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9 PALA BAND OF MISSION INDIANS

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13 **BEFORE THE CALIFORNIA DEPARTMENT OF**  
14 **RESOURCES RECYCLING AND RECOVERY**

15 PALA BAND OF MISSION INDIANS,

16 Petitioner,

17 v.

18 SAN DIEGO COUNTY DEPARTMENT  
19 OF ENVIRONMENTAL HEALTH, SOLID  
20 WASTE LOCAL ENFORCEMENT  
21 AGENCY,

22 Respondent.

**PETITIONER'S OPENING BRIEF IN  
SUPPORT OF ITS APPEAL OF THE  
SAN DIEGO COUNTY LEA  
HEARING PANEL'S SEPTEMBER  
26, 2014, DECISION**

**(PUBLIC RESOURCES CODE  
SECTIONS 44307, 45030)**

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1 **I. INTRODUCTION**

2 This appeal by the Pala Band of Mission Indians (“Pala Band”) concerns the  
3 continuing failure of the San Diego County Department of Environmental Health, acting as  
4 the local enforcement agency (“LEA”), to stop the illegal operation of a solid waste  
5 disposal facility on property owned by Gregory Canyon Ltd., LLC (“GCL”). GCL has  
6 been and continues to illegally operate a solid waste disposal facility on its property  
7 because a significant amount of construction debris generated in 2009-2010 during the  
8 construction of a natural gas pipeline across the GCL property was and continues to be  
9 disposed on GCL’s property. The LEA and GCL admit that the construction debris  
10 disposed on the GCL site was generated by the construction of the pipeline to service the  
11 Orange Grove Power Plant (“OGPP”) and that the construction was completed by the  
12 owner and operator of the OGPP, not by GCL.

13 Consequently, there is no dispute about why or when the construction debris was  
14 generated or that the construction debris remains on the GCL property five years later.  
15 Even so, the LEA refused the Pala Band’s written requests that the LEA order GCL to  
16 cease the illegal operation of the disposal facility by removing the construction debris from  
17 its property. When the Pala Band brought the issue before the San Diego County Solid  
18 Waste Hearing Panel (“Hearing Panel”), it also rejected the Pala Band’s arguments. The  
19 Hearing Panel’s terse decision issued on September 26, 2014, concluded that the Pala  
20 Band’s two Requests for Hearing were barred as untimely under Public Resources Code  
21 section 44310.<sup>1</sup> The Hearing Panel also made clear during the hearing that it agreed with  
22 the LEA that the construction debris did not have to be removed because it was being  
23 “reused” as a “vehicle barrier.”

24 The Hearing Panel’s conclusion that the Pala Band’s Requests for Hearing were  
25 barred as untimely was wrong for a number of reasons. First, the record shows that the  
26 Pala Band timely filed its two Requests for Hearings. The first request was filed after the

27 <sup>1</sup> Unless otherwise stated, all references to state law are to various provisions in the California  
28 Public Resources Code.

1 LEA responded to a letter from the Pala Band by stating that the LEA would not require  
2 GCL to remove any of the construction debris on its property. The Pala Band's second  
3 Request for Hearing was filed after the LEA issued an "Official Notice" to GCL that  
4 required it to remove some but not all of the construction debris from the property. That  
5 Official Notice reiterated that, because the construction debris being used as a "vehicle  
6 barrier," it was not a "solid waste" subject to regulation. Until the LEA responded to the  
7 Pala Band's letters, it had not publicly refused to act as required by law.

8 The Pala Band's Requests for Hearing also were timely because the disposal of this  
9 solid waste and GCL's illegal operation of a disposal facility both are continuing violations  
10 of state law. Because the LEA has a continuing legal obligation to enforce state law that  
11 prohibits the illegal operation of a solid waste disposal facility, the right to petition under  
12 Section 44307 accrues every day that the LEA refuses to act as required by state law.  
13 CalRecycle needs to strongly reject the LEA's argument that its obligation to enforce state  
14 law magically disappears after the 30-day period identified in Section 44310 expires.

15 Finally, it is not clear that the Waste Act even requires a person to request a hearing  
16 under Section 44307 at all prior to seeking judicial review of this type of inaction. That is  
17 because both Section 44307 and Section 44310 are in Chapter 4 of the Waste Act, which is  
18 titled "Denial, Suspension, or Revocation of Permits." Because the Pala Band's requests  
19 did not concern the denial, suspension, or revocation of a permit, those sections arguably do  
20 not apply. The Pala Band followed the statutory process because it seemed more  
21 streamline and avoided judicial involvement, but that approach did not achieve the desired  
22 result.

23 While the Pala Band believes that its actions were timely, it challenges CalRecycle's  
24 statement in the Notice of Hearing that the Pala Band's appeal was accepted "for the  
25 limited purpose" of determining whether its claims were timely. Such a limited review of  
26 this procedural issue is improper for a number of reasons.

27 First, Section 45032 states that, if CalRecycle overturns the decision of an LEA or a  
28 Hearing Panel or finds that an LEA has "failed to act as required," CalRecycle may either

1 direct the LEA to take the appropriate action or take the appropriate action itself. That  
2 provision does not state that CalRecycle can or should remand the issue to the Hearing  
3 Panel for further hearings, especially when the Hearing Panel, as here, made clear that it  
4 agreed with the LEA's argument that the construction debris is not a solid waste.

5 Second, if CalRecycle finds that either of the Pala Band's Requests for Hearing was  
6 timely, it should decide the substantive issues as well because there is no need for further  
7 "fact finding" by the Hearing Panel. The relevant facts concerning the construction debris  
8 are known and are not in dispute. In fact, a CalRecycle inspector visited the GCL property  
9 on July 30, 2014, during an LEA inspection, so CalRecycle has the benefit of the  
10 information gleaned during that inspection. (Exhibit A). Also, if CalRecycle believes that it  
11 needs additional information to resolve disputed facts, it has the authority to direct the  
12 parties to submit specific additional information and/or to schedule a hearing to resolve any  
13 such concerns.

14 Third, the substantive issues before CalRecycle raise questions of law concerning  
15 whether the construction debris on the site is a "solid waste" subject to regulation and  
16 whether it continues to be illegally disposed on GCL's property. Those are legal issues that  
17 CalRecycle, not the Hearing Panel, has the expertise to resolve. Consequently, remanding  
18 the issue back to the Hearing Panel would be an exercise in futility for the Pala Band and  
19 would create an unnecessary merry-go-round process. Based on the record before it,  
20 CalRecycle can resolve the substantive issues, determine what actions the LEA must take to  
21 remedy GCL's continuing violation of state law, and direct the LEA to take those actions or  
22 take them itself.

23 CalRecycle cannot simply ignore the effect of the LEA's interpretation of state law  
24 governing the regulation of construction debris. Under the LEA's interpretation of the law,  
25 any person can generate construction debris on site or bring construction debris onto its  
26 property from off site, and then pile the construction debris and claim it is being reused as a  
27 "vehicle barrier" and is not a "solid waste" subject to regulation. That interpretation  
28 renders irrelevant all CalRecycle's detailed rules governing the regulation of construction

1 debris. CalRecycle can resolve that straightforward issue now as a matter of law, if only to  
2 satisfy its own legal obligation to oversee the LEA's enforcement of state law.

3 As to CalRecycle's oversight duty, under state law, if an LEA fails to take  
4 appropriate enforcement actions or takes actions that are "inconsistent with, or that are not  
5 authorized by" statute or regulation, CalRecycle "shall find" that the LEA is not fulfilling its  
6 legal responsibilities and take the actions identified in Sections 43214(d)(5)-(6) and  
7 43216.5. The LEA's continued refusal to require GCL to cease its illegal operation of a  
8 solid waste disposal facility on its property is a clear example of the type of inaction that  
9 CalRecycle has a mandatory legal duty to remedy.

10 CalRecycle's position that it will avoid addressing the merits of the LEA's position  
11 is also troubling because CalRecycle has copies of the Pala Band's letters to the LEA and  
12 its responses, and has inspected the GCL property, meaning that it had sufficient  
13 information to resolve this issue before the Hearing Panel hearing. In fact, CalRecycle's  
14 failure to take any action to address this issue during the three months after its inspection of  
15 the GCL property appears to be tacit approval of the LEA's position. To show that is not  
16 the case, CalRecycle needs to render a decision on all the issues raised by the Pala Band  
17 now.

## 18 **II. FACTUAL BACKGROUND**

19 There is no dispute that the construction debris at issue was generated by the Orange  
20 Grove Energy, L.P. (identified as a subsidiary of J-Power USA Development Company  
21 Ltd. in its final certification by the California Energy Commission), during its construction  
22 in 2009-2010 of a natural gas pipeline across the GCL property to the OGPP. The pictures  
23 taken by the LEA attached as Exhibit B show the construction debris, which appears to be  
24 mainly asphalt and concrete.

25 In a letter to the LEA dated August 5, 2014, GCL stated that the decision to leave  
26 the construction debris on the GCL property was made by representatives of GCL, J-Power  
27 and San Diego Gas & Electric Company and agreed to by the LEA. (Exhibit C). The facts  
28 show that a portion of the construction debris generated by the pipeline construction was

1 placed in a “bunker” on the GCL property as shown in Exhibit D (“Bunker Debris”). The  
2 Bunker Debris may have been placed in an area within the area permitted for the proposed  
3 landfill in the solid waste facility permit issued in August of 2011. The Bunker Debris has  
4 been removed from the GCL property, and is not an issue in this appeal.

5 Another large portion of the construction debris generated by the pipeline  
6 construction was piled for approximately 2075 linear feet along the pipeline route next to a  
7 road identified on maps as Jamie’s Lane to allegedly serve as a vehicle “barrier” (“Barrier  
8 Debris”). (Exhibit E, Declaration of Jim Henderson at ¶¶ 7-8). The area where the  
9 construction debris was placed is located on the western end of the GCL property outside  
10 the area permitted for the proposed landfill as shown on the highlighted portions of a map  
11 from the Joint Technical Document. (Exhibit F).

12 In a May 7, 2010, Inspection Report, LEA Inspector Henderson stated that the  
13 construction debris was considered by GCL to be a “base material” for the proposed landfill  
14 and was being stored mainly in a “staging area” (the Bunker Debris), but that other debris  
15 was being used as a “barrier” (the Barrier Debris) (Exhibit G). The Inspection Report also  
16 stated that there were “[n]o issues noted with this material,” but it did not identify any  
17 evidence supporting that conclusion or provide the legal basis for allowing the construction  
18 debris to remain indefinitely on the GCL property.

19 The current proceedings began with a letter to the LEA dated June 9, 2014, on  
20 behalf of the Pala Band, which raised a number of issues including questioning the  
21 continuing disposal of the construction debris on the GCL property in violation of state law.  
22 (Exhibit H). That letter explained that the LEA had a legal obligation to issue a cease and  
23 desist order to require GCL to cease its illegal operation of a solid waste disposal facility by  
24 removing the construction debris from its property.

25 The letter in reply from the County dated June 30, 2014, admitted that construction  
26 debris from the pipeline construction remained on the GCL site. (Exhibit I). But, the letter  
27 claimed that the construction debris was being “used” for “access control” and that the  
28 “stockpiling” of the construction debris on the GCL site had been “reviewed” and

1 “approved” by the LEA as a “valid reuse option.” (*Id.*) The letter did not state when the  
2 LEA’s claimed “review and approval” had occurred or provide the legal authority under  
3 which the LEA had allowed the construction debris to be “used” or “stored” on the GCL  
4 property at all, let alone indefinitely.

5 Photographs taken by the LEA show the significant amount of Barrier Debris that  
6 remains on the GCL property. (Exhibit B). Notably, the record contains no documents  
7 showing that GCL ever filed an application to “store” or to “reuse” the construction debris  
8 on the site. Other than the passing reference in Mr. Henderson’s May 2010 Inspection  
9 Report, there is no document in the record showing the process used by LEA to review and  
10 approve this alleged “reuse” of the Barrier Debris.

11 While admitting that the construction debris had been on the GCL site for a number  
12 of years, the LEA’s June 2014 letter rejected the need for GCL to remove it. Instead, the  
13 letter stated that GCL would have the option of either (1) removing the construction debris  
14 at some unspecified time, or (2) submitting an application for an after-the-fact approval of  
15 the site as an “inert debris recycling center.” (Exhibit I). The LEA’s letter appeared to  
16 indicate that the submission of an application alone would allow the construction debris to  
17 be “stored” on the GCL property for an additional six months and that the construction  
18 debris could be “stored” for an additional 18 months if it was processed and even longer if  
19 GCL submitted a “storage plan” that the LEA approved. The letter did not distinguish  
20 between the Bunker Debris and the Barrier Debris when allowing GCL to choose one of  
21 these options.

22 The LEA also claimed in its June 2014 letter that it had approved the “reuse” of the  
23 construction debris as valid because construction of the proposed landfill “seemed  
24 imminent.” But that claim ignores the fact that by early 2010, GCL did not have a valid  
25 solid waste facility permit,<sup>2</sup> and it was public knowledge that GCL would need to obtain an

26 \_\_\_\_\_  
27 <sup>2</sup> The Barrier Debris was generated at the time the LEA was arguing that the solid waste facility  
28 permit issued in 2004 was valid. The LEA made that argument even though the Superior Court  
had ordered the permit rescinded in 2006, and CalRecycle had told the LEA that the permit no  
longer existed. When the LEA ignored that fact, the Pala Band sued and in June of 2010, the

1 individual Clean Water Act Section 404 permit from the Army Corps of Engineers to “fill”  
2 the canyon during construction and that an Environmental Impact Statement under the  
3 National Environmental Policy Act would have to be prepared first. That meant that the  
4 LEA knew that construction of the proposed landfill was not “imminent” unless by  
5 “imminent” it meant years. The LEA also knew that GCL still needed approvals from the  
6 Regional Water Quality Control Board, the San Diego Air Pollution Control District, the  
7 County Water Authority, and other agencies before the project could proceed.

8         Given the LEA’s response, the Pala Band again addressed the construction debris  
9 issue in a letter to the LEA dated July 8, 2014. (Exhibit J). But given the LEA’s refusal to  
10 require GCL to remove the construction debris, the Pala Band also filed its first Request for  
11 Hearing on July 28, 2014. That request was filed within 30 days of the LEA’s June 30,  
12 2014, letter stating that it would not require GCL to remove the construction debris from its  
13 property.<sup>3</sup>

14         Shortly thereafter, on August 7, 2014, the LEA issued GCL an “Official Notice,  
15 Compliance Schedule and Notice of Compliance Status (No. 2014-04) (“Official Notice”)  
16 addressing the Bunker Debris and the Barrier Debris. (Exhibit K). As for the Bunker  
17 Debris, the Official Notice stated that, because the debris “was no longer outside the scope  
18 of the State CDI regulations based on 14 C.C.R. section 17380(g),” GCL was in violation  
19 of state law for “[o]perating a solid waste operation without proper notification.” (*Id.* at  
20 pgs. 2-3). The LEA cited 14 C.C.R. section 17381.1(h) and Public Resources Code  
21 section 44000.5(a) for support, and it directed GCL to “immediately cease and desist all  
22 disposal activities” at the site and to “remove and properly manage the inert debris  
23

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24 Superior Court confirmed that the 2004 permit was no longer valid, and characterized the LEA’s  
25 argument as being based on a “hyper-technical, and out-of-context, reading of a portion of the writ  
of mandate.” The LEA’s current faulty reading of the law is reminiscent of that fiasco.

26 <sup>3</sup> The Statement of Issues filed with the LEA by the Pala Band for each of its Requests for Hearing  
27 was attached to the Statement of Issues filed by the Pala Band with CalRecycle for this appeal.  
28 Because those documents are lengthy and are part of the record, they are incorporated by reference  
but not attached in whole to this brief.

1 stockpile” by September 1, 2014. (*Id.*) But, the LEA also improperly offered GCL the  
2 option of keeping the construction debris “for further use on site” if it “submitted an  
3 application for an inert debris recycling center” by September 2, 2014. (*Id.*)

4 The Official Notice addressed the Barrier Debris very differently. Instead of  
5 identifying it as a solid waste requiring removal, the Official Notice confirmed the LEA’s  
6 position that the “large pieces of concrete debris used to create a barrier parallel to SR 76  
7 are in use, and are not waste.” (*Id.* at 2). A subsequent letter from County Counsel dated  
8 August 8, 2014, also rejected the need for an order directing GCL to remove the Barrier  
9 Debris, arguing that the debris was “in use” and “has not been disposed but is stored for use  
10 in construction.” (Exhibit L at pg. 8).

11 Because the Official Notice granted GCL the option of continuing to retain the  
12 Bunker Debris on the site and the Notice and County Counsel’s letter reaffirmed the LEA’s  
13 position that GCL could continue the illegal disposal of the Barrier Debris, the Pala Band  
14 filed a second Request for Hearing dated August 27, 2014. That second Request for  
15 Hearing was filed within 30 days of the LEA’s issuance of the Official Notice.

16 In response to the Pala Band’s two requests for hearing, the LEA filed a single  
17 response dated September 5, 2014 (“LEA Response”). The LEA Response stated that GCL  
18 had removed the Bunker Debris from the site, but that the Barrier Debris could remain on  
19 the site because it was not a solid waste. The LEA also argued that the Pala Band’s  
20 Requests for Hearings should be barred as untimely. The LEA’s Response included  
21 photographs and declarations to allegedly support its position.

22 But the Pala Band’s Reply to the LEA’s Response filed on September 15, 2014,  
23 showed that the exhibits submitted by the LEA actually proved that the alleged “debris  
24 barrier” constructed out of the Barrier Debris was both (1) unnecessary, because there were  
25 other existing barriers that limited access, and (2) ineffective, because the areas allegedly  
26 being protected by the Barrier Debris could be accessed by simply going around or through  
27 the Barrier Debris. As the photographs at Exhibit B show, existing features on the site  
28 (fences and the concrete lip) make the debris “barrier” unnecessary, and the maps and

1 photographs at Exhibit M show that the debris “barrier” is ineffective because a road to the  
2 west of the “barrier” and a road through the “barrier” both allow access to the area  
3 allegedly being protected.

4 The Pala Band also filed objections to the declarations of Mr. Henderson and Ms.  
5 Merlos submitted by the LEA as support. (Exhibit N). Those objections included that their  
6 testimony was hearsay, opinion, speculation, without foundation, non-expert testimony  
7 posing as expert testimony, or unacceptable for other reasons. For example, the sole  
8 evidence submitted by the LEA to support the claim that the debris “barrier” was needed to  
9 limit access was Mr. Henderson’s declaration that the “caretaker” had told him that vehicles  
10 were accessing the property “to access vacant structures located to the south and east.”  
11 (Exhibit E at ¶ 6). Not only was that statement hearsay, but the Pala Band showed, based  
12 on the LEA’s maps, that those structures could be accessed even with the construction  
13 debris “barrier” in place.

14 At the hearing, the Hearing Panel first adopted rules governing its hearings. Then,  
15 based on those rules, one of the members of the Hearing Panel recused himself due to a  
16 conflict of interest. Conveniently, a substitute was in the audience and joined the panel.  
17 (Exhibit O, Transcript of the Solid Waste Hearing Panel Hearing (“Transcript”) at pg. 3).

18 The Hearing Panel then consolidated the Pala Band’s two Requests for Hearing.  
19 (*Id.*) After the Pala Band made its presentation, based primarily on the LEA’s own  
20 documents showing that the “vehicle barrier” was ineffective and unnecessary, the LEA  
21 made its presentation. While that presentation included the testimony of LEA witnesses,  
22 the Hearing Panel did not allow those witnesses to be cross examined. (*Id.* at 24: 10-17).

23 The Hearing Panel’s Minute Order stated that the “claims regarding the vehicle  
24 barrier on GCL property are time-barred based on the parties’ written submissions to the  
25 Panel and testimony as well as evidence presented at the hearing.” (Exhibit P). The  
26 Minute Order stated only that the LEA had presented “evidence and testimony to support  
27 this finding, including public inspection reports dating back to 2008 that identified the  
28 concrete vehicle barrier and evidence that the barrier could be seen from State Route 76.”

1 The Minute Order did not make clear if the preparation of the inspection report alone  
2 triggered the 30-day period or if the testimony that at least a portion of the Barrier Debris  
3 was visible from SR 76 also was required. Critically, the Barrier Debris was not generated  
4 until 2009 at the earliest, so the reference in the Minute Order to inspection reports “dating  
5 back to 2008” showing that the construction debris was in use as a “vehicle barrier” is non-  
6 sensical.

7 Although the Minute Order did not address the underlying issue of the Barrier  
8 Debris remaining on the site, the Hearing Panel made clear that it agreed with the LEA’s  
9 position on the issue. As one member stated, “it’s obvious with the intent that this material  
10 was relocated. It was re-purposed as a barrier from the way it was laid down. And we had  
11 testimony from Mr. Henderson that it was an effective barrier . . . .” (Transcript at 44: 18-  
12 21). The Panel member continued, stating that “I think the establishment of re-use of this  
13 material, repurposing of this material is all around us. So I don’t see this as its final  
14 deposition of material.” (*Id.* at 44: 26-27). These comments and his comment that “there’s  
15 no valid point on the side of petitioner” did not meet with any objections from the other  
16 members of the Hearing Panel. (*Id.* at 45: 1). This appeal of the Hearing Panel’s Minute  
17 Order was timely filed with CalRecycle.

### 18 **III. LEGAL ARGUMENT**

#### 19 **A. The Pala Band’s Two Requests for Hearings Were Timely**

##### 20 **1. The Two Requests for Hearings Timely Followed the LEA’s** 21 **Actions Refusing to Require GCL to Removal the Illegally** 22 **Disposed Barrier Debris**

23 The reasons why the Pala Band’s action was timely are discussed below. But, at the  
24 outset CalRecycle should reject the Hearing Panel’s conclusion that the mere preparation of  
25 a document that could be obtained as a public record (such as an Inspection Report),  
26 triggers the 30-day period under Section 44310. In effect, the Panel’s interpretation would  
27 mean that, if an inspection report notes what could be interpreted as an illegal activity, but  
28 the LEA takes no action, an interested person must request a hearing within 30 days of the

1 date the inspection report was completed or be barred from challenging the LEA's inaction,  
2 even if the illegal activity is continuing.

3 Such an interpretation of Section 44310 would place an inordinate burden on the  
4 public to monitor an LEA's actions or lack of action, and was not the intent of the  
5 legislature in enacting the provision. As one court has stated, the "general impetus" for the  
6 provision was the "need to *strengthen* local and state enforcement of state minimum  
7 standards for solid waste handling" not limit the public's right to challenge agency inaction.  
8 (*Sustainability of Parks, Recycling and Wildlife Legal Defense Fund v. County of Solano*  
9 *Department of Resource Management* (2008) 167 Cal.App.4th 1350, 1363).

10 Similarly, even if the Barrier Debris was visible from SR 76 (the only "evidence" of  
11 that being Ms. Merlos' testimony), the Hearing Panel's conclusion that Section 44310  
12 requires that any person who saw the debris was required to file a Request for Hearing  
13 within 30 days or forever be barred from challenging the LEA's inaction misreads that  
14 statutory language as well. The intent of the 30-day rule is not to forever insulate an LEA  
15 from having to take a required action, but to provide for quick review of an agency's action  
16 or refusal to act when that decision is made public. That is what occurred when the LEA  
17 refused to act in response to the Pala Band's letters concerning the construction debris.

18 That some public action by an LEA is needed to trigger the 30-day period in Section  
19 44310 is bolstered by the fact that Sections 44307 and 44310 are found in a chapter titled  
20 "Denial, Suspension or Revocation of Permits." As one court found, Section 44307 allows  
21 a permit applicant to challenge inappropriate conditions in a permit, but only allows a non-  
22 applicant to challenge the LEA's action if it is a violation of law. (*Id.* at 1360-61).  
23 Specifically, the court stated that to obtain a hearing under Section 44307, a person "must  
24 allege the agency did not process an application in the manner required by law." (*Id.* at  
25 1362). That interpretation indicates that a final agency action that violates the law and is  
26 publicly known is required to trigger the 30-day period.

27 That holding was in keeping with the court's ruling that the intent of Section 44307  
28 was not "to restrict challenges to enforcement agency procedures or decisions." (*Id.* at

1 1363). Because the intent was to expand public involvement, using the 30-day period to  
2 bar claims where an activity continues in violation of the law and the LEA has taken no  
3 public action will defeat that intent and severely limit public involvement. The preparation  
4 of an inspection report should not be a “get-out-of-jail-free” card for a violator that an LEA  
5 refuses to cite.

6 In this case, the LEA’s June 30, 2014, and its issuance of the Official Notice both  
7 allowed the Barrier Debris to remain on the GCL and provided the required public notice of  
8 the LEA’s legal and factual position as to the Barrier Debris. There is no dispute that the  
9 Pala Band filed a Request for Hearing within 30 days of each of those LEA actions.  
10 Consequently, either or both of those Requests were timely, and the merits of the Pala  
11 Band’s case should have been addressed in the Hearing Panel’s Minute Order and should  
12 be addressed by CalRecycle now.

13 **2. The LEA Has a Continuing Obligation to Enforce the Law**

14 The Pala Band’s Requests for Hearing also were timely because GCL’s illegal  
15 disposal of solid waste and its illegal operation of a solid waste disposal facility are  
16 continuing violations that the LEA has a continuing legal obligation to stop. That means  
17 that the LEA’s continuing refusal to take the required action to stop GCL’s violations is  
18 itself a continuing violation for which the Pala Band’s right to a hearing before the Hearing  
19 Panel accrues continually. Application of the continuing violation or continuous accrual  
20 doctrines is especially proper when the continuing nature of the violation is clear, and the  
21 remedy for the violation is simple and prospective in nature. Here that remedy would be  
22 entirely prospective: the LEA simply needs to order GCL to remove the Barrier Debris  
23 from its property.

24 The decision in *California Trout, Inc. v. State Water Resources Control Board*  
25 (1989) 207 Cal.App.3d 585, which the Pala Band cited before the Hearing Panel shows that  
26 the Pala Band’s Requests for Hearings were timely given the LEA’s continuing duty to  
27 enforce the law. In *California Trout*, the petitioner sought writs of mandate to force the  
28 State Water Resources Control Board (“Water Board”) to rescind two licenses to

1 appropriate water it had issued to the City of Los Angeles in 1974 because the licenses did  
2 not contain conditions requiring the city to comply with statutory mandates governing the  
3 release of water from dams to protect fish. (*Id.* at 592). Because the petitions to rescind the  
4 licenses had been filed years after the licenses had first been issued in 1974, the Water  
5 Board demurred on the grounds that the petitioner’s action was untimely.

