appalachian*  
6 *Voices v. McCarthy*, 989 F.Supp.2d 30, 45 (D.C.Cir. 2013) (EPA’s ongoing obligation to  
7 revise RCRA regulations every three years was a continuing obligation so that the statute of  
8 limitations was not a defense).

9 The *Cal Trout* also discussed why the public trust doctrine was a reason that the  
10 action was not barred. But, the court did not rely solely on that doctrine. Consequently, the  
11 LEA’s claim in its supplemental briefing before the Panel that the case only applies to  
12 “public trust doctrine” claims is wrong. Moreover the two cases cited by the LEA for  
13 limiting *Cal Trout* to that doctrine are inapplicable to the situation here.<sup>2</sup>

14 On the flip side, the LEA cannot be making the argument that GCL has the right to  
15 continue to violate the law by its continuing disposal of solid waste without a permit  
16 because the LEA has failed to take action. Not only was that argument rejected in *Cal*  
17 *Trout*, but the rule is clear that “no vested right to violate” the law “may be acquired by  
18 continued violations” and as the violation is “a continuing violation, the statute of limitation  
19 does not run.” (*City of Fontana v. Atkinson* (1963) 212 Cal.App.2d 499, 509). In that vein,  
20 Public Resources Code § 45010.1 allows an LEA to seek penalties for violations for each  
21 day the violation continues to occur, and while an LEA may be limited in the fines it can  
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23 <sup>2</sup> The two cases cited by the LEA in its supplemental letter brief are inapposite or not valid law. In  
24 the first case, *Marin Healthcare District v. Sutter Health* (2003) 103 Cal.App.4th 861, the court  
25 rejected the argument that the public trust doctrine allowed a hospital district’s contractual claim to  
26 proceed after the statute of limitations period had expired. Because the public trust doctrine was  
27 raised as a defense, the court cited to the *Cal Trout* decision. Not only is there is no contract at  
28 issue here, but the *Marin* court did not and could not hold that the basis for the *Cal Trout* court’s  
decision was limited to public trust claims. The other case cited by the LEA, *Grossmont  
Healthcare Dist. v. San Diego Hospital Assn.*, was accepted for review and the opinion superseded.  
The case cannot be cited.

1 seek based on the time when a claim for the fines is brought, its action is not barred  
2 entirely.

3 **V. THE CONSTRUCTION DEBRIS WAS AND CONTINUES TO BE**  
4 **ILLEGALLY DISPOSED**

5 **A. There is no Legal Basis for the LEA's Position That the Barrier**  
6 **Debris Has Not Been Illegally Disposed**

7 The LEA's argument that the Barrier Debris is not a "solid waste" because it is  
8 being used as a "constructed vehicle barrier" is not supported by law or by the facts.  
9 The argument also is undercut by the LEA's own admission that the use of the  
10 material as a barrier is temporary because the Barrier Debris "will ultimately be  
11 processed and used for landfill construction."

12 But, even if the Barrier Debris was needed and actually served the claimed  
13 purpose (which as discussed below it does not), the LEA can cite no statutory  
14 provision or case law to support its position that dumping construction debris to  
15 create any type of "vehicle barrier" is exempt from regulation as a valid reuse of  
16 construction or inert debris. Indeed, the structure of the construction debris laws  
17 shows exactly the opposite, and the LEA's conclusion in the Official Notice that the  
18 Bunker Debris was illegally disposed solid waste applies to the Barrier Debris as  
19 well.

20 There is no dispute that the Barrier Debris was generated during the  
21 "construction work" to install the OGPP pipeline. Because such construction work  
22 generates construction debris, the Article 5.9 "Construction and Demolition and Inert  
23 Debris Transfer/Processing Regulatory Requirements" of the CalRecycle rules  
24 specifically exempt construction and demolition debris ("C&D debris") and inert  
25 debris that is generated at the site of "construction work," but only if that debris does  
26 not "remain on the site after the construction work is completed." (14 C.C.R. §  
27 17380(g)). But, this exemption cannot apply here because the Barrier Debris was  
28 generated during the 2009-2010 installation of the OGPP pipeline by the owner of

1 the power plant not by GCL. There is no dispute that the construction debris has  
2 remained on the GCL site for years after the “construction work “to install the OGPP  
3 pipeline was completed. That means that the Barrier Debris is not exempt from the  
4 Article 5.9 requirements.