6 The trial court rejected that argument, finding that the petitions had alleged facts  
7 “showing a continuing duty of the Water Board” to require the conditions sought, and the  
8 appellate court agreed. (*Id.* at 626). The appellate court held that the Water Board “must  
9 view its 1974 action of issuing the licenses as open to a *present* correction to bring them  
10 into conformity” with the statutory license conditions. (*Id.*).

11 After agreeing with the trial court’s determination that the action was not barred  
12 because the Water Board had a continuing duty to enforce the law, the appellate court  
13 addressed each of the Water Board’s arguments as to why the petition should be barred.  
14 The appellate court first rejected the argument that Water Code section 1360, which allows  
15 a person to file a writ of mandate challenging a permit application “within 30 days after  
16 final action by the Board,” barred the action. (*Id.* at 627). The appellate court rejected that  
17 argument because the petitioner’s claims concerned conditions in licenses and not the  
18 propriety of a permit application, and those processes were governed by different sections  
19 of the Water Code. (*Id.* at 627-28). As discussed above, that is the situation here as well  
20 as Sections 44307 and 44310 are in a Chapter dealing with the denial, suspension or  
21 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 and to hold that the  
24 Water Board’s failure to include the conditions in the licenses “presents a continuing  
25 violation of the statute as to which no statute of limitations prevents remediation.” (*Id.* at  
26 628). The appellate court likened the Water Board’s failure to impose the conditions in the  
27 licenses as being “similar to that which arises when a nuisance has been maintained for a  
28 protracted period of time.” (*Id.* at 628). As the appellate court put it, if a nuisance is an

1 “ongoing conduct that can be discontinued by an order to stop acts or omissions it is viewed  
2 as ‘continuing’ and hence ‘abatable,’ despite the fact that the acts or omissions have been  
3 conducted for a period beyond that of the pertinent statute of limitations. (*Id.*) The  
4 appellate court cited a number of other cases where courts had applied the continuing  
5 violation doctrine to allow actions to proceed. (*Id.* at 628-29).

6 In *Aryeh v. Canon Business Solutions* (2013) 55 Cal.4th 1185, the California  
7 Supreme Court provided a lengthy analysis of what it termed “continuing-wrong-accrual  
8 principles” to reverse the lower courts and hold that the plaintiff’s claims for damages  
9 under the Unfair Competition Law (“UCL”) were not time barred. The facts showed that  
10 the defendant had imposed excess charges for test copies on the plaintiff since 2002, that  
11 the plaintiff was aware of these overcharges in 2002, but that he had not filed a lawsuit until  
12 2008. (*Id.* at 1197.) Given the four-year statute of limitations for UCL claims, the lower  
13 courts had dismissed the claims as untimely. On appeal, the plaintiff argued that the  
14 lawsuit was timely based on continuing-wrong-accrual principles.

15 The Supreme Court explained that the principle had two branches: the “continuing  
16 violation doctrine” and the “theory of continuous accrual.” (*Id.*) The Court defined a  
17 “continuous violation” as an “indivisible course of conduct actionable in its entirety,  
18 notwithstanding that the conduct occurred partially outside and partially inside the  
19 limitations period.” (*Id.* at 1198). Applying this doctrine allows a plaintiff to recover  
20 damages for the entire period, notwithstanding any statute of limitations. As GCL’s illegal  
21 disposal of solid waste and the LEA’s refusal to stop that illegal disposal have been  
22 ongoing, the LEA’s failure to act constitutes a continuing violation for which the Pala Band  
23 can seek redress at any time. Because the Pala Band is seeking prospective relief only (the  
24 removal of the illegally disposed solid waste) and not penalties for past violations, the  
25 equitable purposes of the doctrine would be served by allowing its complaints to be  
26 addressed. (*California Trout, supra*, 207 Cal.App.3d at 631).

27 Although the Supreme Court found that the continuous violation doctrine did not  
28 apply to Aryeh’s claims, it held that the continuous-accrual theory did apply, and it

1 reversed the lower courts. (*Id.* at 1202). In describing that theory, the Court stated that it  
2 applies “whenever there is a continuing or recurring obligation” and when that obligation  
3 arises “on a recurring basis, a cause of action accrues each time a wrongful act occurs,  
4 triggering a new limitations period. [Citation and internal quotes omitted.]” (*Id.* at 1199).  
5 The Court continued, stating that each new breach of the obligation “may be treated as an  
6 independently actionable wrong with its own time limit for recovery.” (*Id.*) Consequently,  
7 the Court found that, because the defendant owed Mr. Aryeh a “duty not to impose unfair  
8 charges in monthly bills” that “was a continuing one, susceptible to recurring breaches,”  
9 each new breach triggered a “new statute of limitations.” (*Id.* at 1200).

10 In this case, the LEA has a continuing legal duty to enforce state law prohibiting the  
11 illegal operation of a solid waste disposal facility. That obligation does not simply  
12 disappear after 30 days. Based on *Aryeh*, every day that the LEA fails to take the required  
13 action is another breach of that duty which is actionable. *Aryeh* clearly shows that the Pala  
14 Band’s Requests for Hearings were timely under either the continuing-violation or the  
15 continuous-accrual theories.

16 The *Aryeh* court relied in part on its earlier decision in *Howard Jarvis Taxpayers*  
17 *Association v. City of La Habra* (2001) 25 Cal.4th 809. In that case, the petitioners  
18 challenged the City’s imposition of a tax on utility users, arguing that the tax was improper  
19 without the voter approval required by Proposition 62. (*Id.* at 812). Again, the lower  
20 courts held that the action was barred by the statute of limitations because it had not been  
21 filed within three years of the passage of the ordinance instituting the tax. (*Id.*)

22 On appeal, the petitioners relied on the theory of continuous accrual, arguing that the  
23 City’s continuing collection of the tax and its continuing refusal to hold an election as  
24 required by law were ongoing violations that “continuously give rise to a cause of action to  
25 invalidate the tax.” (*Id.* at 819). The Supreme Court agreed, and it reversed the lower  
26 courts, holding that the petitioners had alleged ongoing violations of Proposition 62 and  
27 that their claims were not barred “merely because similar claims could have been made at  
28 earlier times as to earlier violations.” (*Id.* at 821-822).

1 The holding in the *Howard Jarvis* case concerning the City's continuing obligation  
2 to comply with state law also applies to the LEA's failure to act in this matter as well. The  
3 Supreme Court's admonition that "[c]ities and counties must eventually obey the state laws  
4 governing their taxing authority," (*id.* at 825) also applies to the LEA's failure to stop the  
5 illegal operation of a solid waste disposal facility on the GCL property.

6 Other state and federal cases have applied the continuing-violation doctrine to allow  
7 actions to proceed. For example, in *Santa Monica Municipal Employees Association v.*  
8 *City of Santa Monica* (1987) 191 Cal.App.3d 1538, the appellate court upheld the trial  
9 court's rejection of the City's statute of limitations defense because the City's violation of  
10 the provisions of the City's charter requiring promotional examinations to fill civil service  
11 positions "has been and is a continuing violation." (*Id.* at 1543, fn.2). Similarly, in  
12 *Appalachian Voices v. McCarthy*, 989 F.Supp.2d 30, 45 (D.C.Cir. 2013), the court held that  
13 EPA's ongoing obligation to revise its regulations under the Resource Conservation and  
14 Recovery Act ("RCRA") every three years imposed a "continuing obligation to act" on the  
15 agency "such that EPA 'continue[s] to violate it until that obligation is satisfied.' [Citation  
16 omitted.]"

17 In a similar manner, GCL's continued illegal disposal of solid waste and operation  
18 of a disposal facility, which is what triggers the LEA's legal duty, also is not protected by  
19 statute of limitations defenses. If that is the argument the LEA is making, it was rejected in  
20 *Cal Trout*, and the rule is clear that a "vested right to violate" the law cannot be "acquired  
21 by continued violations" and for a violation that is "a continuing violation, the statute of  
22 limitation does not run." (*City of Fontana v. Atkinson* (1963) 212 Cal.App.2d 499, 509).  
23 As that court put it, no vested right to violate city zoning ordinance can be acquired by  
24 city's failure to enforce continued violation. Indeed, Section 45010.1 allows an LEA to  
25 seek penalties for violations for each day a violation continues to occur. Interpreting  
26 similar authority in the Clean Water Act, federal courts have held that the placement of  
27 illegal fill in waters of the United States constitutes a continuing violation of the Clean  
28 Water Act that does not bar an agency enforcement action. (*See, e.g., Sasser v. EPA*, 990

1 F.2d 127, 129 (4th Cir. 1993); *United States v. Reaves*, 923 F.Supp 1539, 1534 (M.D. Fla.  
2 1996).

3 Based on these cases, the Pala Band's challenges to the LEA's refusal to act as  
4 required by law were timely. Under any of these theories, the Hearing Panel's decision was  
5 wrong.

### 6 3. There Was No Need for the Pala Band to Request a Hearing

7 CalRecycle also should resolve the substantive merits of the issues raised by the Pala  
8 Band because it is not clear that it was required to seek review before the LEA Hearing  
9 Panel at all before seeking judicial review. That is because the placement of both Section  
10 44307 and Section 44310 in a chapter titled "Denial, Suspension, or Revocation of Permits"  
11 indicates that a hearing is only need to challenge a permit-related action. That is not the  
12 case here. Consequently, the Pala Band did not need to seek a hearing before the Hearing  
13 Panel. Indeed, one court has held that the Section 44307 process "is arguably permissive,  
14 rather than a mandatory administrative appeal that is a precondition to judicial review."  
15 (*No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573, 582).

16 In *California Trout* the court rejected the Water Board's argument that the petition  
17 was barred by language allowing a person 30 days to challenge in court the issuance of a  
18 permit. (*California Trout*, 207 Cal.App.3d at 627). The court held that the 30-day period  
19 applied only to a permit, not to the issuance of the license that followed because the  
20 provisions governing licenses were in a different section of the Water Code. (*Id.*) Again,  
21 the placement of Section 44307 in a chapter governing permits limits its applicability to  
22 matters concerning permits.

### 23 B. CalRecycle Has a Legal Obligation to Determine Now if the Construction 24 Debris Continues to be Illegally Disposed

25 Because the Pala Band's Requests for Hearing were timely, it is incumbent on  
26 CalRecycle to resolve now whether the LEA has an obligation to require GCL to remove the  
27 Barrier Debris from its property. As state above, limiting its review to whether the Pala  
28 Band's claims were timely would be improper under Section 45032, which does not

1 provide for a remand to the Hearing Panel for further hearings, and is unnecessary because  
2 all relevant facts are known or can be clarified by requesting the submission of specific  
3 information from the parties or by holding an evidentiary hearing.

4 In addition, the only substantive issues remaining are questions of law concerning  
5 whether the Barrier Debris is a “solid waste” subject to regulation and whether if it is a  
6 solid waste it has been disposed. Those are issues that CalRecycle or a court has the  
7 expertise to resolve, not the Hearing Panel. Remand to the Hearing Panel also would be  
8 futile because it made clear at the hearing that it agrees with the LEA’s position that the  
9 Barrier Debris is not a solid waste.

10 CalRecycle also needs to clarify now, as a matter of law, why its existing rules  
11 governing the management of construction debris and the time limits on storage of such  
12 debris do not apply to the Barrier Debris. The LEA’s interpretation of the rules governing  
13 the handling of construction debris eviscerates those rules, and CalRecycle has its own  
14 legal duty to ensure that the LEA properly interprets and enforces state law. For these  
15 reasons, the Pala Band addresses the substantive issues below.

16 **1. There is No Legal Basis for the LEA’s Position That the Barrier**  
17 **Debris Has Not Been Disposed**

18 The LEA’s argument that the Barrier Debris is not a “solid waste” because it is  
19 being used as a “constructed vehicle barrier” is not supported by the law or by the facts.  
20 The argument also is undercut by the LEA’s own repeated admission that the use of the  
21 material as a “vehicle barrier” is temporary because the Barrier Debris ultimately would be  
22 processed and used for construction of the proposed landfill.

23 But, even if the Barrier Debris was needed and actually served the claimed purpose  
24 of preventing access (which, as discussed below, it does not), the LEA cites no statutory  
25 provision or case law to support its position that dumping construction debris generated  
26 during construction work to create any type of “vehicle barrier” is exempt from regulation  
27 as a valid “reuse” of construction or inert debris. Indeed, the structure of the rules  
28 governing the handling of construction debris shows exactly the opposite, and the LEA’s

1 proper conclusion in the Official Notice that the Bunker Debris was illegally disposed solid  
2 waste applies to the Barrier Debris as well.

3                   **2. CalRecycle Rules Require That Construction Debris be Removed**  
4                   **From a Site When Construction is Complete**

5           There is no dispute that (1) the Barrier Debris was generated during the  
6 “construction work” to install a natural gas pipeline across the GCL property to service the  
7 OGPP in 2009-2010; (2) the construction work was part of the OGPP project and not part  
8 of the proposed landfill project; and (3) the construction work was done by the owner of the  
9 OGPP, not by or for GCL. There also is no dispute that the construction work to install the  
10 natural gas pipeline to the OGPP ended approximately five years ago.

11           The CalRecycle rules found in Article 5.9 of Title 14 of the California Code of  
12 Regulations, Division 7, Chapter 3, and titled “Construction and Demolition and Inert  
13 Debris Transfer/Processing Regulatory Requirements,” state that Article 5.9

14                   sets forth permitting requirements, tier requirements, and minimum  
15                   operating standards for operations and facilities that receive, store, handle  
16                   transfer or process construction and demolition (C&D) debris and inert  
                    debris, as defined herein.

17 (14 C.C.R. § 17380(a)). The next sentence of that subsection then states that “C&D debris  
18 and inert debris are specific types of solid waste . . . [that] can be handled with different  
19 regulatory oversight.” (*Id.*, emphasis added). The subsection’s last sentence states that  
20 Article 5.9 “places operations and facilities that handle C&D debris and inert debris into the  
21 board’s tiers to provide appropriate regulatory oversight . . . .” (*Id.*, emphasis added). The  
22 rules broadly define the term “handling” as including the “receipt, collection,  
23 transportation, storage, transfer, or processing of solid waste and recyclable materials.” (*Id.*  
24 § 17381(j)).

25           Recognizing that “construction work” can generate C&D debris or inert debris, the  
26 rules specifically state that Article 5.9 does not apply to “persons” who generate such  
27 debris “in the course of” carrying out “construction work,” but only if that person does not  
28

1 “allow C&D debris or inert debris, other than C&D debris or inert debris used in the  
2 construction work, to remain on the site of the construction work after the construction  
3 work is completed.” (*Id.* § 17380(g) emphasis added). The rule provides examples of the  
4 types of construction work to which the regulations do not apply, but reaffirms in the last  
5 sentence that the exemption from regulation is limited and that the persons to whom it  
6 applies “are not subject to these regulations during the course of the construction work.”  
7 (*Id.*, emphasis added). Notably, the exemption does not state that a person or an activity is  
8 exempt from regulation under Article 5.9 if the C&D or inert debris is “reused” on the site  
9 of ~~the~~ construction work.

10       There can be no dispute that this exemption from Article 5.9 does not apply to the  
11 Barrier Debris. The “construction work” that generated the Barrier Debris (the installation  
12 of ~~the~~ natural gas pipeline to the OGPP) ended in early 2010, approximately five years ago.  
13 Again, the Barrier Debris was not generated during the construction of the proposed  
14 landfill, so referring to the construction potential construction of the proposed landfill as the  
15 reason to allow the Barrier Debris to remain on the GCL property is factually and legally  
16 wrong. While it may have been possible for GCL to seek approval to retain the Barrier  
17 Debris on its property before or during the construction of the pipeline, that time has long  
18 since passed. As no exemption allows the Barrier Debris to remain on the GCL property, it  
19 ~~needs~~ to be removed now.

### 20                   3.     **The Barrier Debris Is “Solid Waste”**

21       Because the Barrier Debris is not exempt from the Article 5.9 rules, the LEA  
22 argument must be that all the CalRecycle rules governing the management of C&D debris  
23 or inert debris are inapplicable because the Barrier Debris is not a “solid waste” subject to  
24 any regulation. But that argument is untenable given that Article 5.9 clearly states that  
25 “C&D debris and inert debris are specific types of solid waste.” (*Id.* § 17380(a) emphasis  
26 added)). In addition, the definitions of the terms “C&D Debris” and “Inert Debris” in  
27 Article 5.9 specifically state that each type of debris is a “solid waste.” (*Id.* § 17381(e), (k)).  
28 Because there is no dispute that the Barrier Debris is C&D debris and/or inert debris, the

1 Barrier Debris is “solid waste” by definition.

2 Ignoring the clear language and intent of the CalRecycle rules governing the  
3 management of construction debris, the LEA has argued that the Barrier Debris is not a  
4 “solid waste” because it is being “reused” as a “vehicle barrier” now, and could be used in  
5 the future in the construction of the proposed landfill. Under the LEA’s interpretation of  
6 the term “solid waste,” the Barrier Debris apparently could remain on the site indefinitely  
7 and never be considered a solid waste, even if it is never used in the construction of the  
8 proposed landfill. The LEA cites no specific statutory or regulatory provision of state law  
9 that exempts construction debris allegedly being “reused” as a “vehicle barrier” from the  
10 definition of “solid waste.” As noted above, the exemption from Article 5.9 regulation of  
11 construction or inert debris generated during construction work also does not apply to the  
12 “reuse” of the construction debris for any purpose.

13 State law governing the regulation of “solid wastes” does not define the term  
14 “reuse.” However, state law does define the term “recycling” which itself mentions reuse.  
15 Section 40180, with emphasis added, defines the term “recycling” as the “process of  
16 collecting, sorting, cleansing, treating, and reconstituting material that would otherwise  
17 become solid waste, and returning them to the economic mainstream in the form of raw  
18 material for new, reused, or reconstituted products which meet the quality standards  
19 necessary to be used in the marketplace.”

20 While the Barrier Debris may have been “collected” or “sorted” as those terms are  
21 used in this definition, there is no evidence that the Barrier Debris has been cleansed,  
22 treated, reconstituted or returned to the “economic mainstream in the form of a raw  
23 material” for a product that can be “used in the marketplace.” Instead, the Barrier Debris  
24 has been randomly piled for 2,075 linear feet in the area where it was generated during the  
25 construction of the natural gas pipeline. That piling of the construction debris does not  
26 constitute “recycling” as defined by state law.

27 Because the Barrier Debris has not been recycled under the law, and C&D and inert  
28 debris both are defined by CalRecycle’s rules as “solid wastes,” the Barrier Debris has not

1 avoided “otherwise becoming a solid waste” under state law. No legal conclusion can be  
2 reached except that the Barrier Debris is “solid waste” under state law.

#### 3                   **4.       The Barrier Debris Has Been Disposed Under State Law**

4           The LEA also argued that the Barrier Debris has not been “disposed” as defined in  
5 Section 40192 because the debris “was not solid waste, and the storage of the debris at the  
6 GCL site was also not a final deposition” and because “GCL intends to use the debris for  
7 landfill construction, and the debris is suited for that purpose.” (LEA Response at 13: 12-  
8 15). As Ms. Merlos testified at the LEA Hearing Panel hearing, the Barrier Debris was not  
9 “disposed” because it has not reached its “final resting location.” (Exhibit O, Transcript at  
10 19: 15-22).

11           The LEA’s muddled argument conflates the definitions of “solid waste” and  
12 “disposal.” But, as shown above, the Barrier Debris is “solid waste” by definition. That  
13 leaves only the LEA’s equally unavailing argument that the Barrier Debris has not been  
14 “disposed” because it is allegedly being used as a “vehicle barrier” and ultimately is  
15 intended to be used in the construction of the proposed landfill.

16           The LEA relies on the language in Section 40192 defining the term “disposal” as the  
17 “final deposition of solid waste onto land” to argue that, because the Barrier Debris is being  
18 used as a “vehicle barrier,” it has not reached its point of “final deposition.” But that  
19 argument has to be predicated entirely on the LEA’s speculation that the Barrier Debris  
20 ultimately would be used in the construction of the proposed landfill, if it is ever  
21 constructed, and that the proposed landfill would be the point of final deposition for the  
22 Barrier Debris. Otherwise, under the LEA’s interpretation of the law, if the proposed  
23 landfill is not constructed, the Barrier Debris will never reach its “final deposition” point  
24 and so will never be considered to have been “disposed.” If five years is not sufficient time  
25 to find that the Barrier Debris has been disposed, then how long is that period?

26           That is a flagrant misreading of the law that CalRecycle should correct now. The  
27 LEA’s tortured interpretation of the terms “solid waste” and “disposal” creates a gaping  
28 hole in the law, and its argument that it has the unfettered and unchallengeable discretion to

1 determine if construction debris is a solid waste that has been disposed also is untenable.  
2 Under the LEA's interpretation, GCL could accept construction debris from anywhere, at  
3 any time and, so long as the construction debris was piled to allegedly limit access to some  
4 area, and it was claimed that the debris would be used sometime in the future in the  
5 proposed landfill. That is an unacceptable interpretation of state law for a number of  
6 reasons.

7 First, as California has an approved solid waste program, its laws governing the  
8 regulation of solid waste can be no less stringent than those of the federal RCRA, including  
9 its prohibition on open dumps. (*Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997).  
10 Under RCRA, the term "disposal" means the "discharge, deposit, injection, dumping,  
11 spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or  
12 water so that such solid waste or hazardous waste or any constituent thereof may enter the  
13 environment or be emitted into the air or discharged into any waters, including ground  
14 waters." (42 U.S.C. § 6903(3)). The "final deposition" language in California law can be  
15 no less stringent than this definition. Because the Barrier Debris has been placed on the  
16 land in a manner that a constituent of the debris "may enter the environment," the Barrier  
17 Debris has been disposed. (*See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 1013  
18 (11th Cir. 2004) (by placing scrap metal and other materials throughout their property,  
19 defendants placed solid waste in a manner that the waste "could enter the environment" and  
20 thus "disposed of" solid waste under RCRA); *Kaiser Aluminum & Chemical Corp. v.*  
21 *Catellus Development Corp.*, 976 F.2d 1338, 1342 (9<sup>th</sup> Cir. 1992) (under CERCLA, which  
22 uses the RCRA definition of disposal, the spreading of soil constitutes disposal)).

23 Second, CalRecycle rules clearly state when the "storage" of C&D or inert debris is  
24 deemed disposal. The term "storage" is defined broadly to include the "holding or  
25 stockpiling" of such debris, and the definition specifically states that the storage of such  
26 debris "for periods exceeding the limits set in this Article is deemed to be disposal," even at  
27 properly approved facilities. (14 C.C.R. § 17381(ee) emphasis added).

28 Expanding on that general rule, the CalRecycle rules describing activities not subject

1 to the C&D or inert debris regulatory requirements are quite specific. Specifically, even for  
2 a facility that qualifies as a Type A inert debris recycling center, the rules state that inert  
3 debris stored for more than (1) six months if the debris has not been processed or sorted for  
4 resale or reuse, or (2) 18 months if the debris has been processed “shall be deemed to have  
5 been unlawfully disposed and therefore subject to enforcement action ....” (14 C.C.R. §  
6 17381.1(e)(1)-(2) emphasis added). Although the GCL property is not a Type A inert debris  
7 recycling facility (or any other type of recycling facility), the allowable storage period at  
8 the site was the end of construction, not even six or 18 months allowed by these rules, and  
9 clearly not the five years the Barrier Debris has remained on the site.

10 These and the other storage time limits in the CalRecycle rules make clear that the  
11 Barrier Debris cannot simply be stored on the GCL property indefinitely in the hopes that  
12 the proposed landfill will be constructed sometime in the future. These rules put “meat on  
13 the bones” of what constitutes “final deposition,” establishing specific periods after which  
14 storage at even approved facilities shall be deemed disposal. The rules do not state that an  
15 alleged use of solid waste as a “vehicle barrier” overrides this mandatory directive.

16 Even if the disposal of the Barrier Debris qualified GCL to be characterized as a  
17 “Type A inert debris disposal facility,” GCL still would be required to obtain “Registration  
18 Permits” and to comply with the requirements listed in the rules “in the same manner as if  
19 they were municipal solid waste landfills.” (14 C.C.R. § 17388.4). Those requirements  
20 include obtaining waste discharge requirements from the Regional Water Quality Control  
21 Board or a waiver, and complying with financial assurance standards, among other listed  
22 requirements. GCL has obtained none of these required approvals, but the LEA improperly  
23 continues to allow GCL to illegally operate a disposal facility on its property.

#### 24 **5. The Claimed “Use” of the Barrier Debris is a Sham**

25 Even if the LEA had the legal authority to ignore state law and allow the “reuse” of  
26 the Barrier Debris in a manner that exempted it from regulation, the facts show that the  
27 alleged “barrier” is both unnecessary and ineffective. Consequently, this alleged “reuse” is  
28 a textbook example of sham reuse.

1           The sole argument that the Barrier Debris is even needed is based on the hearsay  
2 testimony of Mr. Henderson that a caretaker (since identified only as “Julio”) told him that  
3 “persons were driving vehicles into the riparian area on this site, to access vacant structures  
4 located to the south and east.” (Exhibit E, Henderson Declaration at ¶ 6). Even if his  
5 hearsay testimony is accepted as true, the facts show that the “Barrier Debris” (1) is  
6 unnecessary to prevent access to the riparian area or the structures because other existing  
7 structures already prevent access or other types of legal barriers could be installed, and (2)  
8 can be easily avoided simply by driving on the dirt road to the west of the Barrier Debris or  
9 on Wild Road through a “deliberate gap” in the middle of the Barrier Debris. The lack of  
10 effectiveness of the Barrier Debris is not changed by the fact that there may other barriers  
11 that limit access to the “structures” on the south side of the river or to the riparian area once  
12 a vehicle has passed through or gone around the Barrier Debris.

13           As to the lack of need for the “barrier,” Exhibit B includes a number of photographs  
14 that show a substantial concrete lip in front of the Barrier Debris that itself prevents vehicle  
15 access to the area south of the Barrier Debris. The photographs also show metal fencing  
16 behind the Barrier Debris that limits access. In fact, the last photograph is tellingly titled  
17 “Fencing and other barriers also in place in addition to Inert Debris as barricade.”  
18 Consequently, piling the Barrier Debris to allegedly limit access to an area when access is  
19 already limited is not a valid reuse of the construction debris.

20           As for the ineffectiveness of the “barrier,” Exhibit M contains two maps created by  
21 the LEA. The first shows the location of the Barrier Debris in relation to the San Luis Rey  
22 River to the south, which is identified by the green line and the trees. The second map  
23 shows the same thing, but also shows the location of the “structures” on the south side of  
24 the river allegedly being protected by the Barrier Debris. Supposedly, the Barrier Debris is  
25 there to prevent access to and across the river and to the area between the Barrier Debris  
26 and the river.

27           But the maps clearly show a dirt road to the left (west) of the farthest left arrow  
28 demarcating the Barrier Debris. The map shows that that this road provides vehicles access

1 from SR 76 around the Barrier Debris (1) to the river, and (2) to roads that lead east into the  
2 area between the Barrier Debris and the river. These photographs show that the Barrier  
3 Debris does not prevent access on that dirt road around it, making the Barrier Debris a  
4 Maginot Line.

5 The third photograph in Exhibit M also shows a self-titled “opening in barricade”  
6 that also allows vehicles into the area south of the Barrier Debris through a “deliberate gap  
7 in the barrier.” (Exhibit E, Henderson Declaration at ¶ 13). Again, because this deliberate  
8 gap in the Barrier Debris allows access to the riparian areas behind the Barrier Debris, there  
9 is no support for the claim that the Barrier Debris prevents access to that area. Whether  
10 there are other impediments to further access on the south side of the Barrier Debris is  
11 irrelevant to whether the Barrier Debris is needed and effective.

12 Finally, although it is not a criteria governing whether the Barrier Debris is illegally  
13 disposed solid waste, the fact is that the LEA did not consider the potential environmental  
14 impacts of allowing the Barrier Debris to be placed in this area and to remain in place  
15 indefinitely is problematic. The LEA did not conduct any environmental assessment of the  
16 disposal of the Barrier Debris even though it knew that the area is designated as critical  
17 habitat for four endangered species, and is identified as containing suitable soils for the  
18 endangered southwestern arroyo toad. (Exhibit Q). That failure to consider the  
19 environmental impacts of placing the Barrier Debris in this sensitive area evinces a  
20 troubling lack of concern by an agency tasked with protecting the environment.

21 The Barrier Debris is not necessary or effective. The LEA’s Official Notice found  
22 that the continued presence of the Bunker Debris on the site constituted the improper  
23 operation of “a solid waste operation without proper notification” in violation of Section  
24 44000.5(a). The LEA should have made the same finding as to the Barrier Debris.

25 The disposal of solid waste at an unpermitted or non-exempt site makes that site an  
26 “illegal site.” (14 C.C.R. § 18011(a)(13)). Section 44002 requires an LEA to “immediately  
27 issue a cease and desist order pursuant to Section 45005” ordering the illegal facility “to  
28 immediately cease all activities for which a solid waste facilities permit is required and

1 desist from those activities until the person obtains a valid solid waste facilities permit  
2 authorizing the activities or has obtained other authorization pursuant to this division.”  
3 This creates a mandatory and immediate duty for the LEA to issue a cease and desist order  
4 to GCL directing it to immediately cease the illegal disposal of the Barrier Debris by  
5 immediately removing the material from its property. The mandatory need for immediate  
6 action also is found in CalRecycle’s “Mandated Enforcement Action” rule. It requires an  
7 LEA to “issue a cease and desist order to cease operations immediately if the EA  
8 determines that a solid waste facility is operating without a permit or that an operation is  
9 operating without the proper notification.” (14 C.C.R. § 18304.3).

10 Administrative agencies cannot “refuse to act” or “act with unfettered discretion,”  
11 and a court can “compel an official both to exercise his discretion (if he is required by law  
12 to do so) and to exercise it under a proper interpretation of the applicable law. (*California  
13 School Boards Ass’n v. State Board of Education* (2010) 186 Cal.App.4th 1298, 1327).  
14 Because state law and CalRecycle rules demand immediate action, the LEA must take that  
15 action to force GCL to cease its illegal operation of a solid waste disposal facility.

16 **IV. CONCLUSION**

17 The Pala Band’s actions were timely for the reasons discussed above, and  
18 CalRecycle should overturn the Hearing Panel’s decision on the issue. Then, given that the  
19 substantive issues solely raise questions of law, CalRecycle should address those issues and  
20 find that the LEA has failed in its duty to enforce state law. CalRecycle should direct the  
21 LEA to order GCL to remove the Barrier Debris or CalRecycle should take that action  
22 itself.

23 DATED: November 12, 2014

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

24  
25 By:   
26 Walter Rusinek  
27 Attorneys for Appellant  
28 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 **November 12, 2014**, I served the within documents:

### **PETITIONER'S OPENING BRIEF IN SUPPORT OF ITS APPEAL OF THE SAN DIEGO COUNTY LEA HEARING PANEL'S SEPTEMBER 26, 2014, DECISION**

- 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 **November 12, 2014**, at San Diego, California.



---

Sarai DeJesus

SERVICE LIST

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

**EXHIBIT A**

## Disposal Facility Inspection Report (52)

<b>Enforcement Agency:</b>		County of San Diego			
<b>SWIS Facility File Number (99-xx-9999)</b>		<b>Inspection Date</b>		<b>Program Code</b>	
37-AA-0032		7/30/2014		LEA Periodic	
<b>Time In</b>	10:00	<b>Time Out</b>	10:45	<b>Inspection Time</b>	3 Hours
<b>Facility Name</b>			<b>Received By</b>		
Gregory Canyon Landfill			provided by email see comments		
<b>Facility Location</b>			<b>Owner Name</b>		
9708 Pala Road, Pala		92059	Gregory Canyon Limited		
<b>Inspector</b>			<b>Also Present (Name)</b>		
Henderson			See comments		

THE ABOVE FACILITY WAS INSPECTED FOR COMPLIANCE WITH APPLICABLE SECTIONS OF THE DIVISION 70 OF THE PUBLIC RESOURCES CODE (PRC) AND TITLE 14 AND TITLE 17 UNIFORM CODE OF REGULATIONS (UCR)

No Violations or Areas of Concern		
V	A	Regulations
	X	20530 - Site Security
		Comments: Site is not secure from the South side (water pipeline road). Ensure that site is secured to prevent unauthorized access.
	X	20830 - Litter Control
		Comments: Illegal dumping of solid waste and green waste observed on site along the water pipeline road during pervious inspections remains on site. No new dumping observed. Remove this material.

**Inspection Report Comments:**

Gregory Canyon - Monthly Inspection

**Participants:**

Alfred Worcester (CalRecycle)

**Observations:**

Inert Construction Debris (concrete and asphalt) continues to be stockpiled onsite as noted in the last inspection report. A separate Notice will be issued to GCL related to the stockpiled Construction Debris in the bunker. The concrete material in use as access control can continue to be used for that purpose.

Site was secure from hwy 76. The west side access gate was secure. Water pipeline road is not secure.

The landfill is not yet under construction, and no site preparation activities were observed.

Contact LEA prior to construction, grading, or implementation of mitigation measures.

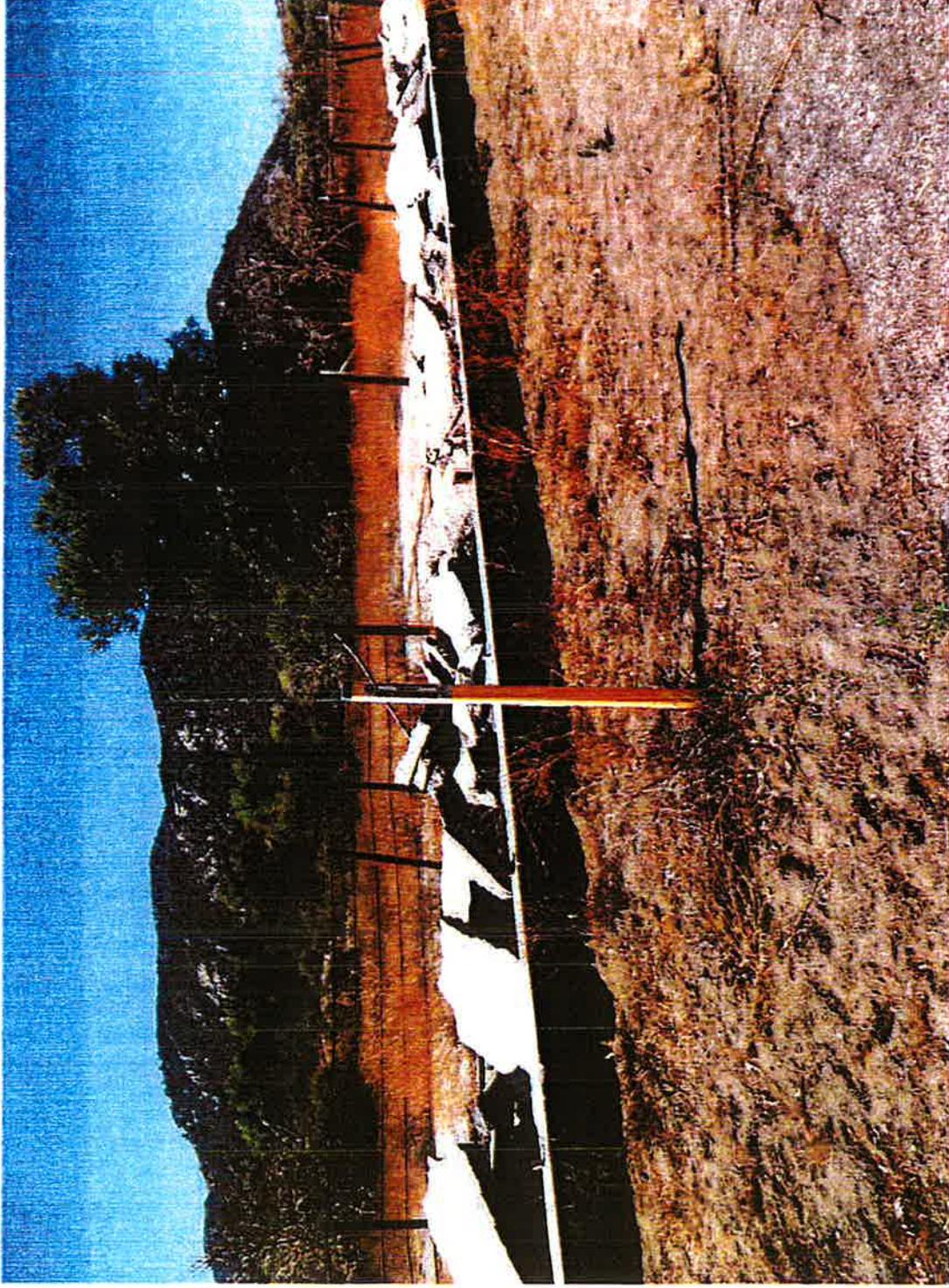
Report e-mailed to Jason Simmons.

**e copies to:**

Jim Simmons  
Bill Hutton  
KariLyn Merlos

**EXHIBIT B**

Gregory Canyon Landfill 37-AA-0032  
Jim Henderson, LEA - 8/30/14



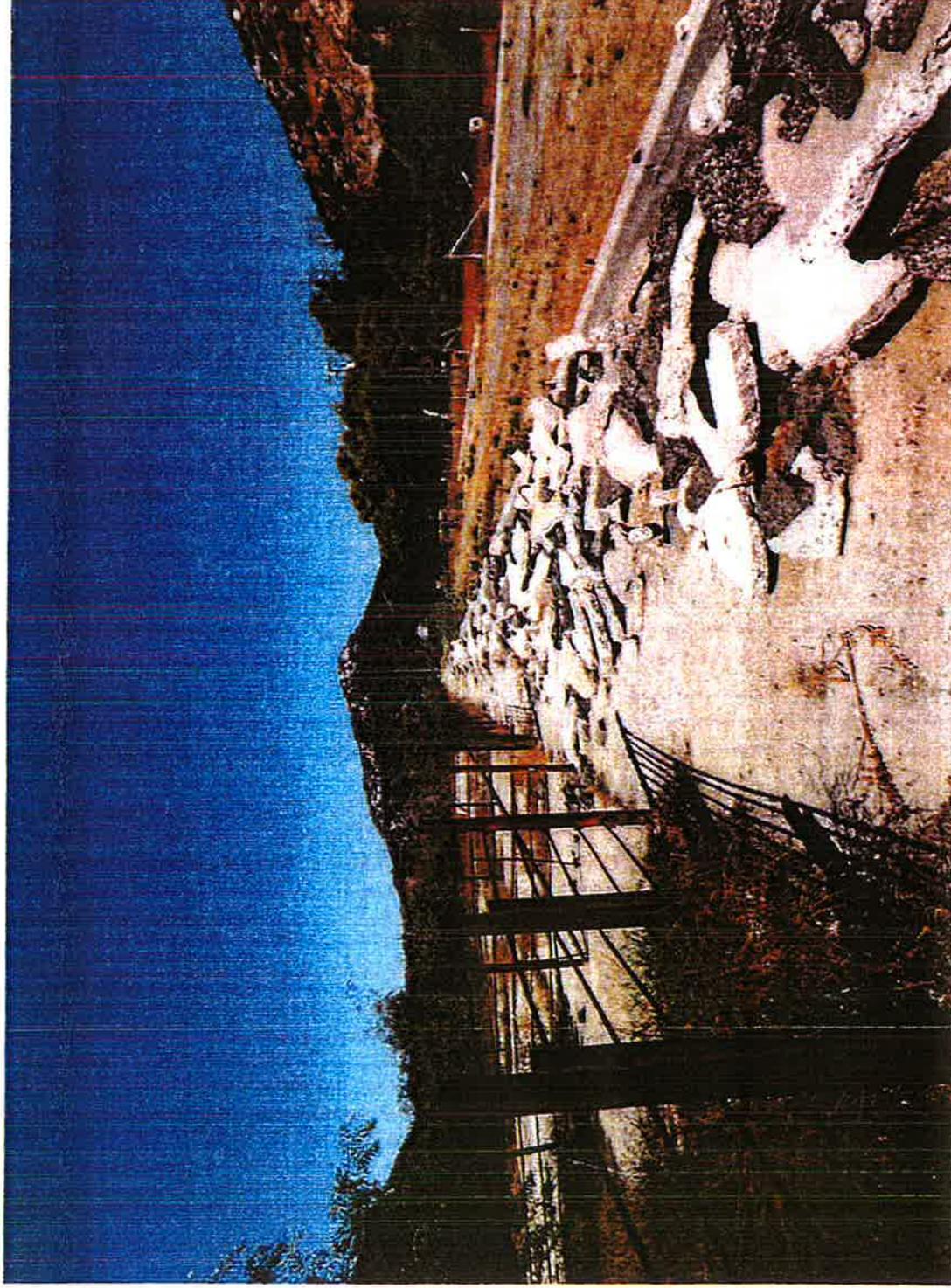
Inert Debris as barricade.

Gregory Canyon Landfill 37-AA-0032  
Jim Henderson, LEA - 8/30/14



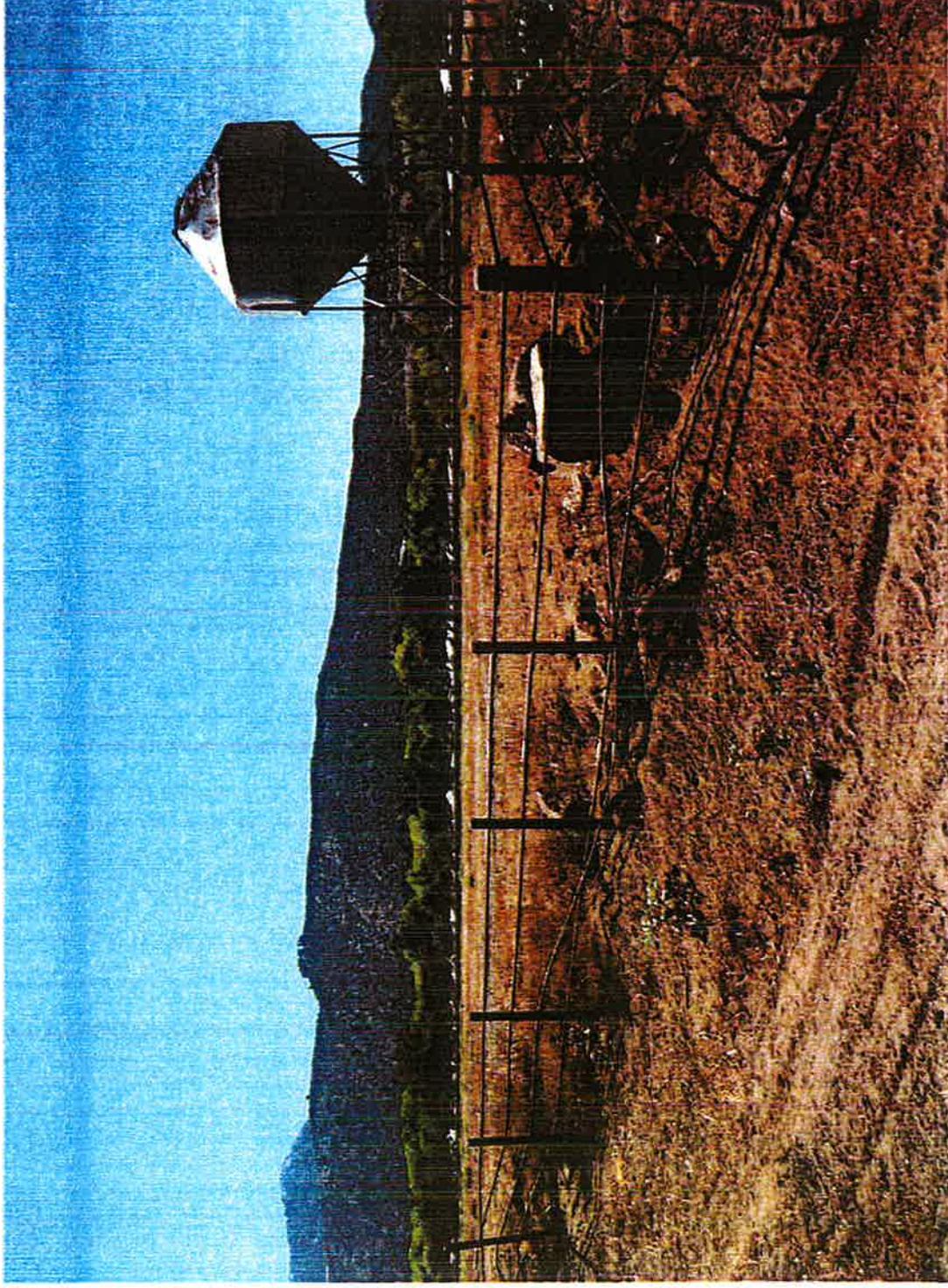
Inert Debris as barricade.

Gregory Canyon Landfill 37-AA-0032  
Jim Henderson, LEA - 8/30/14



Inert Debris as barricade.

Gregory Canyon Landfill 37-AA-0032  
Jim Henderson, LEA - 8/30/14



Fencing and other barriers also in place in addition to Inert Debris as barricade.

**EXHIBIT C**



August 5, 2014

Jim Henderson  
County of San Diego DEH  
5500 Overland Ave, Suite 170  
San Diego, CA 92123

Dear Mr. Henderson:

In response to our conversation this afternoon and our discussions of last week, I am writing to memorialize Gregory Canyon's understanding of the reason for the broken concrete that is stacked along the alignment of the new gas pipeline on the Gregory Canyon Landfill site. I have asked Nancy Chase to speak to Jim Pomillo who was the project manager for J-Power and worked with SDG&E to supervise the installation of the pipeline. He has confirmed what I had thought to be true with regard to the broken concrete and why it was left in place on the site. As you are aware there is not a continuous fence or barrier along the road on this site. It was agreed by SDG&E, J-Power, Gregory Canyon, LLC, and the DEH that it would be acceptable to leave the concrete as a barrier to block access to the site and that when the site went into construction the concrete would be recycled as road base. With regard to the asphalt and soil mix that is stored in the concrete bunker, it was agreed that we could leave it there provided we did not add to the amount stored in the bunker. We have not added any amount to the stockpile. The material has construction value and is not classified as solid waste.

We believe we have met all the requirements of our permit with regard to these issues and look forward to working with you to be sure there is a clear understanding of the situation.

Sincerely,

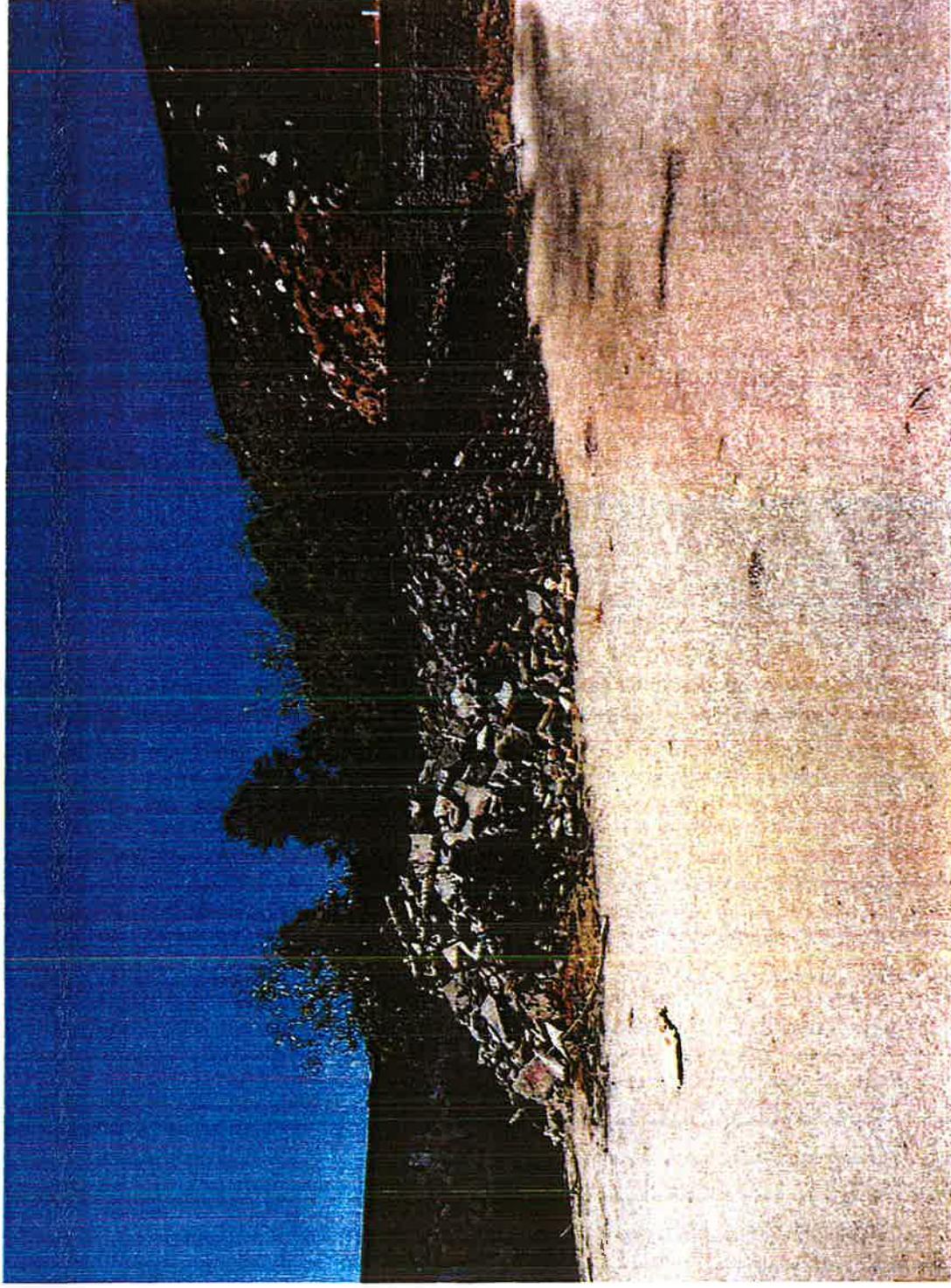
A handwritten signature in black ink, appearing to read "Jim Simmons", is written over a large, faint oval shape that serves as a placeholder or a decorative element.

Jim Simmons  
Project Manager  
Gregory Canyon, LLC

160 Industrial Street, Suite 200 San Marcos, CA 92078  
Tel: 760.471.2365 Fax: 760.471.2383 Email: GregoryCanyon@gmail.com

# **EXHIBIT D**

Gregory Canyon Landfill 37-AA-0032  
Jim Henderson, LEA - 8/27/14



Inert Debris Pile.

# **EXHIBIT E**

1 DEBORAH A. McCARTHY (SBN NO. 99062)  
Assistant County Counsel  
2 RODNEY F. LORANG (SBN NO. 93078)  
Senior Deputy County Counsel  
3 Office of County Counsel, County of San Diego  
1600 Pacific Highway, Room 355  
4 San Diego, California 92101-2469  
Telephone: (858) 694-3204  
5 Facsimile: (619) 531-6005  
E-Mail: rodney.lorang@sdcounty.ca.gov  
6

7 Attorneys for San Diego County Department of Environmental Health  
8

9 **BEFORE THE SAN DIEGO COUNTY SOLID WASTE HEARING PANEL**

10  
11 PALA BAND OF MISSION INDIANS,

12  
13 Petitioner,

14 v.

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

19 Respondent.  
20  
21

HEARING ON LOCAL ENFORCEMENT  
AGENCY'S ALLEGED FAILURE TO ACT AS  
REQUIRED BY LAW OR REGULATIONS

Case No. LEA-2014-2

DECLARATION OF JIM HENDERSON

Public Resources Code §§ 44307;  
27 California Code of Regulations § 22272

Date: September 22, 2014

Time: 2 p.m.

Place: Room 402A  
1600 Pacific Highway  
San Diego, California 92101

22  
23 1. I, Jim Henderson, declare as follows:

24 2. If called as a witness and sworn, I could and would competently testify to the facts set  
25 out in this declaration.

26 3. I have been employed with the County of San Diego Solid Waste Local Enforcement  
27 Agency (LEA) since March 2007. I have been assigned to the proposed Gregory Canyon  
28 Landfill project since March 2007.

1           4. I inspect the Gregory Canyon Ltd. LLC (“GCL”) property in Northern San Diego  
2 County near Pala CA monthly, and have done so since July 2008, with the exception of the time  
3 between June 2010 when a previously issued permit was rescinded, and August 2011 when a  
4 new Solid Waste Facility Permit was issued. GCL owns 1770 acres of land in this area. Of this  
5 acreage 308 acres, all south of Hwy 76, have been permitted for a future Solid Waste Facility  
6 Landfill.

7           5. My “landfill” inspections typically include the landfill site and the portions of this  
8 property south of Hwy 76 that are not designated for landfill construction. This is partly  
9 because the landfill permit includes environmental protection and mitigation provisions that  
10 apply in some of these areas. In addition, property owners living near the site, and the Pala  
11 Band of Mission Indians, have repeatedly expressed concerns to the LEA about any activity on  
12 the GCL property that might be associated with the landfill project, and about any other activity  
13 on the property that might be illegal under any County regulatory or land use control program.

14           6. In 2010, GCL’s on-site caretaker told me that unknown persons were driving vehicles  
15 into the riparian area on this site, to access vacant structures located to the south and east. The  
16 caretaker expressed concern about damage to these structures, illegal activity in the structures,  
17 and impacts to the riparian area.