5 Under the LEA’s interpretation of this rule, however, this exemption is  
6 irrelevant because the Barrier Debris is not a “solid waste” even though it debris  
7 generated during construction work that has remained on the site long after the  
8 construction work has been completed. That means that debris generated during  
9 construction can remain on a site indefinitely if it was going to be used in a future  
10 project. And, since piling concrete and asphalt debris anywhere could create a  
11 “barrier” to access, the LEA’s tortured interpretation of the rules creates a gaping  
12 hole for violations. The LEA’s position that it has the unfettered and  
13 unchallengeable discretion to determine based on little or no evidence that debris is  
14 being “reused” is untenable. The fact is that the LEA’s interpretation would allow  
15 GCL to accept construction debris from anywhere and for any period for future use  
16 in the proposed landfill as long as the debris was piled somewhere to allegedly  
17 “limit” access.

18 Not only does the law not allow this speculative accumulation of material for  
19 future use,<sup>3</sup> CalRecycle rules are very clear on when the “storage” of C&D or inert  
20 debris becomes disposal. The rules define the term “storage” broadly to include

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21  
22 <sup>3</sup> California laws governing the regulation of solid waste can be no less stringent than the federal  
23 Resource Conservation and Recovery Act (“RCRA”). RCRA (42 U.S.C. § 6903(27)) and  
24 California law (Pub. Res. Code § 40191) both define “solid waste” as including “other discarded”  
25 materials.” In *Owen Electric Steel Company of South Carolina v. Browner* (1994) 37 F.3d 146,  
148, the court held that slag generated during on-site processing was a solid waste even though it  
was “ultimately recycled and used in roadbeds” because the material was stored on the ground for  
six months before reuse.

26 Both federal and California law also incorporate the idea that materials become solid wastes if they  
27 are “accumulated speculatively” even if the materials are intended to be recycled. For example,  
28 state law allows the accumulation of materials prior to recycling, but identifies those materials as  
solid wastes if at least 75% of the material is not recycled in one year. (22 C.C.R. § 66260.10).

1 “holding or stockpiling” of debris, and specifically state that the storage of such  
2 debris “for periods exceeding the limits set in this Article is deemed to be disposal,”  
3 even at properly approved facilities. (14 C.C.R. § 17381(ee)).

4 Expanding upon that general rule, the section describing activities not subject  
5 to the C&D or inert debris regulatory requirements is quite specific. Even for an  
6 inert debris recycling center, inert debris stored for more than six months that has not  
7 been processed for sorted for resale or reuse or for 18 months that has been so  
8 processed is deemed “to have been unlawfully disposed and therefore subject to  
9 enforcement action.” (14 C.C.R. § 17381.1(e)(1)-(2)). While these time limits do  
10 not apply to “Type A inert debris recycling centers” at an “inert debris engineered  
11 fill operation,” the GCL site is not either, and even those facilities have time limits  
12 that also have been exceeded by GCL. (14 C.C.R. § 17388.2(a)).

13 The GCL site is not a C&D or inert debris recycling facility but a construction  
14 site, so even these six to 18 month allowable time limits do not apply. Rather, under  
15 CalRecycle rules, once the construction work on the site was completed, the Barrier  
16 Debris (and the Bunker Debris) could not be simply left on the GCL site for use in  
17 the proposed landfill. By law, the GCL site where the Barrier Debris was disposed  
18 was and continues to be an illegal disposal site and a solid waste facility operating  
19 without a permit.

20 We note that CalRecycle faced a similar issue in 2007 when it upheld a cease  
21 and desist order issued by the Ventura County LEA to Mr. Fishback for illegally  
22 operating a solid waste facility by accepting inert debris, which the decision stated  
23 “constitute solid waste under PRC 40191.” (*In Matter of Fishback v. Ventura*  
24 *County Environmental Health Division* at 7). The Board noted that certain  
25 exemptions in the rules might allow Fishback’s inert debris to be excluded from  
26 regulatory oversight, but there is no evidence that any of those exemptions apply to  
27 the Barrier Debris. (*Id.* at 6). Whereas Mr. Fishback was given the opportunity to  
28 show that the activity was exempt, the facts here are clear that the use of construction

1 debris as a "barrier" does not qualify for any exemption from regulation.

2 **B. The Facts Show That the Claimed Use of the Barrier Debris is a**  
3 **Sham**

4 Not only does the law not support the LEA's position, but its own exhibits  
5 show that the "barrier" created by the Barrier Debris is both unnecessary and  
6 ineffective. This is a textbook example of sham recycling or reuse that the LEA has  
7 and continues to willingly and unabashedly support.