18           7. At about the same time in 2010, GCL constructed a barrier to vehicle traffic, using  
19 large pieces of concrete from the Orange Grove pipeline installation project. I took the  
20 photographs of that barrier that are in Exhibit 5 to the LEA’s Response. Those photos are  
21 recent, and are an accurate representation of the barrier. The barrier is substantial enough to  
22 significantly deter vehicle transit across the barrier by unauthorized vehicles. The Exhibit also  
23 includes photos I took recently of the structures that were being accessed through the riparian  
24 area. The hills in the background of these photos show that these are not the houses near Hwy  
25 76, which have already been thoroughly vandalized.

26           8. The vehicle barrier is parallel to and near Hwy 76. I have measured the barrier with a  
27 measuring wheel as being 2,075 feet long. The barrier is readily visible from Hwy 76.

28           9. Exhibit 5 also includes an overhead photo of a portion of the GCL site showing the

1 relationships between Hwy 76, the barrier, the riparian area, and the structures at issue. The  
2 barrier is placed where it serves its intended purpose of deterring vehicle access from Hwy 76 to  
3 the riparian area.

4 10. The barrier works in combination with other site features. Existing access control for  
5 the property south of Hwy 76 is as follows:

6 11. On the North side of this portion of the property (but still south of Hwy 76) there are  
7 two main dairy areas, both with structures and houses clearly visible from Hwy 76. The one to  
8 the west is totally abandoned but is the location where a wooden bridge previously provided  
9 access to the Southern part of the property. The bridge is no longer intact but parts of the  
10 wooden bridge can still be seen crossing the riparian area at this location on the old bridge road.  
11 GCL has used tree trunks, boulders, traffic barriers, fencing and the existing houses and  
12 structures in this area to limit access from Hwy 76 to the riparian area by this route. As a result  
13 this also limits access to structures to the south of the riparian area and to Gregory Canyon itself.  
14 However, prior to construction of the additional barrier in 2010, access was available to the  
15 north end of the old bridge road by cutting into the dairy at the west end just past the line of  
16 houses and barriers.

17 12. During the construction of the Orange Grove Pipeline in 2009 and 2010, GCL  
18 decided to use some of the large pieces of concrete and some asphalt from the demolition of a  
19 pad running along the route of the pipeline as an additional barrier. It is not a complete barrier  
20 and is only one of several barriers in place. There are fence posts next to this barrier, but only  
21 some spots have wire between the posts, most are only bare posts. The concrete barrier did  
22 prevent direct access to the starting end of the old bridge area, by blocking the end access to this  
23 area, which was previously accessible by vehicle.

24 13. There is still a deliberate gap in the barrier, shown in an Exhibit 5 photo. This gap  
25 does not provide access to the riparian area from Hwy 76, because barricades on the sides  
26 prevent vehicle access from that highway. The gap can be accessed from the south, but only  
27 from an area that is protected by a locked gate. The purpose of the gap appears to be to allow  
28 authorized access for maintenance from the south, since access from the highway has been cut

1 off by barricades.

2 14. The old dairy to the north on the east edge is fenced and there is a caretaker that lives  
3 in one of the old dairy houses. There is a construction yard, fences and natural barriers that  
4 prevent access to the riparian area and the southern part of the property from this dairy area.

5 15. The east edge of the property is bordered by Gregory Mountain which forms a  
6 natural barrier for that side.

7 16. The south side is not readily accessible, but there is a narrow paved road running  
8 through some houses and avocado groves that leads to a right of way road to the San Diego  
9 Aqueduct. The right of way is not paved, has no gate or security other than "No Trespassing"  
10 signs. The road is flat and in good condition at the top, but as it drops into the canyon below it  
11 can be in poor condition and also slopes steeply into a "four wheel drive only" type of condition.

12 17. The west side of the property use fences and trenches on the north side of the riparian  
13 area. There is also a locked gate that provides access to this area. After using an Arizona  
14 Crossing (private property) to cross to the South of the riparian area there is access to Gregory  
15 Canyon through a locked gate. There are also a couple of dirt trails on the west side that could  
16 be used by off road vehicles to access the site but the obvious access is through the locked gate.

17 18. Construction of the vehicle barrier with construction debris from the Orange Grove  
18 Pipeline Project, when combined with these other access controls, prevents vehicle traffic from  
19 Hwy 76 to the riparian area, reducing environmental damage. This barrier also closed off a  
20 route that was being used for unauthorized access to the two houses and the barn to south and  
21 east of the riparian area.

22 19. There is also a canyon to the north of Hwy 76 that is GCL property, which contains a  
23 couple of houses and structures. Access control to this canyon is by a locked chain between a  
24 couple of concrete traffic barricades.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
26 true and correct.

27 Dated: 09-04-2014

By: Jim Henderson  
Jim Henderson, REHS  
Solid Waste Local Enforcement Agency

Digitally signed by Jim Henderson  
DN: cn=Jim Henderson, o=DEH, ou=DEH,  
email=jim.henderson@sdcounty.ca.gov, c=US  
Date: 2014.09.04 15:17:45 -0700

28

**EXHIBIT F**



**EXHIBIT G**

## Disposal Facility Inspection Report (52)

Enforcement Agency:		County of San Diego		
SWIS Facility File Number (99-xx-0000)		Inspection Date		Program Code
37-AA-0032		5/7/2010		LEA Periodic
Time In	09:30	Time Out	11:30	Inspection Time
			5 Hours	
Facility Name			Received By	
Gregory Canyon Landfill			Provided by email	
Facility Location			Owner Name	
9708 Pala Road, Pala		92059	Gregory Canyon Limited	
Inspector			Also Present (Name)	
Jim Henderson				
<small>THE ABOVE FACILITY IS INSPECTED FOR COMPLIANCE WITH APPLICABLE SECTIONS OF THE DIVISION 18 OF THE CALIFORNIA REGULATORY CODE AND THE TITLE 18 OF THE CALIFORNIA CODE OF REGULATIONS.</small>				
<input checked="" type="checkbox"/> <b>No Violations or Areas of Concern</b>				
<input type="checkbox"/> <b>A</b> <b>Regulations</b>				
<b>Inspection Report Comments:</b>				
<p>Gregory Canyon - Monthly Inspection</p> <p>Observations</p> <p>Met with Jim Pomillo, from JPower (pipeline contractor) and Keith Battle representing Gregory Canyon Ltd. (GCL), and Javier the on site caretaker to review several piles of debris, some consisting of piping and metal and others consisting of concrete and asphalt. Based on a review, the metal and piping debris was confirmed as existing site debris that was re-located and consolidated during the pipeline construction. The piping and metal debris piles are not a responsibility of JPower. GCL is responsible for these piles. Remove and recycle or dispose of properly.</p> <p>The concrete and asphalt debris in other locations is considered by GCL as base material for future use during landfill construction. Most of the concrete and asphalt is stored in a staging area but some is being used as barrier material to restrict access to the riparian areas. No issues noted with this material.</p> <p>Observed a couple of new illegal disposal piles near the west edge of the property, one consisting of wood and the other with a mattress and some green waste. Remove and dispose of properly.</p> <p>Contact LEA prior to any construction, grading, or implementation of mitigation measures.</p> <p>The landfill is not yet under construction.</p> <p>Report e mailed to:  Jason Simmons (jason@cciconnect.com)</p> <p>E copies to:  Jim Simmons (jim@cciconnect.com)  Bill Hutton (bill.hutton@huttonlawoffice.com)  Jerry Riessen (j.riessen@comcast.net)</p>				

# **EXHIBIT H**

June 9, 2014

**VIA E-MAIL**

Jim Henderson  
County of San Diego  
Department of Environmental Health  
Local Enforcement Agency  
5500 Overland Avenue, Suite 170 MS 0560  
San Diego, CA 92123

**Re: Proposed Gregory Canyon Landfill – Encumbrances and Illegal  
Disposal of Solid Wastes on the Property**

Dear Mr. Henderson:

This letter is provided in response to your e-mail to me dated May 28, 2014, which is attached to this letter as Exhibit A. Thank you for your e-mail, which responded to my questions regarding whether Gregory Canyon Ltd. LLC (“GCL”) had provided the information the Local Enforcement Agency (“LEA”) requested in its letter to GCL dated April 21, 2014, which is attached for your convenience as Exhibit B.

In that April 21<sup>st</sup> letter, the LEA asked GCL to provide (1) the notifications it had submitted to the LEA prior to placing encumbrances on the GCL property, or (2) “a letter certifying that the property has not been encumbered.” The LEA’s letter also repeated that GCL should “secure site access from the south” to halt illegal dumping on the GCL property, and “conduct a clean-up of existing dumped waste.” The LEA had identified the illegally dumped waste during its September 12, 2013, and November 18, 2013, inspections of the facility. That information was provided to GCL in the LEA’s Inspection Reports.

**I. GCL Has Placed Numerous Encumbrances on the Property Without  
Providing the Required Notifications.**

In your May 28, 2014, e-mail you acknowledged that GCL had not provided a letter certifying that the property has not been encumbered. But you also claimed that GCL had no legal obligation “to certify the absence of encumbrances in writing,”

Jim Henderson  
June 9, 2014  
Page 2

although that written certification is exactly what the LEA's April 21<sup>st</sup> letter to GCL had requested. Your e-mail then stated that a representative of GCL told you in April that "there were no encumbrances on the property."

Once again, a GCL statement regarding the proposed landfill is simply not true because, in this case, there are numerous encumbrances affecting GCL's property. Attached to this letter as Exhibit C are relevant pages of a preliminary title report showing the existing recorded encumbrances (Deeds of Trust) that affect all of the parcels that make up the property owned by GCL at the Gregory Canyon site. There are other recorded encumbrances that affect only portions of the GCL property, some of which also may be within the area permitted under the solid waste facility permit ("SWFP"), but information on those recorded documents has not been provided to make this discussion more straightforward.

What the attached document shows is that the entire property is encumbered by a number of Deeds of Trust "to secure an indebtedness," which belies GCL's assertion to you that there are no encumbrances on the property. While some of the encumbrances were placed on the property in 2003 and early 2004, a number of them were placed on the property between December of 2004 and June of 2010. That was during the period when GCL and the LEA took the erroneous position (one rejected by CalRecycle and ultimately by the trial court) that the SWFP issued in 2004 was still valid. Even so, GCL failed to provide the required notifications before it repeatedly encumbered the property.

After the court confirmed that the 2004 SWFP was invalid, the LEA issued a new SWFP in August of 2011. Again, without making the required notifications, GCL placed additional encumbrances on the property or modified existing encumbrances. By law, GCL should have notified the LEA and CalRecycle before it took those actions, and it clearly should have provided information on the existence of these numerous encumbrances when the LEA requested that information in its April 21<sup>st</sup> letter.

Public Resources Code Section 44005 requires that an owner/operator of a solid waste facility notify the LEA and CalRecycle 45 days prior to encumbering the property on which a solid waste facility is located. The statute requires that the LEA and CalRecycle review the notification and determine within 30 days whether the facility will be operated in compliance with the terms and conditions of the permit.

Clearly, GCL has ignored that legal obligation for years, and now falsely claims that there are no encumbrances on the property. This is yet another example GCL's willingness to ignore its legal obligations, and it should raise additional questions

Jim Henderson  
June 9, 2014  
Page 3

concerning whether GCL ever could operate the proposed facility in accordance with legal requirements. Given the mandatory notice requirement in the statute, the LEA should direct GCL to provide the required information on these encumbrances for the LEA and CalRecycle to review.

## **II. The LEA Has Repeatedly Found That Solid Waste Has Been Illegally Disposed on the Site and That Site Security is Lacking.**

As for the illegal dumping on the GCL property, your e-mail acknowledged that GCL has taken no action in response to the LEA's direction in its April 21, 2014, letter that access to the southern portion of the site should be secured and that GCL should clean up the illegally disposed waste. The LEA's April 21<sup>st</sup> letter acknowledged that the lack of security in the southern area of the property "has resulted in repeated cases of illegal dumping," a fact confirmed by the LEA's Inspection Reports from September 6, 2012, and January 15, 2013, which also identified illegal dumping in that area. Notably, the September 12, 2013, Inspection Report "advised" GCL to "implement measures to prevent unauthorized access, and arrange for the proper management of waste illegally dumped on the property." Notably, all the acts of illegal disposal identified above have occurred after the facility received its SWFP.

But even though the illegally dumped material has not been removed and measures have not been put in place to prevent unauthorized access for 10 months, your e-mail stated that the LEA has concluded that the illegal dumping and lack of security on the site "are not issues which would require or warrant escalated enforcement action at this time." This means that, even though (1) the LEA has identified the illegal dumping and lack of security, which both violate CalRecycle rules and the terms of GCL's SWFP, as a continuing problem at this permitted facility, and (2) GCL has chosen to ignore these problems for 10 months, the LEA's position is that it will not take action to rectify these violations.

The LEA's argument that "escalated" enforcement is not required at this time is confusing because it appears that the LEA has done nothing at all regarding these violations. Even if the repeated illegal dumping and the lack of security were considered to be "minor" violations, Public Resources Code Section 45003 still states that an LEA inspector who discovers a "minor violation" during an inspection "shall take an enforcement action . . . in accordance with this section" by issuing a notice to comply. While the statute limits the LEA's ability to bring an enforcement action to those situations where the person cited "fails to correct the violation or fails to submit the certification of correction within the time period prescribed in the notice," it also states

Jim Henderson  
June 9, 2014  
Page 4

that the person receiving a notice to comply “shall not have not more than 30 days from the date of the notice to comply in which to correct any violation cited in the notice to comply” and file a certification of completion.

That is the minimal process required by the statute for even a minor violation. If the LEA believes that a notice to comply has not been provided, it needs to issue one to GCL now, and require it to remedy these continuing and repeated violations.

### **III. GCL Has Illegally Stored Construction Debris on the Property For Years.**

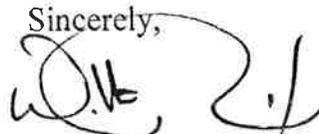
Another issue that the LEA needs to address regarding the GCL site is that fact that GCL has illegally stored large amounts of construction debris on the site which apparently was generated during the installation of a natural gas pipeline in 2009. This concrete (and possibly other construction debris) constitutes “demolition and construction wastes,” which are “solid wastes” that can be disposed only in the permitted area of a permitted facility. Pub. Res. Code §§ 40191 and 44000.5. The disposal of solid waste at a site that is not permitted or exempt from permitting is considered an “illegal site,” 14 C.C.R. § 18011(a)(13), and even though the site has a SWFP, this material has been disposed outside the permitted area under that SWFP.

CalRecycle rules clearly limit the amount of time construction debris may be stored, even at permitted facilities, and storage in excess of those allowed periods “is deemed to be disposal.” *See, e.g.*, 14 C.C.R. § 17381(ee). For example, storage at an inert debris recycling center for more than six months is deemed “to have been unlawfully disposed and therefore subject to enforcement action.” 14 C.C.R. § 17381.1(e).

Even so, for more than four years, GCL has stored this construction debris on the ground near riparian areas of the San Luis Rey River, within critical habitat for endangered species, and completely exposed to the elements. Such debris can harbor rodents. The LEA has not enforced these rules even though it acknowledged the presence of the construction debris in its January 2010 Inspection Report. In addition to the other actions discussed above, the LEA needs to enforce the requirements governing the illegal disposal of construction debris on the property by directing GCL to remove and properly dispose of these materials now.

Jim Henderson  
June 9, 2014  
Page 5

We trust that the LEA will take the necessary actions to resolve these issues quickly and without the need for a hearing before the LEA Hearing Panel. We request that you notify us of the actions taken by the LEA and by GCL in response. But, if the LEA is unwilling to take the actions needed to rectify these violations, then a hearing or hearings and further legal actions may be necessary.

Sincerely,  
  
Walter E. Rusinek

cc: Robert Smith, Chairman, Pala Band of Mission Indians  
Shasta Gaughen, THPO and Director, Pala Environmental Department  
Jared Blumenfeld, Administrator, EPA Region 9  
William H. Miller, Army Corps of Engineers  
Scott Sobiech, Acting Field Supervisor, U.S. Fish & Wildlife Service, Carlsbad  
David Gibson, Executive Officer, Regional Water Quality Control Board  
Robert Kard, Director, San Diego County Air Pollution Control District  
Maureen Stapelton, San Diego County Water Authority  
Wesley Miliband, Esq., San Luis Rey Municipal Water District  
Damon Nagami, Esq., Natural Resources Defense Council  
Everett L. DeLano III, Esq., RiverWatch  
Joy Williams, Environmental Health Coalition  
Dan Silver, Endangered Habitats League

# **EXHIBIT A**

## Rusinek, Walter E.

---

**From:** Henderson, Jim <Jim.Henderson@sdcounty.ca.gov>  
**Sent:** Wednesday, May 28, 2014 8:27 AM  
**To:** Rusinek, Walter E.  
**Cc:** Caroll.Mortensen@calrecycle.ca.gov; Fisher, Megan; Pozzebon, Liz; Lafreniere, Rebecca; Merlos, KariLyn; Lorang, Rodney F; Elizabeth.Felix@calrecycle.ca.gov  
**Subject:** RE: Gregory Canyon Update

Mr. Rusinek,

To date Gregory Canyon Ltd. LLC ("LLC") has not provided "a letter certifying that the property [on which the solid waste facility is located] has not been encumbered." However, the operator's legal obligation is to report encumbrances, not to certify the absence of encumbrances in writing. Mr. Simmons did state in April that there were no encumbrances on the property. Your April 1 letter stated that you could provide a copy of a preliminary title report showing encumbrances put in place after the current SWFP permit was issued by the LEA. We would appreciate the opportunity to review that report, if it pertains to the parcels that are part of the permitted facility, and if the conditions under which you obtained the report allow it to be relied on by other parties. If you have any direct documentation of encumbrances put in place after the current permit was issued, please provide that documentation as well.

Your April 1 letter also speculated that the amount of debt secured by encumbrances may exceed the value of the encumbered parcels. The LEA has no authority to inquire into or to speculate concerning property values

As of the last inspection in early May, Gregory had not removed the green waste and palm fronds or secured the water line road as advised by the LEA. As noted previously these observations will continue to be noted on inspection reports, but are not issues which would require or warrant escalated enforcement action by the LEA at this time.

*Jim Henderson*

County of San Diego  
Department of Environmental Health  
Local Enforcement Agency  
5500 Overland Ave, Suite 170 MS O560  
San Diego, CA 92123  
(858) 694-3607

---

**From:** Rusinek, Walter E. [<mailto:walter.rusinek@procopio.com>]  
**Sent:** Friday, May 23, 2014 1:36 PM  
**To:** Henderson, Jim  
**Cc:** [Caroll.Mortensen@calrecycle.ca.gov](mailto:Caroll.Mortensen@calrecycle.ca.gov); Fisher, Megan; Pozzebon, Liz; Lafreniere, Rebecca; Merlos, KariLyn; Lorang, Rodney F; [Elizabeth.Felix@calrecycle.ca.gov](mailto:Elizabeth.Felix@calrecycle.ca.gov)  
**Subject:** RE: Gregory Canyon Update

Please advise if Gregory Canyon Ltd. LLC ("LLC") has provided the information the LEA requested concerning encumbrances on the property as required in your April 21, 2014 letter to Mr. Simmons and as mentioned in your April 30, 2014, letter to me.

Also, please advise if the LLC has removed the illegally disposed waste and secured the water line road as required by your April 21<sup>st</sup> letter.

Thank you for your assistance.

**EXHIBIT B**



# County of San Diego

ELIZABETH A. POZZEBON  
ACTING DIRECTOR

DEPARTMENT OF ENVIRONMENTAL HEALTH  
SOLID WASTE LOCAL ENFORCEMENT AGENCY  
5500 OVERLAND AVENUE, SUITE 170, SAN DIEGO, CA 92123  
Phone: (858) 694-2888 Fax: (858) 495-5004  
www.sdcedeh.org

AMY HARBERT  
ACTING ASSISTANT DIRECTOR

April 21, 2014

Jim Simmons  
Gregory Canyon Ltd. LLC  
Consultants Collaborative  
160 Industrial St. Ste 200  
San Marcos CA 92078

## GREGORY CANYON LANDFILL -- ENCUMBRANCE AND SITE SECURITY

Dear Mr. Simmons:

The County of San Diego Local Enforcement Agency (LEA) has received an allegation that the property associated with the Solid Waste Facility permit (SWFP) for the Gregory Canyon Landfill has been encumbered by Gregory Canyon Ltd. LLC (GCL). California Code of Regulations Title 14, § 18105.8 requires that the operator of a solid waste facility notify the enforcement agency (LEA) in writing and in advance if the property on which the facility is located is going to be encumbered. Please provide the LEA with this notification if applicable or with a letter certifying that the property has not been encumbered.

The LEA will continue to address site security and illegal dumping at the site during ongoing LEA monthly inspections. It is advised that GCL secure site access from the south (water line access road) and conduct a cleanup of existing dumped waste. The water line access road has no gate or barrier and has resulted in repeated cases of illegal dumping, including dumping into the canyon which is part of the permitted facility.

If you have any questions, please call me at (858) 694-3607.

Sincerely,

JIM HENDERSON, EHS III  
Local Enforcement Agency

ec: E. William Hutton  
Caroll Mortensen, CalRecycle  
Megan Fisher, CalRecycle  
Elizabeth Pozzebon, DEH  
Rebecca Lafreniere, DEH  
KariLyn Merlos, LEA  
Rodney Lorang, Office of County Counsel

cc: LEA file #H86907

**EXHIBIT C**

**SCHEDULE B**  
(continued)

provisions and conditions therein contained, recorded April 1, 2003 as Instrument No. 2003-0364850 of Official Records.

142. A Deed of Trust to secure an indebtedness in the original amount shown below.

Amount: \$849,249.15  
 Dated: May 4, 2000  
 Trustor: Gregory Canyon Ltd., limited liability company  
 Trustee: Chicago Title Company, a California corporation  
 Beneficiary: Pieter J. Verboom and Lani M. Verboom, Trustees of the Pieter J. Verboom 1980 Trust dated May 2, 1980  
 Loan Number: Not shown  
 Recorded: May 4, 2000 as Instrument No. 2000-0232725 of Official Records

Affects Parcels 37 to 43

An Agreement to modify the terms and provisions of said Deed of Trust as therein provided.

Executed by: Gregory Canyon, Ltd., a California limited liability company and Pieter J. Verboom and Lani M. Verboom as Trustees of the Pieter J. Verboom 1980 Trust dated May 2, 1980  
 Recorded: March 24, 2003 as Instrument No. 2003-0322083 of Official Records

An assignment of the beneficial interest under said Deed of Trust which names:

As Assignee: Heroz Environmental, Inc., a California corporation  
 Recorded: January 5, 2005 as Instrument No. 2005-0008238 of Official Records

An Agreement to modify the terms and provisions of said Deed of Trust as therein provided.

Executed by: Gregory Canyon, Ltd., a California limited liability company and Herzog Environmental, Inc., a California corporation  
 Recorded: November 9, 2005 as Instrument No. 2005-0974607 of Official Records

An assignment of the beneficial interest under said Deed of Trust which names:

As Assignee: Herzog Contracting Corp., a Missouri corporation  
 Recorded: April 13, 2010 as File No. 2010-0180498. Official Records

The terms and provisions contained in the document entitled "Memorandum of Second Amendment to Agreement recorded September 16, 2010 as Instrument No. 2010-0492661 Official Records

**THE FOLLOWING MATTERS AFFECT ALL SAID LAND**

**SCHEDULE B**

(continued)

143. A Deed of Trust to secure an indebtedness in the original amount shown below.

Amount: \$10,000,000.00  
 Dated: March 7, 2003  
 Trustor: Gregory Canyon, Ltd., a limited liability company, a California limited liability company  
 Trustee: Action Foreclosure Services, Inc.  
 Beneficiary: Kevin D. Atkins and Marie Jo Atkins, trustees FBO Associates Trust dated December 30, 1998 \$75,000.00 0.75%, March 19, 2003 Judith R. Barringer, Trustee Judith R. Barringer, Trustee of the Judith R. Barringer Living Trust dated December 8, 1992 \$50,000.00 0.5% March 19, 2003, et al (Note: Numerous Beneficiaries not set out in full)  
 Loan Number: Not shown  
 Recorded: March 24, 2003 as Instrument No. 2003-0322085 of Official Records

Affects all said land

The beneficial interest of Water Hickel, Trustee and Rebecca Hickel, Trustee and Rebecca Hickel, Trustee

Was Assigned of  
 Record to: James Money Management, Inc., a California corporation, as to an undivided 1.0% (\$100,000)  
 Recorded: July 31, 2003 as Instrument No. 2003-0917619 of Official Records

An assignment of the beneficial interest under said Deed of Trust which names:

As Assignee: Ellen E. Zinn, Trustee of the Zinn Family Trust-E dated May 23, 2003, as to an undivided 3.0% (\$300,000.00) interest  
 Recorded: December 17, 2003 as Instrument No. 2003-1483068 of Official Records

A Substitution of Trustee under said Deed of Trust which names the substituted Trustee, the following

Trustee: FCI Lender Services, Inc.  
 Recorded: February 22, 2008 as Instrument No. 2008-0091194 of Official Records

Note: Various partial assignments of said Deed of Trust

Recorded: October 15, 2007 as Instrument No. 2007-0662183, February 8, 2008 as Instrument No. 2008-0066698, February 15, 2008 as Instrument No. 2008-0080706, March 20, 2008 as Instrument No. 2008-0147073, April 3, 2008 as Instrument No. 2008-0176375, May 19, 2008 as Instrument No. 2008-0268410, July 8, 2008 as Instrument No. 2008-0363822, July 8, 2008 as Instrument No. 2008-0363823, July 8, 2008 as Instrument No. 2008-0363824, July 8, 2008 as Instrument No. 2008-0363825, July 8, 2008 as Instrument No. 2008-0363826, July 8, 2008 as Instrument No.

**SCHEDULE B**

(continued)

2008-0363827, July 28, 2008 as Instrument No. 2008-0401712, August 6, 2008 as Instrument No. 2008-0420069, August 6, 2008 as Instrument No. 2008-0420070, August 8, 2008 as Instrument No. 2008-0425556, August 8, 2008 as Instrument No. 2008-0425557, August 8, 2008 as Instrument No. 2008-0425558, August 8, 2008 as Instrument No. 2008-0425559, September 2, 2008 as Instrument No. 2008-0466952, September 2, 2008 as Instrument No. 2008-0466953, September 2, 2008 as Instrument No. 2008-0466954, September 2, 2008 as Instrument No. 2008-0466956, September 2, 2008 as Instrument No. 2008-0466958, September 29, 2008 as File Nos. 2008-0511231 and 2008-0511232; November 17, 2011 as File No. 2011-0617621; October 29, 2013 as File No. 2013-0646987 and November 15, 2013 as File No. 2013-0676952, 0676953, 0676954 and 0676955, all of Official Records.

144. A Deed of Trust to secure performance under an agreement referred to therein, and any other obligations secured thereby.

Dated: March 21, 2003  
 Trustor: Gregory Canyon Ltd., a California limited liability company  
 Trustee: Chicago Title Company, a California corporation  
 Beneficiary: Herzog Environmental, Inc., a corporation  
 Recorded: April 1, 2003 as Instrument No. 2003-364849 of Official Records.

Affects all said land

145. A Deed of Trust to secure an indebtedness in the original amount shown below.

Amount: \$8,250,000.00  
 Dated: March 9, 2003  
 Trustor: Gregory Canyon, limited liability, a California limited liability company  
 Trustee: Chicago Title Company  
 Beneficiary: Sachs Financial Services, LLC, a California limited liability company  
 Loan Number: Not shown  
 Recorded: July 14, 2003 as Instrument No. 2003-0835429 of Official Records

Affects all said land

An agreement which states that this instrument was subordinated

To: Deed of Trust  
 Recorded: October 22, 2004 as Instrument No. 2004-1004630 of Official Records

By Agreement  
 Recorded: October 22, 2004 as Instrument No. 2004-1004631 of Official Records

An agreement which states that this instrument was subordinated

To: Deed of Trust

**SCHEDULE B**  
(continued)

Recorded: October 7, 2005 as Instrument No. 2005-0869870 of Official Records

By Agreement

Recorded: October 7, 2005 as Instrument No. 2005-869869 of Official Records

146. Intentionally omitted.

147. A document entitled "**Notice of Lien**", dated, September 10, 2004, executed by County of San Diego, subject to all the terms, provisions and conditions therein contained, recorded September 20, 2004 as Instrument No. 2004-0888804. of Official Records.

148. A document entitled "**Notice of Lien**", dated, September 10, 2004, executed by County of San Diego, subject to all the terms, provisions and conditions therein contained, recorded September 20, 2004 as Instrument No. 2004-0888805 of Official Records.

149. A document entitled "**Notice of Lien**", dated, September 10, 2004, executed by County of San Diego, subject to all the terms, provisions and conditions therein contained, recorded September 20, 2004 as Instrument No. 2004-0888806. of Official Records.

150. Intentionally omitted.

151. A Deed of Trust to secure an indebtedness in the original amount shown below.

Amount: \$280,000.00  
 Dated: July 18, 2005  
 Trustor: Gregory Canyon Ltd., a limited liability company, a California limited liability company  
 Trustee: Chicago Title Company  
 Beneficiary: Herzog Environmental Inc., a California corporation  
 Loan Number: Not shown  
 Recorded: July 28, 2005 as Instrument No. 2005-0640372 of Official Records

An assignment of the beneficial interest under said Deed of Trust which names:

As Assignee: Herzog Contracting corp., a Missouri corporation  
 Recorded: April 16, 2010 as File No. 2010-0188406. Official Records

An Agreement to modify the terms and provisions of said Deed of Trust as therein provided.

Executed by: Gregory Canyon Ltd. limited liability company and Herzog Environmental, Inc.  
 Recorded: January 14, 2013 as File No. 2013-0024809. Official Records

152. Intentionally omitted.

153. An Abstract of Judgment for the amount shown below and any other amounts due:

Debtor: Gregory Canyon, Ltd. et al

**SCHEDULE B**

(continued)

Creditor: Riverwatch and Pala Band of Mission Indians  
 Date Entered: October 13, 2009  
 County: San Diego  
 Court: Superior  
 Case No.: GIN054668  
 Amount: \$185,599.00  
 Recorded: November 6, 2009 as File No. 2009-0623073, Official Records

Reference is hereby made to said document for full particulars.

154. A Deed of Trust to secure an indebtedness in the original amount shown below.

Amount: \$113,775,666.00  
 Dated: December 3, 2010  
 Trustor: Gregory Canyon Ltd., a limited liability company  
 Trustee: First American Title Insurance Company  
 Beneficiary: Deutsche Bank Trust Company Americas  
 Recorded: December 7, 2010 as Instrument No. 2010-0673655 Official Records

An Agreement to modify the terms and provisions of said Deed of Trust as therein provided.

Executed by: Gregory Canyon Ltd., a limited liability company and Deutsche Bank Trust Company Americas  
 Recorded: November 2, 2011 as File No. 2011-0583189, Official Records

An agreement which states that this instrument was subordinated

To: Three deeds of trust and a modification of deed of trust  
 Recorded: July 28, 2005 as Instrument No. 2005-0640372; March 21, 2000 as Instrument No. 2000-0141461; May 4, 2000 as Instrument No. 2000-0232725 and January 14, 2013 as File No. 2013-0024809, respectively, all of Official Records

By Agreement  
 Recorded: January 14, 2013 as File No. 2013-0024810, Official Records

155. A Deed of Trust to secure an indebtedness in the original amount shown below.

Amount: \$10,000,000.00  
 Dated: November 30, 2012  
 Trustor: Gregory Canyon Ltd., limited liability company, a California limited liability company  
 Trustee: Chicago Title Company, a California corporation  
 Beneficiary: Canyon Farm Funding, LLC, a Delaware limited liability company  
 Recorded: December 26, 2012 as File No. 2012-0811233, Official Records

156. Matters which may be disclosed by an inspection and/or by a correct ALTA/ACSM Land Title Survey of said land that is satisfactory to this Company, and/or by inquiry of the parties in possession thereof.

**EXHIBIT I**



# County of San Diego

ELIZABETH A. POZZEBON  
DIRECTOR

DEPARTMENT OF ENVIRONMENTAL HEALTH  
SOLID WASTE LOCAL ENFORCEMENT AGENCY  
5500 OVERLAND AVENUE, SUITE 170, SAN DIEGO, CA 92123  
Phone: (858) 694-2888 Fax: (858) 495-5004  
www.sdcdeh.org

AMY HARBERT  
ASSISTANT DIRECTOR

June 30, 2014

Walter E. Rusinek  
525 B Street, Ste. 2200  
San Diego, CA 92101

## GREGORY CANYON LANDFILL

Dear Mr. Rusinek:

This letter is in response to your letter of June 9, 2014 related to Gregory Canyon Ltd. LLC (GCL). The County of San Diego Solid Waste Local Enforcement Agency (LEA) has reviewed the items provided and has taken or will take further action on the issues you raised.

- I. GCL Has Placed Numerous Encumbrances on the Property Without Providing the Required Notifications.

The LEA has investigated and obtained a copy of a Deed of Trust from the County Recorder's Office based on the Preliminary Report provided in your June 9, 2014 Letter. The Deed of Trust confirms that a \$10,000,000 encumbrance was placed on the property after the current Solid Waste Facility Permit was issued on August 1, 2011. Neither the LEA nor CalRecycle were notified of this action, which was recorded on December 26, 2012. This is a violation of California Code of Regulations, Title 14, Section 18105.8 and enforcement action is warranted.

- II. The LEA Has Repeatedly Found That Solid Waste Has Been Illegally Disposed on the Site and That Site Security is Lacking.

The LEA has observed an area where illegal dumping occurred on property owned by GCL beginning in September, 2013. Litter control and illegal dumping are both addressed in the Joint Technical Document that is part of the Solid Waste Facility Permit. These observations were noted on the inspection reports to notify the owner of potential issues. The limited dumping of green waste (primarily palms) and solid waste observed does not pose an imminent hazard to health or the environment. GCL has in the past completed periodic cleanups of illegal dumping and is expected to do so again. This issue will continue to be monitored during routine inspections and escalated if needed. The LEA has discretionary authority on the use of enforcement tools and does not agree that additional action is required at this time.

Site Security is a valid issue for an operating Solid Waste Facility. In this situation the access point is remote and there are geographical features, including steep hills, which provide natural access limitations. There is also no active Solid Waste Facility. GCL has posted "no trespassing" signs at the entry points and patrols the area. This issue will continue to be monitored during routine inspections and escalated if needed. The LEA has discretionary authority on the use of enforcement tools and does not agree that additional action is required at this time.

### III. GCL Has Illegally Stored Construction Debris on the Property For Years.

When the Orange Grove gas pipeline was installed through the property some construction debris was generated. GCL utilized some of this Construction Debris for access control and stockpiled other Construction Debris (Concrete and Asphalt) on site as a material for future use at the Landfill. This was reviewed by the LEA and approved as a valid reuse option for this material when construction seemed imminent. However, at the current time the lack of progress on the required landfill permits and Environmental Impact Statement indicates that construction is not imminent. The LEA will provide GCL with options to either remove the Construction Debris or submit an application to the LEA for an inert debris recycling center which will allow this material to be stored on site for an additional 6 months. Additional on-site storage time will require either processing the Construction Debris into material which can then be stored for 18 months or requesting a storage time exemption which would need to include a storage plan as required in Title 14 CCR 17384(b).

If you have any questions, please call me at (858) 694-3607.

Sincerely,



JIM HENDERSON, EHS III  
Local Enforcement Agency

ec: E. William Hutton  
Carol Mortensen, CalRecycle  
Megan Fisher, CalRecycle  
Elizabeth Felix, CalRecycle  
Elizabeth Pozzebon, DEH  
Rebecca Lafreniere, DEH  
KariLyn Merlos, LEA  
Rodney Lorang, Office of County Counsel

cc: LEA file #H86907

**EXHIBIT J**

July 8, 2014

VIA E-MAIL

Elizabeth A. Pozzebon  
Director  
County of San Diego  
Department of Environmental Health  
Local Enforcement Agency  
5500 Overland Avenue, Suite 170  
San Diego, CA 92123

**Re: Proposed Gregory Canyon Landfill – Response to the LEA’s Letter Dated  
June 30, 2014, Concerning Notice of Encumbrances and the Illegal Disposal  
of Solid Wastes on the Property**

Dear Director Pozzebon:

This letter responds to the letter from the LEA identified that was signed by Mr. Henderson and was a response to our previous letter dated June 9, 2014. The LEA’s June 30, 2014, letter is attached for your convenience. In that response, the LEA acknowledged that:

1. Gregory Canyon Ltd. LLC (“GCL”) had failed to notify the LEA prior to placing encumbrances on the GCL property, which violated state law and now warrants an enforcement action;
2. The LEA will not enforce its previous directives to GCL to “secure site access from the south” to halt repeated illegal dumping on the GCL property and to “conduct a clean-up of existing dumped waste” identified in a September 2013 inspection, and
3. Debris from the construction of a natural gas pipeline to the Orange Grove Power Plant has been disposed on the GCL property for more than four years with the undocumented approval of the LEA, but the LEA intends to allow GCL to file for an after-the-fact permit to process the material if it chooses to do so.<sup>1</sup>

---

<sup>1</sup> Please consider this letter to be a request under the California Public Records Act, Government Code Section 6250 *et seq.* (“PRA”) for all “public records” related in any way to (1) the LEA’s decision to

Elizabeth A. Pozzebon  
July 8, 2014  
Page 2

We agree with the LEA's conclusion that GCL's failure to provide notice that it had placed a \$10 million encumbrance on the property violated state law and warrants an enforcement action. However, the LEA's focus on this \$10 million encumbrance ignores the fact that GCL placed numerous encumbrances on the property without notice during the period 2004-2010 when the GCL and the LEA together asserted (wrongly) that the 2004 solid waste facility permit still was valid. In other words, this \$10 million encumbrance is only one instance of GCL's repeated failure to provide these required notices.

On the other hand, we disagree with the LEA's decision not to require that GCL (1) implement site-security measures to stop the repeated illegal disposal of solid waste on the site, or (2) remove the illegally disposed materials identified in the LEA's inspection nine months ago. GCL should be directed to take both those actions. We also disagree that geographical features make additional security measures at the site unnecessary as the repeated illegal disposal in this area attests to the lack of secure site boundaries as required by state law.

**I. The LEA Must Issue a Cease and Desist Order Requiring GCL to Remove the Orange Grove Power Plant Construction Debris That Was Disposed on the GCL Property in 2009.**

More troubling is the LEA's response to the illegal disposal of construction debris on the site. That response acknowledges that the debris has been on the GCL site since the natural-gas pipeline was installed in 2009, but then simply ignores the LEA's statutory obligation to stop the continued illegal operation of a disposal facility on the site. Instead, the LEA's letter states that the "use" and stockpiling of the construction debris on site was "reviewed" and "approved by the LEA (and those are some of the documents sought in the Public Records Act request), but says nothing about how the LEA reviewed the environmental impacts of its approval (given that the area is within critical habitat for the federally endangered arroyo toad) or why the LEA had the authority to approve that activity without following state law on the issuance of construction-debris permit. But, that is just another example of the LEA's "nod nod wink wink" approach to regulating GCL.

To make matters worse, the letter states that the LEA will provide GCL with the "option" of remedying its illegal disposal of the construction debris at the site for the last five years by (1) removing the "Construction Debris" or (2) seeking an after-the-fact permit to create an "inert debris recycling center" which would allow the material to be stored on site for six months or

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allow debris from the construction of the natural gas pipeline to the Orange Grove Power Plant to remain on the GCL property; and (2) the LEA's response to our letters to the LEA dated June 9, 2014, and April 1, 2014, including but not limited to all contacts with representatives of GCL. For purposes of this request, the term "public records" includes all correspondence, electronic information, e-mails, letters, memoranda, notes, telephone notes, reports, writings, and other forms of recorded information.

Elizabeth A. Pozzebon  
July 8, 2014  
Page 3

more. But by offering this second option, the LEA once again is taking an approach that violates state law and its legal obligation.

Public Resources Code Section 44002 is very clear as to what the LEA is required to do in this situation, stating (with emphasis added) that:

If the enforcement agency determines that a person is operating a solid waste facility in violation of subsection (a) [which requires that a permit be obtained to operate such a facility], the enforcement agency shall immediately issue a cease and desist order pursuant to Section 45005 ordering the facility to immediately cease all activities for which a solid waste facilities permit is required and desist from those activities until the person obtains a valid solid waste facilities permit authorizing the activities or has obtained other authorization pursuant to this division.

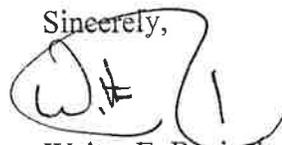
That language creates a mandatory and immediate duty requiring that LEA issue a cease and desist order to GCL directing it to immediately cease the illegal action, which in this case is the illegal disposal of the construction debris. A similar requirement is found in 14 C.C.R. § 18304.3. The only immediate action that GCL can take to cease its illegal operation of a solid waste disposal facility at the site is to remove the illegally disposed debris. Neither the statute nor the CalRecycle rule allows the LEA to offer GCL the option to apply for an after-the-fact permit to continue to conduct the illegal activity, especially when that illegal activity has been ongoing (with the LEA's acquiescence) for five years.

As we pointed out in our last letter, CalRecycle rules limit the amount of time construction debris may be stored, and storage in excess of those allowed periods, even at permitted processing facilities, is "deemed to be disposal." *See, e.g.*, 14 C.C.R. § 17381(ee); 14 C.C.R. § 17381.1(d) (disposal occurs at a permitted CDI recycling center if the construction debris is not processed and sorted for resale or reuse within 30 days). Even the exemption from the construction and inert debris rules for the generation of debris at a construction site requires that the debris not "remain on the site of the construction after the construction work is completed." 14 C.C.R. § 17380(g). As the construction work was completed five years ago, we are long past that time, and there is no question that the "disposal" of the construction debris on the site occurred years ago.

Because the construction debris was disposed on the GCL five years ago, there is no dispute that the GCL site is an illegal solid waste facility under state law. State law defines a "solid waste facility" as including a "disposal facility," which is defined as any location where the disposal of solid waste occurs. Pub. Res. Code §§ 40194, 40121. There also is no dispute that GCL never obtained a permit to allow it to dispose of the material on the site, and there is no record that it ever filed a Report of Waste Discharge with the Regional Water Quality Control Board as required by Water Code Section 13260 either.

Elizabeth A. Pozzebon  
July 8, 2014  
Page 4

As a result, the LEA's response that it will give GCL the option of what to do with the illegally stored material is wholly inadequate. The LEA needs to comply with state law by immediately issuing a cease and desist order to GCL that requires it to immediately remove the illegally disposed debris. Absent such action, we unfortunately will be forced to take legal action again to force the LEA to comply with the law.

Sincerely,  
  
Walter E. Rusinek

Enclosure

cc: Robert Smith, Chairman, Pala Band of Mission Indians  
Shasta Gaughen, THPO and Director, Pala Environmental Department  
Jared Blumenfeld, Administrator, EPA Region 9  
William H. Miller, Army Corps of Engineers  
Scott Sobiech, Deputy Field Supervisor, U.S. Fish & Wildlife Service  
Caroll Mortensen, Director, CalRecycle  
Dave Roberts, County Board of Supervisors  
David Gibson, Executive Officer, Regional Water Quality Control Board  
Robert Kard, Director, San Diego County Air Pollution Control District  
Maureen Stapelton, San Diego County Water Authority  
Jim Henderson, LEA  
Wesley Miliband, Esq., San Luis Rey Municipal Water District  
Damon Nagami, Esq., Natural Resources Defense Council  
Everett L. DeLano III, Esq., RiverWatch  
Joy Williams, Environmental Health Coalition  
Dan Silver, Endangered Habitats League



# County of San Diego

ELIZABETH A. POZZESON  
DIRECTOR

DEPARTMENT OF ENVIRONMENTAL HEALTH  
SOLID WASTE LOCAL ENFORCEMENT AGENCY  
5500 OVERLAND AVENUE, SUITE 170, SAN DIEGO, CA 92123  
Phone: (658) 694-2888 Fax: (658) 495-5004  
www.sdcdeh.org

AMY HARBERT  
ASSISTANT DIRECTOR

June 30, 2014

Walter E. Rusinek  
525 B Street, Ste. 2200  
San Diego, CA 92101

## GREGORY CANYON LANDFILL

Dear Mr. Rusinek:

This letter is in response to your letter of June 9, 2014 related to Gregory Canyon Ltd. LLC (GCL). The County of San Diego Solid Waste Local Enforcement Agency (LEA) has reviewed the items provided and has taken or will take further action on the issues you raised.

- I. GCL Has Placed Numerous Encumbrances on the Property Without Providing the Required Notifications.

The LEA has investigated and obtained a copy of a Deed of Trust from the County Recorder's Office based on the Preliminary Report provided in your June 9, 2014 Letter. The Deed of Trust confirms that a \$10,000,000 encumbrance was placed on the property after the current Solid Waste Facility Permit was issued on August 1, 2011. Neither the LEA nor CalRecycle were notified of this action, which was recorded on December 26, 2012. This is a violation of California Code of Regulations, Title 14, Section 18105.8 and enforcement action is warranted.

- II. The LEA Has Repeatedly Found That Solid Waste Has Been Illegally Disposed on the Site and That Site Security is Lacking.

The LEA has observed an area where illegal dumping occurred on property owned by GCL beginning in September, 2013. Litter control and illegal dumping are both addressed in the Joint Technical Document that is part of the Solid Waste Facility Permit. These observations were noted on the inspection reports to notify the owner of potential issues. The limited dumping of green waste (primarily palms) and solid waste observed does not pose an imminent hazard to health or the environment. GCL has in the past completed periodic cleanups of illegal dumping and is expected to do so again. This issue will continue to be monitored during routine inspections and escalated if needed. The LEA has discretionary authority on the use of enforcement tools and does not agree that additional action is required at this time.

Site Security is a valid issue for an operating Solid Waste Facility. In this situation the access point is remote and there are geographical features, including steep hills, which provide natural access limitations. There is also no active Solid Waste Facility. GCL has posted "no trespassing" signs at the entry points and patrols the area. This issue will continue to be monitored during routine inspections and escalated if needed. The LEA has discretionary authority on the use of enforcement tools and does not agree that additional action is required at this time.

III. GCL Has Illegally Stored Construction Debris on the Property For Years.

When the Orange Grove gas pipeline was installed through the property some construction debris was generated. GCL utilized some of this Construction Debris for access control and stockpiled other Construction Debris (Concrete and Asphalt) on site as a material for future use at the Landfill. This was reviewed by the LEA and approved as a valid reuse option for this material when construction seemed imminent. However, at the current time the lack of progress on the required landfill permits and Environmental Impact Statement indicates that construction is not imminent. The LEA will provide GCL with options to either remove the Construction Debris or submit an application to the LEA for an inert debris recycling center which will allow this material to be stored on site for an additional 6 months. Additional on-site storage time will require either processing the Construction Debris into material which can then be stored for 18 months or requesting a storage time exemption which would need to include a storage plan as required in Title 14 CCR 17384(b).

If you have any questions, please call me at (858) 694-3607.

Sincerely,



JIM HENDERSON, EHS III  
Local Enforcement Agency

cc: E. William Hutton  
Caroll Mortensen, CalRecycle  
Megan Fisher, CalRecycle  
Elizabeth Felix, CalRecycle  
Elizabeth Pozzebon, DEH  
Rebecca Lafreniere, DEH  
KariLyn Merlos, LEA  
Rodney Lorang, Office of County Counsel

cc: LEA file #H86907

**EXHIBIT K**



# County of San Diego

ELIZABETH A. POZZEBON  
DIRECTOR

DEPARTMENT OF ENVIRONMENTAL HEALTH  
SOLID WASTE LOCAL ENFORCEMENT AGENCY  
5500 OVERLAND AVENUE, SUITE 170, SAN DIEGO, CA 92123  
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AMY HARBERT  
ASSISTANT DIRECTOR

## SOLID WASTE LOCAL ENFORCEMENT AGENCY

### OFFICIAL NOTICE, COMPLIANCE SCHEDULE AND NOTICE OF COMPLIANCE STATUS No. 2014-04

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**IN THE MATTER OF:**

**NOTICE ISSUED PURSUANT TO:**

Gregory Canyon Limited  
Inert Debris Storage Activities  
9798 Pala Rd  
Pala, CA 92059

Title 14 of the California Code of Regulations (14 CCR), Chapter 5, Article 4, §18304.4; and San Diego County Code of Regulatory Ordinances, Section §65.107

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**TO FACILITY OWNER/OPERATOR:**

Gregory Canyon Ltd.  
Jim Simmons  
Consultants Collaborative  
160 Industrial St. Ste 200  
San Marcos CA 92078

The County of San Diego Department of Environmental Health is the designated Solid Waste Local Enforcement Agency (LEA) for the County of San Diego and is responsible for the regulation of solid waste facilities and operations under the authority of the Public Resources Code (PRC) and Titles 27 and 14 of the California Code of Regulations (CCR). In accordance with subsection (d) of sections 43209 and section 43213 of the PRC, the governing body of the LEA (i.e., the County Board of Supervisors) has authority to establish a solid waste permitting program and to require that fees be paid by any person who conducts solid waste handling. The Board has done so, at section 65.107 of the County Code. In accordance with 14 CCR §18304.4, after providing notification of a compliance schedule, the LEA may provide notice of an operator's compliance status, and as the LEA deems appropriate may determine whether the compliance schedule will be extended or enforced.

#### Summary of Facts and Applicable Law

Gregory Canyon Ltd. (GCL) source separated and stockpiled Inert Debris (Concrete and Asphalt) from the Orange Grove Pipeline Project as a material for future use in the construction of the proposed Landfill in 2010. This activity was reviewed by the LEA and approved in an inspection report dated May 7, 2010, which recited GCL's intentions and noted that there were "no issues" with the stored debris. The basis for that determination was not set out in detail, but the determination was based on 14 CCR §17380, subsection (g), which excludes from regulation debris generated at a site by construction (including demolition) until construction work is completed.

August 7, 2014

A significant amount of time has passed since 2010 without construction work at this site. Circumstances have also changed; GCL's APCD permit application has been cancelled and the Army Corps of Engineers has suspended work on GCL's permit and supporting environmental review. Based on the lack of progress on required permits and Environmental Impact Statement the LEA has determined that the retention of this debris on site for future construction is more like debris management than like landfill construction.

On July 2, 2014, in the "Observations" section of an inspection report, the LEA gave GCL 30 days to either remove the stockpiled Inert Debris or submit an application to the LEA for an inert debris recycling center. This was a compliance schedule. On August 5, 2014 the LEA received a letter from you stating that this material "has construction value and is not classified as solid waste."

This Notice rejects your response and sets out formally the LEA's determination that the inert debris stored in the bunker at this site is no longer outside the scope of the State CDI regulations based on 14 CCR 17380(g). (We agree however that the large pieces of concrete debris in use to create a barrier parallel to SR 76 are in use, and are not waste.)

GCL apparently intends to leave the stored debris in place until landfill construction begins. That is allowable only if GCL meets the conditions for an exemption in 14 CCR 17381.1(e). Applying those conditions to this debris is appropriate, because those regulations provide for the LEA to determine (based on substantial evidence provided by GCL) whether extended storage of this material without further processing would increase the potential harm to public health, safety or the environment. If there would be no such harm, 14 CCR 17381.1(e) would allow the LEA to approve an extended storage period.

The LEA considers July 2, 2014 to be the date from which GCL's compliance with the time limits for storing debris without processing and sorting for resale or reuse should be measured for purposes of assessing whether this operation is subject to the Construction and Demolition/Inert (CDI) Debris Regulations at 14 CCR 17380 and following. Because the LEA did not notify you a change in its "no problem" assessment from 2010 until July 2, 2014, we will treat this debris as having been exempt under 14 CCR §17380(g) until that date. However, if this debris remains on site for more than six months after July 2, 2014 without GCL submitting an application for and receiving an inert debris permit, GCL would no longer meet the conditions for an exemption from regulation set out in 14 CCR §17381.1(e), the debris would be "deemed disposed" by operation of law, and GCL would be operating an unpermitted disposal facility in violation of PRC §44002.

#### Compliance Status

GCL is currently in violation of County Code section 68.503 subsection (a) [unlawful deposit of solid waste on private property] because you have not submitted the application required under the County's PRC-authorized local permitting program. (The fee which will be invoiced after receipt of the application, pursuant to County Code §65.107 subsection (j)(3) [one inspection per year tier] is \$659.) The application has not been received and the material has not been removed.

Based on a July 2, 2014 date to terminate exemption under 14 CCR 17380(g), this debris is not yet deemed disposed, and this operation remains exempt from the debris processing regulations. Please note however that if you do not address this operation under one of the options in 14 CCR 17381.1(e), the LEA could determine that this debris has been disposed in fact prior to the expiration of six months. A GCL decision to leave the debris in place without taking the steps necessary to qualify this operation as an exempt inert debris recycling center would constitute disposal, because this debris is no longer outside the scope of regulation pursuant to 14 CCR

§17380(g). It is therefore vital that you make GCL's intentions clear on the schedule set out in the Compliance Schedule section of this Notice below.