8 Exhibit 7 to this Statement of the Issues includes two maps from Exhibit 5 to  
9 the LEA's Response. The maps show the location of the Barrier Debris with relation  
10 to the San Luis Rey River to the south identified by the green line and the trees. The  
11 Barrier Debris allegedly is preventing access to the river and the area between the  
12 Barrier Debris and the river.

13 But the maps also show a dirt road to the left (west) of the farthest left arrow  
14 demarcating the Barrier Debris. The map clearly shows that that this road provides  
15 vehicle access from SR 76 to (1) the river to the south, (2) the area to the east of the  
16 road and between the Barrier Debris and the river on the various east/west roads  
17 shown on the map, and (3) the structures south of the river across the river. The  
18 Barrier Debris never has and cannot prevent such access on that dirt road making the  
19 Barrier Debris a Maginot Line.

20 Exhibit 8 to this Statement of the Issues contains six numbered photographs  
21 from Exhibit 5 of the LEA Response showing the Barrier Debris close up. What is  
22 notable is that the photographs show there is a significant concrete lip in front of the  
23 Barrier Debris that alone would prevent access to the area to the south and  
24 Photograph 4 is aptly and tellingly titled "fencing and other barriers." These  
25 photographs show that the Barrier Debris is unnecessary to prevent access to the  
26 area.

27 Photograph "6" in Exhibit 8 is titled "Opening in barricade, old bridge  
28 access." That photograph shows that there is access to the area south of the Barrier

1 Debris through this “deliberate gap in the barrier” as stated in the Henderson  
2 Declaration in the LEA’s Response (at 3: 24). This gap is for Wild Road and the  
3 maps in Exhibit 7 show it clearly in the middle of the page. It also provides access to  
4 the riparian areas behind the Barrier Debris, and is another chink in the Maginot Line  
5 that the Barrier Debris is.

6 The LEA’s argument that the Barrier Debris is needed is based on the hearsay  
7 testimony of Mr. Henderson that a caretaker (“Julio”) told him that “persons were  
8 driving vehicles into the riparian area on this site, to access vacant structures located  
9 to the south and east.” (*Id.* at 2: 14-15). Even if accepted as true, the fact is that the  
10 “Barrier Debris” is (1) unnecessary to prevent access because other existing  
11 structures already prevent access or other types of legal barriers could be installed,  
12 and (2) can be easily avoided simply by driving past it on the dirt road to the west or  
13 on Wild Road through the middle. Like its legal arguments, the LEA’s “factual”  
14 basis for allowing the Barrier Debris to continue to be illegally disposed on the GCL  
15 property has no merit and is not supported by evidence in the record.

16 Although it is irrelevant to the issue of whether the Barrier Debris is illegally  
17 disposed solid waste, it is important to note that there is no evidence that the LEA  
18 ever considered the potential environmental impacts of allowing the disposal of the  
19 Barrier Debris to continue. The LEA did not conduct any environmental assessment  
20 of the disposal of the barrier Debris even though it knew (and knows) as the lead  
21 agency that the Barrier Debris is disposed in an area designated as critical habitat for  
22 four endangered species and in an area identified as containing suitable soils for the  
23 arroyo toad. (See Exhibit 6, maps at Exhibit A). That shows a troubling lack of  
24 concern by an agency tasked with protecting the environment.

## 25 **VI. THE LEA MUST ISSUE AN ORDER REQUIRING GCL TO REMOVE** 26 **THE BARRIER DEBRIS**

27 The transparent and obviously flimsy “reuse” argument shows that the LEA  
28 cannot treat the Barrier Debris differently than the Bunker Debris. The finding in the

1 Official Notice that the continued presence of the Bunker Debris on the site  
2 constitutes the improper operation of “a solid waste operation without proper  
3 notification” in violation of Public Resources Code § 44000.5(a) (which prohibits the  
4 disposal of solid waste at an unpermitted facility) applies as well to the Barrier  
5 Debris. Because the claimed “reuse” of the Barrier Debris is and always has been a  
6 reuse, its presence is a continuing violation of Section 44000.5(a).

7 State law is unequivocal: a person “shall not dispose of solid waste, cause  
8 solid waste to be disposed of . . . or accept solid waste for purposes of disposal,  
9 except at a solid waste disposal facility for which a solid waste facilities permit has  
10 been issued pursuant to this chapter or as otherwise authorized . . . .” (PRC §  
11 44000.5). The disposal of solid wastes at a site that is not permitted or exempt from  
12 permitting requirements is considered an “illegal site.” (14 C.C.R. § 18011(a)(13)).