Findings:

1. On June 10, 2014 the LEA performed a routine facility inspection, which was issued on July 2, 2014, and observed that the Inert Debris stockpile from the Orange Grove Pipeline project was still being stored on site.
2. The LEA conducted a routine monthly inspection on July 30, 2014 and observed that the Inert Debris stockpile from the Orange Grove Pipeline project was still being stored on site.
3. As of August 7, 2014, GCL has not completed the application process for an Inert Debris recycling center.
4. As of July 2, 2014, 14 CCR 17380(g) no longer excludes the inert debris stored in the bunker at this site from the scope of the State CDI regulations, i.e., Article 5.9 of Chapter 3 of Division 7 of Title 14 of the California Code of Regulations and requirements referenced therein.

Based on the facts set forth in Findings 1 through 4, the LEA has determined that the following violations have occurred:

VIOLATION:	APPLICABLE STATUTE/REGULATION:
1. Operating a solid waste operation without proper notification.	14 CCR 17381.1(h); PRC §44000.5(a) A person shall not dispose of solid waste except at a solid waste disposal facility for which a solid waste facilities permit has been issued.

Compliance Schedule

Mr. Jim Simmons as operator of GCL shall:

1. Immediately cease and desist all disposal activities at the property located at 9798 Pala Rd, Pala, CA 92059.
2. By September 1, 2014, remove and properly manage the Inert Debris stockpile.
3. Maintain for LEA review documentation of the proper disposition of the Inert Debris stockpile.
4. If the intent is to keep the Inert Debris for future use onsite, an application to the LEA for an inert debris recycling center must be submitted. Because the notice provided by the LEA in the Observations section of an inspection report was somewhat obscure, the LEA has determined to extend that compliance schedule by one month to September 1, 2014, by which time an application must be submitted. Note that this would require an annual inspection of the center and an annual Health Permit fee of \$659 for Fiscal Year 2014-2015.

August 7, 2014

Please Take Further Notice That:

1. Pursuant to PRC Section 45011, the LEA has authority to administratively impose a civil penalty not to exceed five thousand dollars (\$5,000) for each day on which the violation occurs if compliance is not achieved within the time schedule set forth in Notice 14-04.
2. Pursuant to PRC Section 45014, 45023, and 45024, upon failure to comply with this Notice 14-04, the LEA may petition the Superior Court to impose, assess, and recover civil penalties not to exceed ten thousand dollars (\$10,000) per day against any person who:

Owns or operates a solid waste facility and who intentionally or negligently violates or causes or permits another to violate the terms and conditions of a solid waste facility permit or a standard, requirement, or order applicable to a solid waste facility;

Nothing in this Notice shall constitute or be construed as a satisfaction or release from liability for any condition or claims arising as a result of past, current or future operations of the Owner/Operator. Notwithstanding compliance with the terms of this Notice, the Owner/Operator may be required to take further actions as are necessary to protect human health and safety and the environment.

This Notice does not relieve the Operator and/or Owner from complying with all other local, state, and federal requirements.

This Notice may only be amended in writing by an appropriate representative of the County of San Diego Solid Waste Local Enforcement Agency.

You have the right to appeal this Notice to the County Solid Waste Hearing Panel, pursuant to sections 45002, 44307 and 44310 of the Public Resources Code and Article LIV (sections 960 and following) of the County Code of Administrative Ordinances. It is the County's position that an appeal to this body is required before any judicial challenge to these orders may be made. However, if you intend to appeal or to judicially challenge these orders, we recommend you seek the advice of an attorney concerning your options.

If you have any questions, please contact me at (858) 495-5799.

Sincerely,



KARILYN A. MERLOS, Supervising Environmental Health Specialist  
Solid Waste Local Enforcement Agency

Enclosures

ec: E. William Hutton  
Megan Fisher, CalRecycle  
Elizabeth Pozzebon, DEH  
Rebecca Lafreniere, DEH  
Rodney Lorang, Office of County Counsel

**EXHIBIT L**



# County of San Diego

THOMAS E. MONTGOMERY  
COUNTY COUNSEL

OFFICE OF COUNTY COUNSEL  
1600 PACIFIC HIGHWAY, ROOM 355, SAN DIEGO, CA 92101  
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RODNEY F. LORANG  
Senior Deputy County Counsel  
Direct Dial: (858) 694-3204  
E-Mail: rodney.lorang@sdcounty.ca.gov

August 8, 2014

Walter E. Rusinek  
Procopio, Cory, Hargreaves and Savitch LLP  
525 B Street, Suite 2200  
San Diego, CA 92101

Re: Proposed Gregory Canyon Landfill, Demolition Debris

Dear Mr. Rusinek:

The County of San Diego Solid Waste Local Enforcement Agency (LEA) letter to you dated July 16, 2014, in response your July 8, 2014 letter, stated you would receive a separate response from County Counsel addressing your assertions concerning the LEA's enforcement responsibilities. I was preparing that further response when I received your petition for a hearing before the Solid Waste Hearing Panel.

The LEA will file its Response to your petition with the Hearing Panel in due course if necessary. However, due to changed circumstances we believe a hearing is unnecessary, and we request that you withdraw your petition. As to debris at this site that is not in use, the LEA has accepted your assertion (made in correspondence, prior your petition being filed) that state CDI regulations should be applied. The LEA has notified the operator of this change in the LEA's position, and has set a schedule for the operator to take appropriate action. Your petition asserts that more than this is mandatory, but for the reasons set out below we disagree. Also, your petition is time-barred.

### Change in circumstances

On July 2, 2014 the LEA delivered the report of its June 10, 2014 inspection to GCL. That inspection report, in the Observations section, included this directive: "The material in use as access control can continue to be used for that purpose. However, GCL must within 30 days either remove the stockpiled Construction Debris or submit an application (form attached) to the LEA for an inert debris recycling center which will allow this material to be stored for an additional six months... ."

On August 5, GCL responded by letter, noting correctly that the LEA had agreed that the asphalt and soil mix in the bunker could remain there provided no additional material was added. The letter also stated GCL's position that the stored material "has construction value and is not classified as solid waste." (Attachment 1.)

On August 7, the LEA issued an Official Notice to GCL, finding that as of July 2, 2014, notwithstanding the "construction" exclusion at California Code of Regulations, Title 14, § 17308(g), the stored debris was no longer beyond the scope of CalRecycle CDI regulations. (Attachment 2.) The notice extended by one month, to September 1, 2014, the timeframe for GCL to take action to respond to this change in status. Appropriate action could either be removing this stored debris, or making a submission to the LEA based on the extended storage provisions of California Code of Regulations, Title 14, § 17308.1(e)(6).

The August 7 Notice did not direct GCL to remove the large pieces of concrete deliberately placed to function as a barrier at this site. It continues to be the LEA's position that this concrete debris is in use, and therefore is not subject to CalRecycle regulations for CDI operations.

#### Hearing Issues: Disputed Facts and LEA Decisions

Your clients and ours disagree on whether or not the debris at this site has been disposed or is already "deemed disposed." Your petition states that there is "no support for the claim...that the County approved the disposal of the C&D debris as a valid reuse option... ." The petition is mistaken on this fact; the inspection materials Mr. Henderson emailed to you on July 16, 2014<sup>1</sup> contain the LEA's approval of the practices being used by GCL. Those practices were not approved as "disposal" but were approved because the practices were not disposal.

The key document is the 5-7-2010 inspection report, but the pattern of LEA inspection report observations and directives prior to that inspection report is also relevant. The 9-4-2009, 10-16-2009, 11-20-2009, and 12-04-2009 inspection reports note the use of concrete to create barriers, and do not require any corrective action. As the photos show, this barrier was laid out linearly to meet its intended purposes, and it was constructed with large pieces of concrete that would form an effective barrier to vehicles. The concrete pieces were not mixed with other materials. In contrast to the LEA's

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<sup>1</sup> You also received these inspection reports years ago, in response to your periodic PRA requests.

silence on any necessary action concerning the concrete in the barrier, GCL was directed to remove a waste tire pile on site. The absence of a directive as to the concrete, contrasted with a directive for the waste tires, implied LEA agreement that the concrete used in the barrier was not waste.

The latter three of these reports also note the presence of “metal, pipe, etc.” from the pipeline project. Like the concrete and asphalt debris, the metal and pipe wastes were generated when obstructions in the pipeline right of way were demolished or removed. LEA staff was told at the time that there was ongoing discussion between GCL and SDG&E about whether these materials were an SDG&E vs. a GCL responsibility.

The 1-08-2010 inspection report notes more specifically than prior inspection reports that the constructed barrier restricted unauthorized access to the river bed from the old dairy property. LEA staff was told that trespassers had been driving vehicles through the riparian area to get to the abandoned houses on the site (for illegal purposes) before this barrier was constructed.<sup>2</sup> The 2-11-2010 inspection report again noted the constructed barrier, but now directed the removal of pipe, metal and dirt. By directing the removal of pipe, metal and dirt but not concrete, the LEA more clearly endorsed the use of concrete in the barrier. The directive to remove pipe metal and dirt was repeated in the 3-5-2010 and 4-8-2010 inspection reports, and ultimately led to the separation of pipe, metal and some dirt from the debris not already being used in the barrier. This left only source-separated inert debris to be stored for use in landfill construction.

Debris-related issues were finally resolved in the 5-7-2010 LEA inspection report. The “observations” section of that inspection report again directed GCL to remove piping and metal debris. The LEA also addressed the concrete and asphalt debris directly and in detail, as follows:

The concrete and asphalt debris in other locations is considered by GCL as base material for future use during landfill construction. Most of the concrete and asphalt is stored in a staging area but some is being used as barrier material to restrict access to the riparian areas. No issues noted with this material.

This observation shows that the LEA was fully aware of this debris, that it considered the debris to be “material” (not waste), that it had discussed the status of the

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<sup>2</sup> In the same report, it is noted that the waste tire pile on site was being referred to the Local Tire Enforcement Agency for follow up. The County became the waste tire enforcement agency at about this time, and with that new authority ensured that these tires were removed.

material with GCL, and that the LEA had informed GCL in its official inspection report that the LEA had “no issues” with the material. Based on this LEA statement, whether it was a correct determination at the time or not, GCL had no reason to consider this debris to be waste, until the LEA notified GCL on July 2, 2014 that the LEA had changed its position.

The LEA’s “no issues” determination in May 2010 was not “wink wink nod nod” regulation to allow a violation of law,<sup>3</sup> but was instead a good faith application of the core regulatory distinction between material that was “in use” versus “waste,” and a good faith application of the exclusion in California Code of Regulations, Title 14, § 17380(g) allowing debris generated at a site by construction work to remain on site until construction work is completed.

The LEA’s application of California Code of Regulations, Title 14, § 17380(g) to this site was consistent with law. When debris is generated during demolition and used during construction on the same site, or is brought to a site for use in construction on that site, a determination of whether this exemption applies requires case-by-case agency judgment. The exclusion reads as follows:

This Article does not apply to persons who generate C&D debris or inert debris in the course of carrying out [construction work] at the site of the construction work or to persons who own the land, buildings and other structures that are the object of the construction work, provided that such persons do not accept at the site any C&D debris or inert debris that is generated at any other location, unless it will be used in the construction work, and provided further such persons do not allow C&D debris or inert debris, other than C&D debris or inert debris that is used in the construction

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<sup>3</sup> The LEA had nothing to gain, and GCL little or nothing to gain, from any winking or nodding. The LEA has been under intense scrutiny concerning this controversial project for more than a decade, and its integrity is its only, albeit incomplete, protection against allegations of improper conduct. Moreover, even if this debris should have been classified differently (and it need not have been), that would not have been burdensome for the LEA or for GCL. Inert debris storage or a small (< 25 tpd) C&D operation would be a notification tier operation. An extended storage period could have been ratified upon submission of a storage plan by GCL, to support an LEA finding that an extended storage period would not increase the potential harm to public health, safety or the environment. Cal. Code of Regs. tit. 14, § 17381.1(d)(5). Making that finding would have been straightforward, because the debris at issue was inert, there was no debris coming onto the site from elsewhere, there was no ongoing processing, and the debris was all either in use or stored appropriately (in a bunker), within a previously disturbed area.

work, to remain on the site of the construction work after the construction work is completed.

The clear intent of this exclusion is to distinguish between construction sites and debris processing sites. All types of construction sites are exempt: buildings can be demolished and the debris processed and sent off-site, without applying Article 5.9.<sup>4</sup> Debris can be brought onto a site, processed there, and used in construction on that site (provided any excess is removed), without applying Article 5.9. Or debris can be both generated on a site and used for construction on the same site, without applying Article 5.9. The substantive language in this subsection does not limit the exclusion to a fixed time period, or to storage or processing “during construction,” or to a particular phase of construction.

The issue for an LEA in a case where there is an interim storage period at a site prior to planned construction, is therefore whether the site is more like an exempt construction site, or more like a CDI processing operation or a disposal site. Making that determination requires regulatory judgment based on multiple factors. Key factors include any indications that the debris will not actually be used on site, whether materials are being actively moved on and off of the site and processed for commercial gain unrelated to the planned construction, and whether plans for construction on the site are definite and consistent with use of the material at issue. All of these factors supported the LEA’s 2009-2010 determination that the stockpiled debris at this site was exempt. The relevant question was not when landfill construction would begin, but whether this debris was stored as sham disposal, or was on site to support landfill construction, or would be processed for off-site use. The LEA’s judgment that the debris was stored for use in construction was reasonable. An agency that makes a necessary judgment based on relevant considerations has not failed to act in accordance with law.

We also note, regarding your allegation of a “wink, nod” relationship, that the LEA has taken enforcement action against GCL when appropriate. For example, only a week after the 5-7-2010 inspection, the LEA conducted a focused inspection of this site in response to a complaint that grading was occurring in the river basin. The inspection concluded that there had been no “grading” in the riparian area, but that archaeological and resource survey teams had improperly cleared vegetation without a biological monitor present. The LEA issued a Notice of Violation.

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<sup>4</sup> Cal. Code of Regs. tit. 14, div. 7, ch. 3, Article 5.9. These are the state CDI regulations. Hereafter, “Article 5.9.”

In any case, whether the LEA's 2009 – 2010 decisions were legally or factually correct is not an issue that can be properly raised in your petition. All of these inspection reports were provided to you long ago in response to prior Public Records Act requests. The reports provided all of the information concerning relevant facts and LEA actions, inaction, decisions and statements necessary for you to determine whether the LEA was acting in accordance with law. By law (Public Resource Code, § 44310) a hearing petition challenging LEA action or inaction must be filed within 30 days from the date you and your clients discovered or reasonably should have discovered the facts on which your allegation is based. We do not expect the hearing panel to be interested in second guessing in 2014, decisions the LEA made in 2009 and 2010.<sup>5</sup>

#### Hearing Issues: Applicable Law on LEA Enforcement Obligations

Your clients and ours also disagree on whether State law and regulations require the LEA to issue a cease and desist order now, directing that this debris be immediately removed.

Even if this question turned solely on Public Resource Code § 44002, which is the provision at the core of your argument, the LEA's actions and inaction would be in accordance with law. Subsection (b) of 44002 applies only where an LEA "determines" that a facility is operating without a permit. "Determinations" are inherently exercises of agency discretion.

Moreover, the LEA had determined that the stockpiled debris on the GCL property is inert debris. Based on the matrix at Title 14, California Code of Regulations ("Cal. Code Regs. tit. 14"), section 17381.2, CDI recycling centers and inert debris recycling centers that operate within the storage time limits set out in California Code of Regulations, Title 14, section 17381.1(d) and (e) (respectively) are "not subject to Article 5.9." Section 44002 therefore does not apply. The time limits in California Code of Regulations, Title 14, section 17381.1 are met in this case, because those limits did not begin to apply until the LEA notified GCL that the LEA no longer classified the stockpiled debris as exempt under California Code of Regulations, Title 14, section 17380(g).

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<sup>5</sup> Your petition also asserts, at footnote 4, that the Solid Waste Facility Permit for this landfill does not adequately define the facility boundary. That assertion is not an independent justification for continuing to pursue your petition, because the assertion also cannot be considered by the hearing panel. You were obviously aware of this purported issue no later than December of 2012, when you filed an opening brief in Superior Court making the same assertion. The limitations period discussion in the text therefore also applies here.

In addition, Public Resources Code section 44002 does not stand alone. It must be read in conjunction with Public Resources Code section 45005, which is cited within Public Resources Code section 44002 but is not acknowledged in your petition.

Even if the Hearing Panel were to direct the LEA to address the stockpiled debris as disposed or deemed disposed, the panel could not direct the LEA to issue a cease and desist order. Instead, the panel would have to take into account that section 44002 directs that any resulting order shall be issued “pursuant to section 45005.” And section 45005 begins as follows: “An enforcement agency or the board may issue a cease and desist order to any of the following: ... .” (Emphasis added.) Because any order under section 44002 is issued “pursuant to” section 45005, the LEA retains the “may issue” discretion provided by section 45005 even in a section 44002 situation.

A similar analysis applies to the requirement for enforcement set out in California Code of Regulations, Title 14, section 18304.3. As a threshold matter, this requirement cannot apply to CDI recycling centers or inert debris recycling centers that meet storage time limits and therefore are not subject to Article 5.9. Where it does apply, California Code of Regulations, Title 14, section 18304.3’s general call for cease and desist orders must also be reconciled with the more specific provisions concerning enforcement against *CDI operations and facilities* set out in California Code of Regulations, Title 14, sections 17381.1 and 18304.

California Code of Regulations, Title 14, section 17381.1 (e)(1) provides for a Notice and Order pursuant to California Code of Regulations, Title 14, section 18304 if source separated inert debris is stored for more than 6 months. In turn, California Code of Regulations, Title 14, section 18304 contains detailed instructions to LEAs for the contents of a notice and order, requiring the LEA to describe the violation at issue and the required corrective actions, with a timeline for implementation “as described in section 18304.1(a).” And 18304.1(a) provides three options: a corrective action order, a cease and desist order, or a compliance order. Therefore, for enforcement triggered by “deemed disposal” under California Code of Regulations, Title 14, section 18304.3, all three of these options are available to LEAs.

It is also highly significant that these regulations require some time to pass before the storage of CDI debris is deemed to be disposal. The existence of these time-lagged “deemed disposal” provisions prevents any inference that State regulations require an LEA to treat every instance of CDI placement on land without a permit or notification as immediate “disposal,” much less as disposal that can only be legally addressed with a cease and desist order requiring immediate removal of the debris. Instead, by law, specified timelines govern “deemed disposal” status. And even if materials are deemed

disposed, an order requiring processing and recycling (under the applicable CDI Tier on a specified schedule) would be an allowable form of notice and order under California Code of Regulations, Title 14, section 18304.3.

Conclusions

In this case, a cease and desist order requiring immediate removal of this debris is neither required by law, nor appropriate. The debris in the barrier is in use, and the debris in storage has not been disposed but is stored for use in construction. The LEA has addressed the extended storage of that debris by issuing an Official Notice requiring GCL either to remove the debris or to submit a storage plan based on California Code of Regulations, Title 14, section 17308.1(e)(6). The LEA has acted in accordance with law.

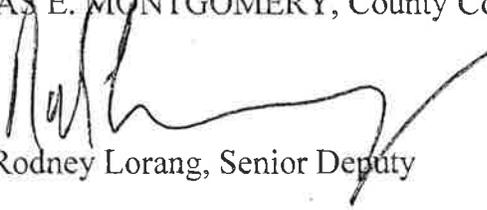
In addition, your petition is time barred.

Please call me if you would like to discuss our request that you withdraw this petition.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By

  
Rodney Lorang, Senior Deputy

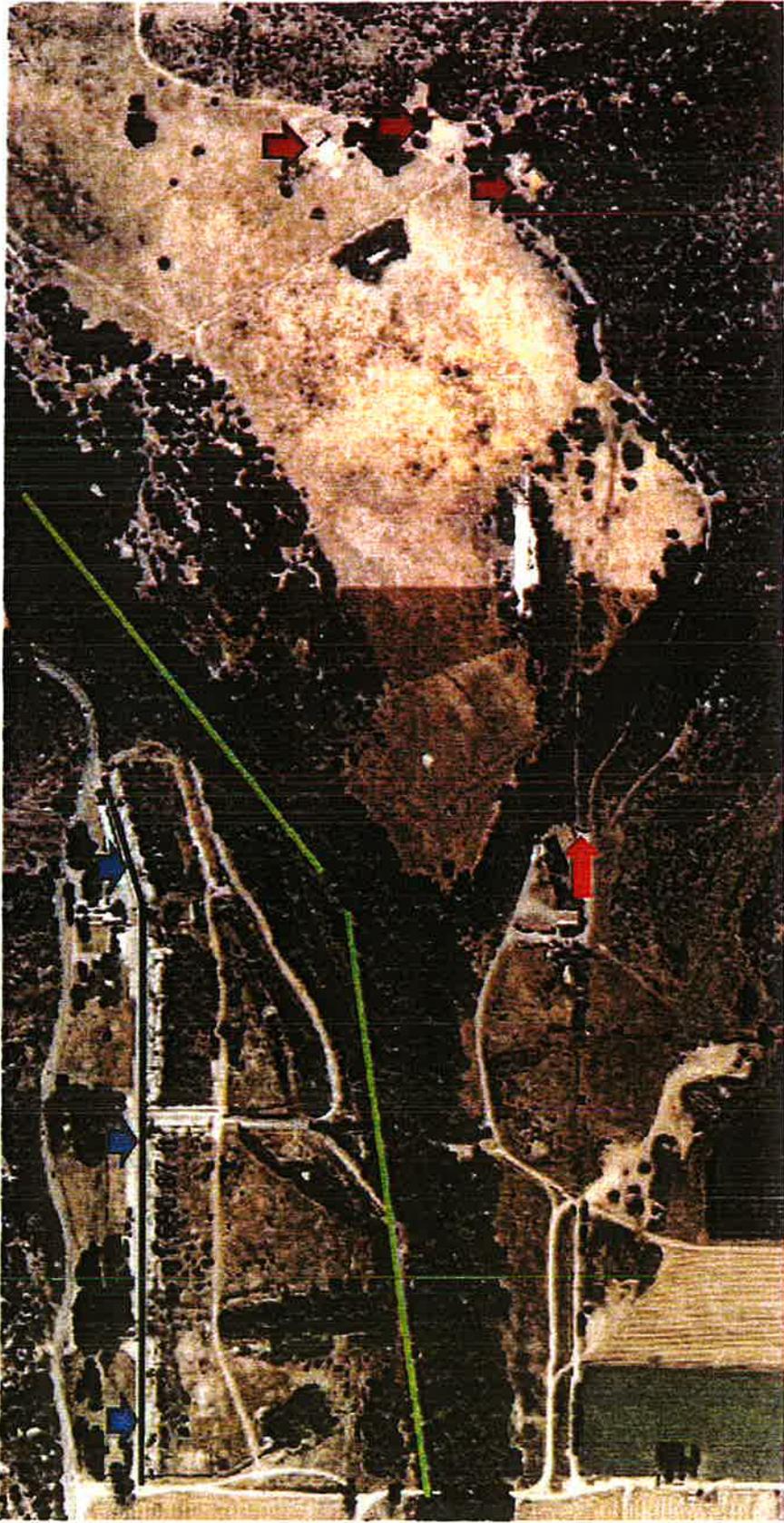
RFL:ls  
02-00853

**EXHIBIT M**



Barrier

Riparian Area



Houses / Blds



West Gate



Barrier



Riparian Area



Gregory Canyon Landfill 37-AA-0032  
Jim Henderson, LEA - 8/30/14



Opening in barricade, old bridge access.

**EXHIBIT N**

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5 San Diego, CA 92101  
6 Telephone: 619.238.1900  
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8 Attorneys for Petitioner  
9 PALA BAND OF MISSION INDIANS

10 **BEFORE THE SAN DIEGO COUNTY SOLID WASTE HEARING PANEL**

11 PALA BAND OF MISSION INDIANS,

12 Petitioner,

13 v.

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

18 Respondent.

HEARING ON LOCAL ENFORCEMENT  
AGENCY'S ALLEGED FAILURE TO  
ACT AS REQUIRED BY LAW OR  
REGULATIONS

**PETITIONER'S OBJECTIONS TO  
THE DECLARATIONS OF JIM  
HENDERSON AND KARI LYN  
MERLOS**

Date: September 22, 2014  
Time: 2:00 P.M.

19 Petitioner, the Pala Band of Mission Indians, hereby objects to and moves to strike  
20 from the administrative record certain portions of the Declaration of Jim Henderson  
21 ("~~H~~enderson Declaration") and the Declaration of Karilyn Merlos ("Merlos Declaration")  
22 filed by the County of San Diego Local Enforcement Agency ("LEA") in support of its  
23 response to Petitioner's Statement of Issues concerning the illegal disposal of construction  
24 debris on property owned by Gregory Canyon Ltd., LLC ("GCL") ("LEA's Response").  
25 The portions of the Henderson and Merlos declarations discussed below should be stricken  
26 from the administrative record and not considered by the Hearing Panel because they  
27 constitute impermissible hearsay, opinion, speculation, non-expert expert testimony, or are  
28 otherwise improper.

1           **I.       General Rules Concerning Declarations**

2           To be proper, a declaration under oath “must show the declarant’s personal  
3 knowledge and competency to testify, state facts and not just conclusions, and not include  
4 inadmissible hearsay or opinion.” (*Bozzi v. Nortstrom, Inc.* (2010) 186 Cal.App.4th 755,  
5 761). A declaration cannot simply state that a declarant “has personal knowledge of the  
6 facts stated” but the declaration must “contain facts showing the declarant’s connection  
7 with the matter” and the “source of his or her information,” otherwise the claim of  
8 knowledge is purely a conclusion. (*Weil & Brown, Civil Procedure Before Trial* § 9:59).  
9 A declaration based on “information and belief” is not competent evidence to establish  
10 facts. (*Brown v. Superior Ct.* (1987) 189 Cal.App.3d 260, 265). An objection to a  
11 statement in a declaration can be based on the hearsay rule (Evidence Code § 1200), a  
12 declarant’s lack of personal knowledge as to the information testified to (*id.* § 702), or that  
13 a statement is opinion (*id.* § 803), speculation (*id.* § 800), or irrelevant (*id.* § 210).

14           In addition, a declarant cannot render an expert opinion in a declaration unless the  
15 declarant actually is an expert. A person is qualified to testify as an expert “only if he has  
16 special knowledge, skill, experience, training, or education sufficient to qualify him as an  
17 expert on the subject to which his testimony relates.” (*People v. Fuiava* (2011) 53 Cal. 4th,  
18 622, 672).

19           **II.       Objections to the Declaration of Jim Henderson**

20           Based on these rules, Petitioner objects to the following statements in the Henderson  
21 Declaration, which is Exhibit 6 to the LEA’s Response:

22           **Paragraph 6:** All of Mr. Henderson’s statements regarding what the “caretaker”  
23 told him are hearsay as the statements are being made to support the validity of those  
24 statements. The declaration also is improper because it does not state when the caretaker’s  
25 statements were made, identify the name of the caretaker, or provide any other information  
26 to assess the veracity of the caretaker’s claims.

27           **Paragraph 9:** Mr. Henderson’s opinion that the barrier is placed “where it serves its  
28 intended purpose of deterring vehicle access from Hwy 76 to the riparian area” is

1 impermissible opinion and is speculation as to the intent of an unnamed party.

2 **Paragraph 12:** Mr. Henderson's statement that "GCL decided to use some of the  
3 large pieces of concrete and some asphalt from the demolition of the pad running along the  
4 route of the pipeline as an additional barrier" is opinion and speculation as to the intent of  
5 GCL in placing the construction debris.

6 **Paragraph 18:** Mr. Henderson's statement that the construction of the "vehicle  
7 barrier with construction debris" when combined with these other access controls,  
8 "prevents vehicle traffic from Hwy 76 to the riparian area, reducing environmental  
9 damage" is opinion with no foundation or evidentiary support. In his declaration, Mr.  
10 Henderson cites to no facts to support his unsubstantiated opinion and speculation that there  
11 was previous "environmental damage" that had occurred in the undefined riparian area or  
12 that the "vehicle barrier" would "reduce" such environmental damage in the future.

### 13 **III. Objections to the Declaration of Karilyn Merlos**

14 Based on these rules, Petitioner objects to the following declarations in the Merlos  
15 Declaration included at Exhibit 7 to the LEA's Response:

16 **Paragraph 5:** Ms. Merlos' statement that, as to the debris generated during the  
17 construction of the natural gas pipeline, "GCL separated and recycled metals from this  
18 debris and determined that the remaining debris was suited to constructing the landfill"  
19 lacks foundation and evidentiary support, does not appear to be based on her personal  
20 knowledge and thus is merely her opinion, and is hearsay.

21 **Paragraph 7:** Ms. Merlos statement that the "concrete in this barrier has been  
22 readily visible from SR 76 since 2010" is not stated to be based on her personal knowledge  
23 and is a mere conclusion and an improper opinion. Likewise, her statement that "GCL  
24 determined that this material would also be used for landfill construction" lacks foundation  
25 and evidentiary support, is merely her opinion, and is hearsay.

26 **Paragraph 9:** Ms. Merlos statement that the "debris has not decomposed during  
27 the four years the debris has been in place" is not supported by any factual evidence, such  
28 as testing of the materials or any identified visual observations during that period.

1 Consequently, the statement is pure speculation and unsupported opinion. Ms. Merlos also  
2 does not state why she is an expert who can render an opinion that no decomposition has  
3 occurred.

4 Ms. Merlos also declares that “to the best of her knowledge” and after consulting  
5 with Mr. Henderson, the “debris has not had an adverse effect on human health and safety  
6 or the environment.” This statement is pure speculation and an opinion based on no factual  
7 foundation or any studies conducted to determine the impact of placing the construction  
8 debris in these areas. Again, there is no evidence that Ms. Merlos or Mr. Henderson is an  
9 expert who could determine whether or not the debris has or continues to have an adverse  
10 effect on human health and safety or the environment.

11 **Paragraph 10:** Ms. Merlos states that the inspection report prepared by Mr.  
12 Henderson “would have been reviewed by the prior LEA supervisor prior to its release to  
13 GCL.” But, the declaration provides no evidence that such a review actually occurred and  
14 so the statement is mere speculation.

15 The last sentence in this paragraph also should be stricken. It states that the “LEA  
16 agreed with GCL that the vehicle barrier would be useful and that all of this debris was  
17 suited to use during landfill construction.” Mr. Henderson’s 2010 Inspection Report states  
18 only that he had “no issues” with the material, and in the sentence before this one, Ms.  
19 Merlos states that the “basis for the LEA’s determination was not documented at that time.”  
20 As the declaration provides no evidence showing that anyone else at the LEA ever  
21 considered the issue let alone agreed that the vehicle barrier would be useful, and Ms.  
22 Merlos does not state that she has actual knowledge that the LEA agreed that the barrier  
23 would be useful or that the debris was suited for used during landfill construction, her  
24 statement is speculation, opinion, and hearsay.

25 **Paragraphs 15-20/Exhibit 8:** The information included in these paragraphs and in  
26 Exhibit 8 as to the LEA’s alleged regulation of other facilities is irrelevant to the issue of  
27 whether or not the construction debris at the GCL facility has been properly managed under  
28 state law and whether statutory and regulatory provisions require that the LEA issue a cease

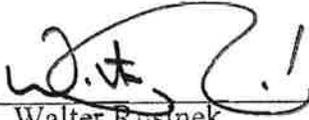
1 and desist order. These paragraphs and Exhibit 8 should be stricken from the record.

2 Paragraph 17: This paragraph also should be stricken because the declaration  
3 provides no evidence to support the broad statement that CalRecycle has indicated that it  
4 has no concerns about the LEA's approach to administering the debris management  
5 regulations. It also is not clear that Ms. Merlos has personal knowledge of this "fact" and  
6 the claim is irrelevant to the issue of GCL's right to continue to dispose the construction  
7 debris on its property.

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DATED: September 15, 2014

PROCOPIO, CORY, HARGREAVES &  
SAVITCH LLP

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

**EXHIBIT O**

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TRANSCRIPT

County of San Diego, Solid Waste Hearing Panel

September 22, 2014

LEGEND:

TM: Traci Mitchell, Administrator, Solid Waste Hearing Panel

RR: Ron Roberts, County Supervisor, Fourth District

PM: Paul Manasjan, Solid Waste Hearing Panel Member

NM: Neil Mohr, Solid Waste Hearing Panel Member

LD: Larry Dershem, Alternate Solid Waste Panel Member

SK: Sachiko Kohatsu, read a letter from District 3 Supervisor Dave Roberts

KL: Kristen Laychus, Deputy County Counsel for Solid Waste Hearing Panel

WR: Walter Rusinek, Counsel for Petitioner Pala Band of Mission Indians

RL: Rod Lorang, Senior Deputy County Counsel for LEA

RLF: Rebecca Lafreniere, LEA

JH: James Henderson, LEA

KM: Kari Lyn Merlos, LEA

PE: Pat Embry, speaker

RH: Ruth Harber, speaker

ED: Everett Delano, speaker (counsel for Riverwatch)

LE: Linda Escalante, speaker (counsel for National Resources Defense Council)

1 [Witnesses sworn in before audio recording began]

2 TM: The Solid waste hearing panel members are appointed directly by a vote of the Board  
3 of Supervisors. Solid Waste Hearing Panel Members are not part of and are  
4 completely independent from the San Diego County Department of Environmental  
5 Health in its capacity as a solid waste local enforcement agency. The Solid Waste  
6 Hearing Panel acts in a quasi-judicial capacity and renders its decision only on the  
7 basis of proper evidence presented at this hearing.

8 RR: Okay. Official roll call?

9 TM: Supervisor Ron Roberts?

10 RR: Here.

11 TM: Mr. Paul Manasjan?

12 PM: Here.

13 TM: Mr. Neil Mohr.

14 NM: Here.

15 RR: And our next order of business. We need to nominate and elect a chairperson and a  
16 vice-chair.

17 PM: I'd like to put forth a suggestion, a nomination that we ask Supervisor Roberts to  
18 serve as chair.

19 RR: Okay. Second?

20 NM: I would second that motion.

21 RR: I like this election.

22 ALL: [laughter]

23 RR: Okay. On that question then all in favor say Aye.

24 Panel: Aye.

25 RR: And then the question of vice-chair?

26 NM I'd like to motion to nominate Mr. Paul Manasjan as vice-chair.

27 RR: I'll second that. Is there any further discussion? Then all in favor say Aye.

28 Panel: Aye.

1 RR: [inaudible] Congratulate you on the assignment. Are there any public speakers on  
2 that?  
3 TM: Not for that item, sir.  
4 RR: Okay. Then our next item of business is the adoption of the rules and regulations to  
5 conduct our business. I would accept motions for the adoption of those rules.  
6 NM: I would make a motion to adopt the rules and regulations.  
7 PM: I second that.  
8 RR: Alright. We have a motion and a second. Is there any public comment on this?  
9 TM: No sir.  
10 RR: Okay, then need to move it to the vote unless there are any other issues. Those in  
11 favor say Aye.  
12 ALL: Aye, aye.  
13 RR: Opposed? [inaudible] And then we move on the hearing of the appeal.  
14 NM: Mr. Chair, may I have something to say.  
15 RR: Go ahead.  
16 NM: In preparing for the hearing, I was [inaudible] some information and saw this as a  
17 verification of California Cal. Recycle Regulations as it relates to the demolition and  
18 the construction and demolition of urban material and hoped that I could rule on that.  
19 But in preparing for the meeting today, as we went over the rules, Rule No. 5 talks  
20 about a conflict of interest that could be a related financial interest. And I work with  
21 the public service that manages landfills and transfer spaces here in San Diego  
22 County. And there's a section in here that said if constructed, would operate in direct  
23 competition with the facility which a member has an employment related interest,  
24 would be considered a financial interest and be presumed to be in conflict. So I have  
25 to recuse myself on this hearing. I apologize for the late notice.  
26 RR: Okay. We have an alternate?  
27 TM: Mr. Dershman  
28 RR: Okay. We do that then. [inaudible] Okay, so let me announce first the pending

1 matters. We have an issue, the Pala Band of Mission Indians' request for a hearing  
2 dated July 28, to review the San Diego County Local Enforcement Agency's alleged  
3 failure to require Gregory Canyon to remove concrete and other debris disposed of on  
4 its property and adequately defined the boundaries of the solid waste facility.

5 Secondly, I am being the Pala Band of Mission Indians request for hearing dated  
6 August 27, to review the LEA's alleged failure to comply with the law when it issued  
7 its official notice, compliance schedule, and notice of compliance status to Gregory  
8 Canyon to require Gregory Canyon to immediately remove concrete and other debris  
9 disposed of on its property and adequately defined the boundaries of the Solid Waste  
10 facility. Okay. At this point do you want to have both parties check in? Appearance  
11 from both parties?

12 WR: Walter Rusinek on behalf of Pala Band of Mission Indians

13 RL: Rod Lorang, Senior Deputy County Counsel on behalf of the Solid Waste Local  
14 Enforcement Agency.

15 RR: Okay. Next, the Pala Band of Mission Indians has moved in its pleadings to  
16 consolidate its two hearing requests into one. The LEA has informed the Panel's  
17 counsel that it does not object to the consolidation, so, if you think it's appropriate, we  
18 should have a motion to consolidate the two hearings.

19 PM: I put forth a motion to consolidate these two.

20 RR: Okay. There's no public testimony on this. All in favor signify by saying Aye.

21 ALL: Aye.

22 RR: And we'll assume that that is unanimously approved. We will now have a brief  
23 opening statement from Pala.

24 WR: Good afternoon. We're here today, you taking time out of your busy schedule and  
25 you're here in a suit because the LEA has refused our request to direct Gregory  
26 Canyon, what I refer to GCL, today, to remove construction debris from the site and  
27 we've argued that this is illegally disposed waste that needs to be removed and that  
28 the County has an obligation to do so. I will at times refer to two different types of

1 KL: Whatever is easiest. [inaudible]  
2 RL: I guess everyone can see you.  
3 RR: Rebecca, you've been sworn in?  
4 RLF: Yes, I have.  
5 RL: Since the chair has addressed her as Rebecca, I will as well. Rebecca sits in the office  
6 next to me. We work together a great deal. Rebecca, would you tell us about your  
7 experience with solid waste regulation.  
8 RLF: I have been working for Solid Waste Local Enforcement Agency since 1992. Up  
9 until I had been involved with two certifications of the Solid Waste Local  
10 Enforcement Agency, County of San Diego, and also the City of San Diego. In 2010,  
11 I was promoted to Chief of our Community Health Division and the LEA is still part  
12 of my responsibility. I started as an Environmental Health Specialist II with the LEA  
13 back in 1992. I've worked on solid waste facility permits, on inspections, on  
14 compliance with California Environmental Quality Act. I've also been a senior doing  
15 the same work with closure and permitting, and then a supervisor over the County  
16 LEA in 2006, until my promotion in 2010. I am a registered environmental house  
17 specialist. I'm also certified as a solid waste enforcement officer with the Solid  
18 Waste Association [inaudible] of America. I'm also certified as a hazardous materials  
19 specialist with the State of California [inaudible].  
20 RL: Thank you. I have another copy of Exhibit 2 from our response that I'd like to have  
21 the witness use and distribute if there is no objection. You have any objection to this  
22 exhibit?  
23 WR: No.  
24 RL: Can you tell me what this is and who prepared it?  
25 RLF: This is an inspection report for a monthly inspection of a solid waste landfill that staff  
26 use to document their inspection. This was completed by Jim Henderson of the  
27 Gregory Canyon Landfill inspection.  
28 RL: And did you review this before it was issued?

1 RLF: Yes.

2 RL: Did you alter what you received from Mr. Henderson before this was issued to  
3 Gregory Canyon?

4 RLF: Our review process when an inspector does their inspection and they write it in draft  
5 for supervisors to review, and Mr. Henderson tends to jot down notes. And so my  
6 edits would have been on complete sentences, and also to look for any type of lack of  
7 detail.

8 RL: So did you review this?

9 RLF: Yes, I did.

10 RL: And did you edit it?

11 RLF: Based on the way it's written I would say yes.

12 RL: Okay. Could you read the second paragraph?

13 RLF: The concrete and asphalt debris in other locations is considered by Gregory Canyon  
14 Ltd. as base material for future use during landfill construction. Most of the concrete  
15 and asphalt is stored in a staging area but some is being used as barrier material to  
16 restrict access to riparian areas. No issues noted with this material.

17 RL: What's the significance the statement, "No issues noted with this material"?

18 RLF: The material is deemed as a material and not as a waste for disposal. It is in use to  
19 enhance the access restrictions to the property. It is also a material that's consistent  
20 for future construction of the landfill as a base material.

21 RL: Was the pipeline debris on this property disposed as that term is defined in the Public  
22 Resources Code?

23 RLF: No, it's not. The pipeline material is the concrete as a result of that project is places  
24 an interim use again to enhance access restriction and trespass on the property. But  
25 also in the future for the construction of the landfill as a future base material.

26 RL: And is this debris suited for use during landfill construction?

27 RLF: Yes it is. It is consistent with practices in other landfills as a material, as a base  
28 material.

1 RL: Okay. Was the debris serving a useful service in 2010?

2 RLF: Yes, it was. And it still remains active as a barrier again for illegal trespass, illegal  
3 disposal onto it. It enhances the existing site conditions.

4 RL: Have you seen this kind of use with this kind of debris before?

5 RLF: Yes, I have seen this type of material used to deter illegal trespass. I've also used it  
6 internally on operating landfills to help direct traffic patterns, and to prevent access to  
7 areas that's not open to the public.

8 RL: Does the LEA regulate that kind of use of debris?

9 RLF: Not as a material, no.

10 RL: And did you communicate to Gregory your conclusion in 2010 that this was use of  
11 the material and not just disposal of a waste?

12 RLF: Those communications are recorded in the monthly inspection reports.

13 RL: Why wasn't a permit application or at least a notification required before GCO  
14 Gregory Canyon could use the debris this way?

15 RLF: The material is determined to be reuse. It's not disposed. It's not necessary.

16 RL: Let's go back to the definition in the Public Resources Code is "disposed." What  
17 constitutes "disposed" under that definition?

18 RLF: It's a solid waste that in its final disposition of resting spot [inaudible].

19 RL: So final disposition of deposition?

20 RLF: Deposition.

21 RL: Deposition.

22 RLF: Final Disposal, the final resting location.

23 RL: Thank you. We also have Exhibit 8 in our response.

24 WR: I object to any discussion of Exhibit 8. It's irrelevant to the issue here. I've raised  
25 that issue. I filed a motion saying that this should not be addressed at all. Can we get  
26 a ruling on that now?

27 KL: Before we begin on that, Mr. Rusinek, I want to back up on Mr. Lorang's question  
28 before we formally admitted what they are labeling as Exhibit 2 into evidence.

1 RL: Then I formally request that the exhibits included in my response be accepted into  
2 evidence.

3 KL: Thanks, and we'll label this for purposes of this as Exhibit 1, and now we can address  
4 your, you are aware, Mr. Rusinek indicated he has filed an objection to Exhibit 8  
5 claiming that it constitutes impermissible hearsay, opinion, speculation, non-expert  
6 testimony, or otherwise improper. Your panel may entertain a motion to overrule that  
7 objection because the panel may admit any relevant evidence if it is the sort of  
8 evidence on which responsible persons are accustomed to rely, and because the  
9 hearsay evidence may be used for purposes of supplementing or explaining direct  
10 evidence. The propounding party should show whether the admissible evidence is,  
11 meets the standard.

12 RR: Can we hear the evidence and then.

13 KL: Mr. Rusinek can voice his objections. Mr. Lorang should, as a propounding party of  
14 that evidence should explain why he believes it's admissible. And then your Board  
15 can rule on that.

16 RL: Well the objection that's been raised here is relevance. We intend to establish  
17 relevance, and Mr. Rusinek has given me a big leg up on that with his opening  
18 argument that says we're in bed with Gregory and doing this to help Gregory rather  
19 than for legitimate reasons. A comparison of this situation to other situations. The  
20 LEA has faced that are similar there is certainly relevant to answer the question of  
21 whether this is special treatment.

22 WR: Can I say something. I object to that as well, because the argument here is whether  
23 this is solid waste at this site specific, fact-specific place. Whether or not Gregory  
24 Canyon is getting special treatment, that doesn't matter to me. I mean, the issue is,  
25 what is the law and is the law being applied properly here.

26 RR: Mr. Rusinek. You raised that as an issue.

27 WR: I didn't raise it as an issue. I raised it as a, by the way, the objection was that my  
28 testimony didn't apply at all anyhow.

1 RL: I didn't refer to your testimony. I referred to your argument identified as argument  
2 where you raised that issue.

3 KL: Your panel can entertain a motion to admit Exhibit 8 if you believe it's the type of  
4 relevant evidence that responsible persons would rely on in this hearing.

5 RR: [inaudible]

6 PM: Can we clarify when you talk about Exhibit 8 exactly what you are referring to?

7 RL: Exhibit 8 was included in our response.

8 PM: It was labelled Exhibit 8?

9 RL: It's labelled Exhibit 8 in our response. This is just a larger print copy because the  
10 print was so small.

11 KL: We need a formal rule on whether to admit it onto the record.

12 RL: You can keep a copy [inaudible]

13 LD: Mr. Lorang, this shows your treatment of various recycling companies.

14 RL: My clients, yes sir.

15 RR: [inaudible]

16 TM: If this is admitted into evidence, this is on the record and will be part of the evidence  
17 that your panel would consider in determining, in making its determination today.

18 LD: Is GCL anywhere? I don't see it.

19 RL: GCL is not on that list.

20 PM: And again, this is to demonstrate this type of enforcement activity in the course it has  
21 taken is not unique or special, as opposed to San Diego County LEA. And that it's  
22 consistent with other enforcement agencies doing similar?

23 RL: This exhibit doesn't address other enforcement agencies although I intend to illicit  
24 testimony that does. That is one reason this exhibit is relevant. The others, it may  
25 assist the panel in understanding the implications of the decision that strips the LEA  
26 of the ability to make determinations about how to do enforcement in the program  
27 area.

28 PM: So then it would be examples within the County of San Diego jurisdiction?

1 [inaudible].

2 RL: These are all within the County jurisdiction, Yes sir.

3 PM: Well, whether or not, I have no problem with the submittal of this as evidence,  
4 whether or not it even is necessary for a determination. I still don't, see any conflict  
5 or any problem with this submittal.

6 LD: Guys, I have a question. Are there any examples of concrete and asphalt in here?  
7 This debris here that's we're taking action?

8 RL: I could put that question to Rebecca.

9 RLF: Yes, some of these cases involve concrete and asphalt.

10 PM: Could you point those out?

11 RLF: The ones that I've been involved with include free rock materials that would be  
12 number 3 down there. Whillock Contracting. Lakeside Land Company. Amswede.  
13 We have a pending case with Wick Property that I'm aware of. And Casper Property.

14 PM: Could I ask you another question? Wherever it refers, can we assume that it refers to  
15 inert debris that we are talking about similar material, such as asphalt or concrete?

16 RLF: When it refers to construction demolition and inert, inert is a component of the  
17 construction demolition. So that is a component within.

18 PM: Then again, it would not be dissimilar from the barrier material that's also referred to  
19 as inert?

20 RLF: Correct.

21 KL: So your Board should make a ruling as to whether or not this should be admitted into  
22 evidence.

23 RR: [inaudible] motion to accept this into evidence

24 PM: I second the motion.

25 RL: Thank you Mr. Chairman, members of the panel.

26 KL: And for purposes of the record, we're labelling this as Exhibit . . . .

27 TM: Exhibit 2.

28 RR: Okay. [inaudible]

1 RL: I have tried to number my exhibits consecutively to what was submitted with the  
2 response so we don't have two sets of numbers running. What you are calling Exhibit  
3 1 is already submitted to you as Exhibit 2. Exhibit 8 is also already submitted to you  
4 as Exhibit 8 in the response. I fear we're going to create confusion if we depart from  
5 my original numbering. We can still clearly identify this, and I chose the numbers  
6 instead of letters because petitioner used letters for their exhibits.

7 RR: So you're suggesting

8 RL: That the first thing I gave remain Exhibit 2,

9 RR: and Exhibit 8.

10 RL: Yes, I do. Thank you Mr. Chair. Rebecca, have you reviewed this exhibit?

11 RLF: Yes I have.

12 RL: The first six cases there started prior to 2010, were you involved in those cases when  
13 you were a LEA supervisor?

14 RLF: I was not involved in number 1 or number 2; it predates my employment as a  
15 supervisor with the County of San Diego LEA program. I was the supervisor for  
16 ReRock Materials, Whillock, Lakeside Land Company.

17 RL: Thank you. And is the exhibit accurate as a summary of those cases?

18 RLF: Yes it is.

19 RL: How did the LEA make decisions about debris related enforcement when you were  
20 the LEA supervisor?

21 RLF: With all solid waste activity, we investigate the activity and in doing that, we go onto  
22 the site, and we make our observations. We also interview the responsible party for  
23 facts. We look at risk versus nuisance. We take into consideration if the activity is  
24 subject to the solid waste statute or the laws. Ultimately, we want compliance. If we  
25 determine it is solid waste activity, we're seeking compliance at the end. If it's a  
26 nuisance, it's something that we will continue to educate the responsible party about  
27 what the requirements are, and allow them to seek compliance. If it's a high risk, then  
28 we can take, we do take immediate enforcement action. Each case is very unique and

1 no two cases are exactly the same, and that has to do with geographical, sensitive  
2 receptors, the type of materials or waste that they're receiving.

3 RL: Thank you. Nothing further.

4 RR: Thank you.

5 WR: I'd like to cross-examine.

6 RL: Object. Rules don't address whether you're allowing cross-examination. The statute  
7 allows you to either allow or not allow it. In light of the fact that you've scheduled  
8 this complex issue for only two hours, I request that cross-examination not be  
9 allowed.

10 KL: The Chairperson has the authority pursuant to the rules to limit the use of evidence on  
11 witnesses, so it would be within the Chairperson's authority to allow or not allow  
12 cross.

13 RR: [inaudible]

14 WR: I would like to state my objection for record and say that I'm not bringing witnesses.  
15 This is a witness that was brought by the LEA, and I have every right to cross-  
16 examine and abide by the [inaudible].

17 RR: [inaudible]

18 RL: Thank you. I call Jim Henderson.

19 RR: [inaudible]

20 RL: Mr. Henderson, could you tell us briefly about your qualifications and your  
21 experience with the LEA?

22 JH: I've got a degree in environmental science. I'm an REHS, State of California  
23 registered environmental health specialist. I've been doing environmental work for  
24 25 years for LEA doing inspections and enforcement and permitting for 7 years. I've  
25 also received a lot of additional training the state and other agencies, private courses  
26 for 3 years.

27 RL: Thank you. You provided a declaration which I included as Exhibit 6 to the LEA's  
28 response. Was that based upon your personal knowledge?

1 JH: Yes it was.

2 RL: How are you familiar with the Gregory Canyon project and the property?

3 JH: I've been kind of a project lead for the LEA on Gregory for the last seven years. I've  
4 been involved with some of the CEQA. I've been involved in the permit actions.  
5 And I've done the routine monthly inspections of the site every month for the last  
6 seven years, except for a brief break for a few months when the permit was not in  
7 standing or in existence.

8 RL: Is your declaration also based in part on things that you were told by representatives  
9 of Gregory Canyon?

10 JH: Yes it is.

11 RL: Okay. Exhibit 2 is an inspection report you prepared, is that correct?

12 JH: Yes.

13 RL: How were your inspection reports produced and reviewed before they went to  
14 Gregory Canyon?

15 JH: They were produced in draft form, provided to the LEA supervisor for revision and  
16 correction and markup, its changes are incorporated. Then it's reprinted as a final  
17 version, copies filed, copies sent to the permit holder.

18 RL: Thank you. I have three additional inspection reports earlier than Exhibit 2 that I'd  
19 like to bring into evidence. And I note that petitioners objected to some paragraphs in  
20 Mr. Henderson's declaration, which is Exhibit 6. And I'd like to suggest that rulings  
21 on those objections be made after Mr. Henderson bolsters some of the statements that  
22 have been objected to in his testimony here today. I think same suggestion for these  
23 additional inspection reports.

24 KL: So the first one you handed will be admitted as Exhibit 9?

25 RL: Thank you. Two copies of 9.

26 KL: If the Board so chooses.

27 RR: [inaudible]

28 RL: Well I was trying to retrieve a copy of each. I have a 9. KL: We're doing one at

1 a time.

2 RL: Okay.

3 KL: Exhibit 9 is now pending before the Board.

4 RR: [inaudible]

5 RL: Mr. Henderson, is this an official record of the LEA

6 JH: Yes, it is.

7 RL: I ask that it be put into evidence.

8 KL: The pending question, should it be put into evidence?

9 RR: Please.

10 RL: Okay. Mr. Henderson, did Gregory Canyon takes steps to block access to the interior

11 houses on this site prior to pipeline project?

12 JH: Yes, they did.

13 RL: Does Exhibit 9 show those efforts?

14 JH: Yes it does.

15 RL: When were they? When was this inspection?

16 JH: That was January 22, 2008.

17 RL: And where does it show on this exhibit?

18 JH: It's the first paragraph, first observation.

19 RL: Read that, please.

20 JH: Some concrete barriers have been placed on the embankment near the old bridge to

21 better block access to the interior houses on the property. According to the site

22 caretaker, trespassers have gone in on foot recently to try and steal copper pipe and

23 wire from the inner building.