13 When a solid waste disposal facility is operating illegally, Public Resources  
14 Code Section 44002 requires that the LEA “immediately issue a cease and desist  
15 order pursuant to Section 45005 ordering the facility to immediately cease all  
16 activities for which a solid waste facilities permit is required and desist from those  
17 activities until the person obtains a valid solid waste facilities permit authorizing the  
18 activities or has obtained other authorization pursuant to this division.” The statute  
19 creates a clear, mandatory, and immediate duty for the LEA to issue a cease and  
20 desist order to GCL directing it to immediately cease the illegal disposal of the  
21 Barrier Debris by immediately removing the material from the site. That mandatory  
22 and immediate requirement is reinforced by CalRecycle’s “Mandated Enforcement  
23 Action” rule that requires an LEA to “issue a cease and desist order to cease  
24 operations immediately if the EA determines that a solid waste facility is operating  
25 without a permit or that an operation is operating without the proper notification.”  
26 (14 C.C.R. § 18304.3). The language of the statute and CalRecycle’s rule could not  
27 be clearer.

28

1 While administrative agencies generally can operate without judicial  
2 interference, this does not mean that they may “refuse to act, or may act with  
3 unfettered discretion.” (*California School Boards Ass’n v. State Board of Education*  
4 (2010) 186 Cal.App.4th 1298, 1327). A court can “compel an official both to  
5 exercise his discretion (if he is required by law to do so) and to exercise it under a  
6 proper interpretation of the applicable law . . . [and] [w]here only one choice can be a  
7 reasonable exercise of discretion, a court may compel an official to make that choice.  
8 [Citations and quotes omitted].” (*Id.*) While Public Resources Code § 44002  
9 imposes a mandatory duty on the LEA to force GCL to cease its illegal operation of  
10 a solid waste disposal facility, even if the LEA has some discretion, it has abused  
11 that discretion by taking unsupported legal and factual positions and allowing this  
12 sham reuse of the Barrier Debris to continue.

13 **VII. CONCLUSION**

14 This appeal presents substantial issues of law that CalRecycle should address.  
15 It should find that (1) the Pala Band’s actions were timely and overrule the Panel’s  
16 decision on that point, (2) the Barrier Debris was and continues to be illegally  
17 disposed on the site, (3) the LEA has the mandatory legal obligation to issue a cease  
18 and desist order to GCL to remove the Barrier Debris immediately. Pursuant to  
19 Section 45032, CalRecycle should direct the LEA to take that action.  
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DATED: October 3, 2014

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

By:   
Walter Rusinek  
Attorneys for Appellant  
Pala Band of Mission Indians

## PROOF OF SERVICE

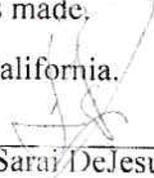
I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 530 "B" Street, Suite 2100, San Diego, California 92101. On **October 3, 2014**, I served the within documents:

### LETTER RE APPEAL OF THE DECISION BY THE SAN DIEGO COUNTY LOCAL ENFORCEMENT AGENCY HEARING PANEL ISSUED SEPTEMBER 26, 2014

### STATEMENT OF ISSUES OF THE PALA BAND OF MISSION INDIANS TO SUPPORT ITS APPEAL OF THE DECISION BY THE SAN DIEGO COUNTY LEA HEARING PANEL ISSUED SEPTEMBER 26, 2014

- by transmitting via facsimile a copy of said document(s) listed above to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.
- by electronic mail.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.
- by placing the document(s) listed above in a sealed overnight envelope and depositing it for overnight delivery at San Diego, California, addressed as set forth below. I am readily familiar with the practice of this firm for collection and processing of correspondence for processing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight box located at 530 "B" Street, San Diego, California 92101 in the ordinary course of business on the date of this declaration.
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **October 3, 2014**, at San Diego, California.

  
\_\_\_\_\_  
Sarah DeJesus

**SERVICE LIST**

<p>Kristen Laychus, Deputy County of San Diego Office of County Counsel 1600 Pacific Highway, Room 355 San Diego, CA 92101  kristen.laychus@sdcounty.ca.gov</p>	<p>Rodney F. Lorang, Esq. County of San Diego Office of County Counsel 1600 Pacific Highway, Room 355 San Diego, CA 92101  Rodney.lorang@sdcounty.ca.gov</p>
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