24 RL: What does the inner building refer to?

25 JH: There are two houses and a barn on the other side [inaudible].

26 RL: Is Exhibit 10 an official record of the LEA?

27 JH: Yes.

28 RL: I move it into evidence.

1 LD: Which one is "10"?

2 RL: It says "10" in the upper right hand corner.

3 RR: Are there two pages?

4 RL: There are two pages in Exhibit 10, yes.

5 LD: Have you any more copies? I don't have a "10." [inaudible].

6 RR: Let's just make sure we all have the same. These are two pages and they are dated  
7 October 16, 2009, is that correct?

8 RL: Do we have a ruling?

9 RR: [inaudible]

10 RL: Thank you, Mr. Chair. Mr. Henderson, by the time you issued this report, had you  
11 determined that the barrier debris was being used rather than disposed?

12 JH: Yes, I had.

13 RL: How is that shown here?

14 JH: Again in the first observation.

15 RL: Read the sentence, please.

16 JH: As noted on the previous inspections, several piles of demolition debris, metal pipe,  
17 etc., from the pipeline project remain on site. Most of the concrete debris from the  
18 pipeline has been used to create barriers.

19 RL: What happened to the metal pipe debris?

20 JH: Eventually that was separated and recycled or disposed.

21 RL: Thank you. I refer to Exhibit 11. Is this an official record of the LEA?

22 JH: Yes, it is?

23 RL: I move it into evidence.

24 RR: Okay. I'll accept this.

25 RL: Thank you, Mr. Chair. Did you determine? Let me rephrase that. The observations  
26 in this inspection report say that debris was used to create barriers to restrict access to  
27 the riverbed from the old Berry property. How did the barrier do that?

28 JH: Previously it was, there was access all the way to the old bridge, what used to be Wild

1 Road, which was the old crossing of the river and the bridge. Once this debris was  
2 put in place, I could no longer drive to that location. I had to park my County vehicle  
3 and walk the rest of the way. I had to observe that here.

4 RL: So if I refer to the photos of the barrier, which were also up there earlier, one of them  
5 is an opening.

6 JH: Correct.

7 RL: At that, are you saying that you could not get to the site of that opening to the north at  
8 all?

9 JH: I could not, from driving from 76, I could not drive, there was no way to get to that  
10 barrier from that. I had a key, I can get to that are through a locked gate from a  
11 different angle. But I can't get there directly from 76.

12 RL: So the gap in the photograph is a gap a vehicle never could have accessed?

13 JH: Not from 76.

14 RL: Thank you.

15 RL: There's a photograph of a waste tire pile in this inspection report no. 11?

16 JH: Yes.

17 RL: What happened to that?

18 JH: We are also the tire enforcement agency. We basically work with Gregory, did some  
19 inspection reports. They eventually hauled the tires off and documented proper  
20 disposal.

21 RL: Thank you. Petitioners objected to some of the paragraphs in your declaration and  
22 I'm referring now to Exhibit 6. I don't have another copy. It was included our  
23 response. I don't think you need to refer to it now, but if you can find it, it might be  
24 helpful. The objections to 6 were in part that the caretaker wasn't identified who told  
25 you people were driving vehicles into the riparian area. Who was that caretaker?

26 JH: Javier.

27 RL: And how did he know what was happening on the site?

28 JH: He lives on the site. And he's the caretaker of the site.

1 RL: There were objections to paragraph 9 and to paragraph 12 where you talk about  
2 Gregory Canyon's purpose in creating the barrier, were those statements based in part  
3 on what Gregory Canyon represented as told you?

4 JH: Yes.

5 RL: Who were those people?

6 JH: Javier again, that's the caretaker. Also, we had one meeting out there with Keith  
7 Bevel, who was at that time a representative from Gregory Canyon.

8 RL: And is what they told you reflected in the inspection reports we've looked at, Exhibits  
9 2, 9, 10, and 11?

10 JH: It is in Exhibit 2, yes. That's where the conversation took place.

11 RL: Okay. Did you make your own determination about whether the barrier was helpful?

12 JH: Yes.

13 RL: How do you know it was helpful?

14 JH: Based on the fact that I could no longer drive all the way down to where the bridge  
15 used to be.

16 RL: Okay. In petitioner's reply, and petitioner in the presentation today said the barrier  
17 wasn't effective because of the road on the western side of the property. When the  
18 exhibit was up there that would have been to the left because up is north. Would you  
19 tell us about that, that road?

20 JH: That road is just off of the edge of Gregory Canyon's property. It's not Gregory  
21 Canyon's property. It does lead to an Arizona crossing where you can cross the  
22 riparian area. The foliage at that crossing is so dense you couldn't turn left and drive  
23 a vehicle into that area. You can get across to the other side, but then when you go  
24 left again to try and access the actual Gregory Canyon area, you'll run into more  
25 barricades and a locked gate before you actually get to the Gregory Canyon proper.

26 RL: Thank you. Petitioners also objected to some paragraphs in Ms. Merlos's declaration  
27 and I'm just going to describe those and see whether you can shed any light on them.  
28 In paragraph 5, Ms. Merlos said debris from the pipeline project was separated by

1 type. Do you have personal knowledge of that?

2 JH: Yes.

3 RL: What was that about?

4 JH: After the construction project went through, there were some piles that were kind of  
5 mixed debris. They had some metals, some dirt, some concrete. Part of the purpose  
6 of meeting some of the representatives out there was to help them, or document that  
7 they even had separated these materials and then disposed, recycled materials that  
8 they weren't keeping.

9 RL: Okay. Ms. Merlos says the debris in the barrier was visible from the road. Do you  
10 have experience of that?

11 JH: Yes, I've seen it from the road.

12 RL: And Ms. Merlos says there was no decomposition of this debris? Do you have  
13 knowledge of that?

14 JH: Yes. No apparent decomposition from months and years I've been doing inspections.

15 RL: Thank you. And this one's a little more controversial. Ms. Merlos says there were no  
16 impacts to health safety or the environment. Petitioners have objected that that's not  
17 qualified expert opinion. And they're correct about that. But would you tell us about  
18 the condition of the area in which the barrier is located.

19 JH: The barrier is located on top of a, I call it a cattle sidewalk. It was basically a penned  
20 area directing the cattle. So it's a concrete pad that did have some fences. So it's a  
21 disturbed area that was previously part of the dairy is concrete but essentially it's 6  
22 inches thick.

23 RL: And the larger surrounding area. What condition is that in?

24 JH: That's also a dairy, both the housing, the dairy infrastructure and pasture.

25 RL: So would adding concrete to an area like that to protect the riparian area in your  
26 opinion be a good trade off environmentally.

27 JH: Yes.

28 WR: I object.

1 RR: Basis.

2 WR: He's not an expert.

3 RL: I offer it as his lay opinion as a person with extensive presence on the site only.

4 WR: Irrelevant.

5 KL: You the Board may admit relevant evidence based upon observations, if you so  
6 choose.

7 RR: I point back to the qualifications. [inaudible].

8 RL: Thank you. Nothing further from Mr. Henderson. I call Kari Lyn Merlos.

9 KM: Stay here?

10 RL: Yes please.

11 RR: Let me [inaudible]. For anybody who's intending to provide public testimony, I am  
12 going to restrict [inaudible]. So if you are intending to make public testimony  
13 [inaudible]. Okay.

14 RL: Thank you, Mr. Chair. Would you tell us about your qualifications and experience  
15 with the LEA.

16 KM: I have a Bachelor's in Science and Biology from the University of California San  
17 Diego, and advanced candidacy with a concentration in Environmental Health in the  
18 Graduate School of Public Health Ed. at SDSU, CSU. I was hired with the LEA in  
19 1998 as a student intern, shortly after was hired as an environmental health specialist,  
20 primarily with the Household Hazardous Wastes and Pollution Prevention programs,  
21 charged with educating residents and businesses on proper disposal of waste and  
22 waste minimization practice. I am a registered environmental health specialist with  
23 the State of California. I have certification as manager of landfill operations from the  
24 Solid Waste Association of North America, and various training in hazardous  
25 materials, hazardous waste management.

26 RL: Thank you. So, it went by pretty quickly, but you didn't start with the LEA until after  
27 the inspection report in May of 2010?

28 KM: Correct. I was promoted to supervisor of the LEA in November 2010.

1 RL: As the LEA supervisor now, what's your position on the debris in the barrier?

2 KM: My position is that the debris in the barrier is in use, and that there is further intention  
3 for it to be reused in the construction of the landfill. And that it is not currently in its  
4 final state of deposition. It is there as an interim measure awaiting final use as part of  
5 the landfill.

6 RL: Petitioners have had some objections that your declaration was not demonstrated to be  
7 based on your personal knowledge. You stated in the declaration that you also relied  
8 on the work and reports of the LEA staff. Do you recall that?

9 KM: Correct.

10 RL: Do you routinely rely on reports from staff concerning conditions in the field?

11 KM: Yes, I do.

12 RL: How do you know those reports are reliable?

13 KM: I have done numerous joint inspections with my staff and they are all highly  
14 experienced, highly trained professionals, and I have implicit trust in their work in the  
15 field.

16 RL: And do you also have personal knowledge of the Gregory Canyon property?

17 KM: Yes, I do.

18 RL: What's your basis for that?

19 KM: I've been on several ride-along out to the site and joint inspections with Mr.  
20 Henderson.

21 RL: You said in paragraph 7 of your declaration that the debris was visible from the road.

22 KM: Yes, I did.

23 RL: Was that based on your direct experience?

24 KM: Yes.

25 RL: You said there was no decomposition of this debris. What the basis for that?

26 KM: It's inert material, which by definition does not contain organics, so it's not a  
27 decomposable material, and based on the state it's remained from the photos as well,  
28 it's very much intact.

1 RL: Okay. You stated there are no impacts to the health safety, or environment and drew  
2 the same objection as Mr. Henderson of not being an expert. I noted in your  
3 qualifications a degree in Biology. Is that relevant to any of the environmental issues  
4 at this site?

5 KM: Not necessarily. It's a degree in general biology, but I did have some education in  
6 [inaudible].

7 RL: I'm not proposing Ms. Merlos as an expert in endangered species biology, but could  
8 you tell me, was there an environmental review done to support the use of this debris  
9 in the barrier?

10 KM: Not specifically for the use of the debris in the barrier.

11 RL: Why wasn't that review done?

12 KM: Because there was no required permit action by the LEA.

13 RL: Do you believe based on your observations of the site, that this debris is not affecting  
14 health safety or the environment?

15 KM: I do believe that there is no impact currently from this material.

16 RL: What do you base that on?

17 KM: The fact that it's located in the highly disturbed area as Mr. Henderson noted. It's on  
18 an area that was already lined with concrete, and it was previously used as a dairy.  
19 The entire portion of that area is highly disturbed.

20 RL: Thank you. Let's go back to Exhibit 8.

21 KM: Okay.

22 RL: Which you discuss in your declaration.

23 KM: Yes.

24 RL: The paragraphs in your declaration about the LEA's approach to construction  
25 demolition and inert debris enforcement are referring to this exhibit, Isn't that  
26 correct?

27 KM: Yes.

28 RL: Okay. How was that summary prepared?

1 KM: It was prepared by reviewing our enforcement and complaint laws, and also in  
2 discussion with my staff, and in reviewing LEA records.

3 RL: And what does the summary show in broad terms?

4 KM: It shows that, as Rebecca stated, to treat all of these activities, and these were  
5 primarily inert debris recycling activities that are outlined in this, we treat them on a  
6 case-by-case basis. We're taking impacts into consideration. And also the goal for  
7 the intended reuse and recycling of these materials. It's also important for us to attain  
8 compliance with state regulations and statutes. But we have various means of  
9 achieving compliance. This demonstrates that we don't always necessarily need to  
10 jump to top tier enforcement activities such as the cease and desist order, or a notice  
11 and order of any kind. We often provide education and notification to the site  
12 operators and have been very successful in achieving compliance with some of those  
13 lower tier actions.

14 RL: Thank you. Paragraph 17 of your declaration says that Cal. Recycle has indicated no  
15 concerns. That part is a quote: "has indicated no concerns regarding LEA's  
16 administration of debris management, regulations." I'd like to know what that  
17 statement in your declaration is based on.

18 KM: The LEA is reviewed or evaluated by the California Department of Resources Cal.  
19 Recycle on a tri-, every three years. And they do an extensive analysis of all of our  
20 activities, including our inspections. They review inspection reports and enforcement  
21 activities. And they have not noted any concerns in the inspection or evaluation that  
22 they conducted in 2011 when I was a supervisor. They are just completing their  
23 current evaluation and their draft results also indicate no concerns with our  
24 enforcement activities.

25 RL: Thank you. Nothing further from Ms. Merlos. That concludes our case presentation.  
26 I've save my arguments for closing argument.

27 RR: Okay. I have all the evidence. I'll take public testimony. Do we have speaker  
28 requests?

1 PM: And the issue, and let's move to Level 3, the issue of the boundary I understand is in  
2 litigation, and will be, and so we don't want to get involved with making another  
3 judgment on something that is actually.

4 RL: Let me make, may I inquire whether the method of decision-making is going to be a  
5 dialog that includes counsel.

6 PM: No. Well, I've put this, putting this actually to these two gentlemen.

7 RL: Ah, thank you. I misunderstood. I apologize.

8 PM: So.

9 RR: I'll second that at some point.

10 PM: On the point of the time-barred, it's, what I see from the exhibit 9 that was an  
11 inspection report issued in 2008, that identified that the concrete, the barrier and the  
12 re-purposing of this debris material as a barrier was acknowledged and the purpose of  
13 that barrier was acknowledged as well. So that was back in 2008. And as I  
14 understand, these inspection reports are a public record. They go to the. . . At this  
15 time, at that time, that was the California Integrated Waste Management Board. So  
16 these are all a public record. So, I would have to say that here, this is 2008, it's 2014,  
17 it seems like that's more than 30 days. So I would argue with that. And even if we  
18 weren't, even if we can't do at level 2, it's obvious with the intent that this material  
19 was relocated. It was re-purposed as a barrier from the way it was laid down. And  
20 we had testimony from Mr. Henderson that it was an effective barrier which is  
21 recorded in your, in that exhibit 9. And it's not, I don't think it's uncommon as  
22 previous testimony, and I believe it was Ms. Lafreniere saying, that it's not  
23 uncommon for these, for this type of inert material to be used as a barrier. Or I think  
24 all of us have seen it used as, for erosion control. I've even seen it on private property  
25 where they've used stacked concrete and asphalt slabs as erosion control on their  
26 property. So I think the establishment of re-use of this material, re-purposing of this  
27 material is all around us. So I don't see this as its final deposition of material. So  
28 either, whether we go with the suggested layer 1 or 2, I still believe that there is no,

1           there's no valid point on the side of petitioner.

2   RR:     You're saying the statute of limitations and the fact that there is a functional,  
3           functionality, of the placement of the material is not a [inaudible].

4   PM:     Right, exactly, and I think it's also, I must say, I understand we're not here to judge  
5           on the legitimacy of the landfill. I may have personal feelings about that. But what  
6           we're asked to do here has nothing to do with whether or not that landfill should be  
7           permitted. But just whether or not the actions of the LEA were correct or were they  
8           subject to actions by the time limitation within 30 days.

9   RR:     Okay.

10  PM:     And so I think, I would say check at Level 1, there's enough submitted, just level 1  
11           for my information is adequate to not side with petitioner.

12  LD:     I had a question. Can this barrier be seen from Highway 76?

13  RR:     There is testimony to that. [inaudible]. I haven't been out there but [inaudible].

14  LD:     And is there anybody here from the Pala Band of Indians?

15  WR:     [inaudible]

16  LD:     Just you representing the Pala?

17  WR:     I don't think so.

18  LD:     I agree, I've even seen this advertised as, they call it urbanite. People come up and  
19           actually pick it up at your place if you do demolition. And it is used for walls, and so  
20           forth. And I just want a clarification on this, if Mr. Henderson is still here, on that  
21           road? It's to the left of the property, so people still can't get into this area. So this is  
22           an effective barrier? There's a road to the left and. I don't suppose this is dispositive  
23           that this road at the left here, they say that's a road, and you still can't get into this  
24           area where the barrier is at, is that correct? Does anybody know the answer to that?  
25           You had it on the slide up there.

26  RR:     His testimony was that this area, heavily foliated area down here where you couldn't  
27           get across

28  WR:     I object to the fact that there was any testimony that he could not get into the area

1 north of the river and south of the barrier.

2 LD Okay, that's right. I remember you saying that.

3 RR: But I think the question of whether you can or cannot. The question really is this

4 barrier may not be the most effective barrier. And then somebody's familiar with the

5 area knows, but I don't think anybody's going try to [inaudible] that rock pile.

6 PM: Right, and again, we're not necessarily here. It was the re-purposing, in my mind, for

7 a barrier. We're not here to judge the effectiveness of that barrier.

8 RR: Right.

9 PM: You know a barrier was obviously laid down, and it was re-purposed. The material

10 was re-purposed.

11 LD: I'm also curious, the bunker debris that was removed, was there any cement or

12 concrete and asphalt in that, so that it was actually separated out and moved? Do we

13 know that?

14 PM: I think there was testimony such that all, what consists of the barrier is the inert

15 material.

16 LD Exactly.

17 PM: The other recyclable material such as the metal piping is gone. And green

18 waste and all that stuff that was in the bunker material was removed prior to laying it

19 down as a barrier.

20 RR: There's no evidence that there's anything other than the concrete [inaudible].

21 LD: [inaudible]

22 RR: [inaudible] or anything like that. I think really the questions are has the statute of

23 limitations in effect, and if that's the case, it seems to me [inaudible].

24 PM: The way I understand it too. It's, the burden is on petitioner to show that the LEA

25 made an error or is not acting properly. And I haven't seen any case to that effect. I

26 haven't seen anything about what the issue on [inaudible].

27 RR: Let me go back to the first point you raised. Given that there was, you know, there's

28 evidence that as early as 2008, that this was pretty obvious [inaudible]. In the public

1 record. Does that give us a trigger for the statute of limitations?

2 KL: Based on our understanding of the statute, that the hearing requires that it, the petition  
3 be filed within 30 days from the date the person discovered or reasonably should have  
4 discovered, that facts upon which the allegations are based, we believe the Board  
5 could legally find that these claims are time-barred.

6 PM: Then Chair I would recommend this. If that is the course we take, it's the most direct,  
7 most supported here, and there's no need to whether or not [inaudible] any other  
8 point.

9 RR: If that's the case then question is, should we [inaudible]. Determine the LEA's  
10 [inaudible]. So basically what we're saying is [inaudible] statute of limitations  
11 specifies [inaudible].

12 PM: Well I think it's even more than our petition that's already a moot case because I  
13 believe that question refers to the bunker place.

14 RR: [inaudible]

15 PM: [inaudible ]

16 RR: Yeah, it's not just the bunker.

17 PM: Right, so it would be both two points [inaudible], one of them, the bunker is a moot  
18 case because it's already been removed. And for the other

19 RR: Yeah, we're done with that.

20 PM: And so the statute of limitations.

21 RR: And so the three of us are in agreement?

22 PM: Yes.

23 KL: Your Panel has another pending question regarding the adequacy of identifying the  
24 area of the Gregory Canyon property.

25 RR: [inaudible].

26 LM: Does that involve the boundaries?

27 PM: That's the boundary issue, I believe it's up for litigation. But is it even subject to that,  
28 because this particular, I think the argument that it's outside of the property, the point

1 is it's being used as a barrier on the property to limit access. So I  
2 RR: [inaudible] A failure to adequately identify the boundaries is contrary to law?  
3 KL: Based upon our understanding of the statute, we're addressing now in the petition  
4 included a claim in both petition 1 and petition 2 that Gregory Canyon, that LEA  
5 failed to adequately identify the area of the Gregory Canyon property that it has  
6 included as part of the solid waste facility. Based upon our understanding of the  
7 statute of limitations, that they have 30 days from when the facts were or could have  
8 been discovered, we believe that your Panel could find that this petition is time-  
9 barred.  
10 RR: That why, that's the question I was asking. It seems to me we're saying.  
11 PM: I would agree.  
12 RR: Same situation.  
13 LD: I would agree.  
14 RR: Then the three of us are in agreement on that.  
15 PM: So we just, do we have to make, how does that make this official, besides we're just  
16 saying yes, the three of us agree that there's based on time-limitations, there's no  
17 merit.  
18 KL: Chairperson Roberts is going to entertain a formal motion that the claims are time-  
19 barred. You panel can vote on that. And then also the secondary claim that  
20 [unaudible] or adequate boundaries, once your panel formally entertains motions and  
21 votes, based upon the Board's action today, the clerk will prepare a written decision  
22 and issue it to the parties within 5 days.  
23 RR: Okay. [inaudible] motion that the actions are time-barred. [inaudible]  
24 LD: Yeah, I make a motion that the petitions as submitted are barred by the statute of  
25 limitations.  
26 PM: And I will second that.  
27 RR: Okay. All those in favor signify by saying Aye.  
28 Panel: Aye.

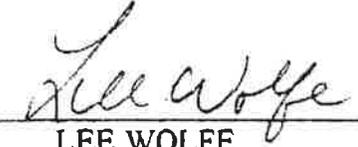
1 RR: Okay. That's unanimous. Now the remaining issue.  
2 KL: On petitions 1 and 2 included a claim that the area of the Gregory Canyon property  
3 was not adequately identified. The area of the solid waste facility that's part of  
4 Gregory Canyon was not adequately identified.  
5 PM: Well again wouldn't the statute of limitations take effect?  
6 KL: So just the  
7 RR: We should take a second vote on that.  
8 KL: Yes, please.  
9 RR: [inaudible]  
10 PM: I propose a motion that the issue of not adequately defining the boundaries is not valid  
11 because of the time-limitation in which is, we argued, [inaudible].  
12 LD: I second it.  
13 RR: Okay. There is a motion and a second to that. [inaudible]  
14 Panel: Aye.  
15 RR: And for the record that unanimously passed. [inaudible]  
16 TM: No additional speakers.  
17 RR: Thank you. That concludes [inaudible].

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1 TRANSCRIPT CERTIFICATION

2 I hereby certified that the foregoing transcript and transcribed by the undersigned, is to  
3 the best of my knowledge true and correct.

4  
5  
6 DATED: November 4, 2014

  
7 LEE WOLFE  
8 Confidential Legal Secretary

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**EXHIBIT P**



**BOARD MEMBERS**

RON ROBERTS  
Chair

PAUL MANASJAN  
NEIL MOHR

*County of San Diego*  
**SOLID WASTE HEARING PANEL**

**MINUTE ORDER OF WRITTEN DECISION  
MONDAY, SEPTEMBER 22, 2014, 2:00 P.M.  
San Diego County Administration Center  
1600 Pacific Highway, Room 402A, San Diego, 92101**

The Pala Band of Mission Indians ("Petitioner") requested a hearing (filed July 28, 2014) to review the San Diego County Local Enforcement Agency's ("LEA") alleged failure to require Gregory Canyon Ltd. LLC ("GCL"), the permittee for Solid Waste Facility Permit 37-AA-0032, to remove concrete and other debris disposed on the GCL property and to adequately identify the area of the GCL property that is included as part of the solid waste facility.

The Petitioner also requested a hearing (filed August 27, 2014) to review the LEA's alleged failure to comply with the law when it issued its Official Notice, Compliance Schedule and Notice of Compliance Status to GCL, to require GCL, the permittee for Solid Waste Facility Permit 37-AA-0032, to immediately remove concrete and other debris disposed on the GCL property, and to adequately identify the area of the GCL property that is included as part of the solid waste facility.

Notice of time and place of hearing was given as required by law.

At the hearing, the parties agreed that any claims based upon the bunker debris were moot.

**ACTION:** ON MOTION of Member Manasjan, seconded by Alternate Dershem, the Solid Waste Hearing Panel consolidated the Hearing Requests from the Petitioner dated July 28, 2014 and August 28, 2014.

**ACTION:** ON MOTION of Alternate Dershem, seconded by Member Manasjan, the Solid Waste Hearing Panel made the following findings:

- A. The Petitioner's claims regarding the vehicle barrier on GCL property are time-barred pursuant to Public Resources Code section 44310.

**Evidence and testimony to support finding:** The Panel found that the claims regarding the vehicle barrier on GCL property are time-barred based upon the parties' written submissions to the Panel and testimony as well as evidence presented at the hearing. Under Public Resources Code section 44310, a hearing request alleging that the LEA failed to act as required by law or regulation shall be filed within 30 days from the date the Petitioner discovered or reasonably should have discovered the facts on which the allegation is based. The LEA presented evidence and testimony to support this finding, including public inspection reports dating back to 2008 that identified the concrete vehicle barrier and evidence that the barrier could be seen from State Route 76.

**ACTION:** ON MOTION of Member Manasjan, seconded by Alternate Dershem, the Solid Waste Hearing Panel made the following findings:

- A. The Petitioner's claims that the LEA's failure to adequately identify the area of the GCL property that is included as part of the solid waste facility are contrary to law is time-barred pursuant to Public Resources Code section 44310.

**Evidence and testimony to support finding:** The Panel found that the claims that the LEA failed to adequately identify the area of the GCL property that is included as part of the solid waste facility are time-barred based upon the parties' written submissions to the Panel as well as testimony and evidence presented at the hearing. Under Public Resources Code section 44310, a hearing request alleging that the LEA failed to act as required by law or regulation shall be filed within 30 days from the date the Petitioner discovered or reasonably should have discovered the facts on which the allegation is based. The LEA presented evidence and testimony to support this finding, including evidence that this issue had been subject to litigation in superior court pending since 2012.

# **EXHIBIT Q**



CC SN Figure 7a. Designated Critical Habitat



**LEGEND**

- Suitable Arroyo Toad Upland Habitat Impact Area
- Arroyo Toad Sightings (URS 2005)
- (approx.) Riparian Boundary
- Landfill Boundary
- Habitat Creation Area
- Suitable Arroyo Toad Soils (Helix)
- FaD2 Fallbrook sandy loam, 9 to 15 percent slopes, eroded
- TuB Tujunga sand, 0 to 5 percent slopes
- VaA Visalia sandy loam, 0 to 2 percent slopes
- VaB Visalia sandy loam, 2 to 5 percent slopes
- Rm Riverwash
- Project Boundary

Exhibit 4.9-5  
 Arroyo Toad  
 Habitat, Sightings, Soils and  
 Habitat Creation Area

Sources: Lenska (aerial, 2002), SANDAG (soils),  
 Harzog (2004 Bridge design), Nolte & Associates (bridge grading, 2005)