

1 Allison G. Jackson, State Bar No. 157078
2 HARLAND LAW FIRM LLP
3 622 H Street
4 Eureka, California 95501
5 (707) 444-9281 telephone
6 (707) 445-2961 facsimile
7
8 Attorneys for SAMOA PACIFIC GROUP, LLC
9

10
11 BEFORE THE CALIFORNIA DEPARTMENT OF
12 RESOURCES RECYCLING AND RECOVERY
13

14 IN THE MATTER OF
15 Samoa Pacific Group, LLC,
16 Appellant,
17 v.
18 Humboldt County Department of
19 Environmental Health, Solid Waste Local
20 Enforcement Agency,
21 Respondent.
22

23 REQUEST FOR HEARING; APPEAL OF
24 HUMBOLDT COUNTY LOCAL
25 ENFORCEMENT AGENCY HEARING
26 PANEL DECISION

27 [California Public Resources Code §§
28 45030, 45031]

LEA Hearing Commencement Date:
Date: September 8, 2016
Time: 9:00 a.m.
Dept: Humboldt County Courthouse,
5th Floor Conference Room
825 5th Street
Eureka, CA 95501

Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. BACKGROUND SUMMARY. 1

II. THE PROCEDURAL SUMMARY. 3

III. FACTS. 5

IV. STATEMENT OF ISSUES ON APPEAL. 8

 A. The LEA Hearing Panel Abused Its Discretion by Failing to Proceed in the
Manner Require by Law. 8

 B. The Burden of Proof in Administrative Hearings Is on the Agency
Asserting That There Has Been a Violation of the Public Resources Code. 9

 C. The LEA Hearing Panel Exceeded It’s Jurisdiction as the There Was No
Underlying Jurisdiction for the Lea and the Hearing Panel’s Decision; the
Decision Improperly Expands the Scope of What Is Deemed to Be Solid
Waste. 9

 D. The Fines Were Inappropriately Assigned to Dates Prior to the Issuance of
NOV 16-02 and by the Relitigation of the Exact Same Materials Subject
to and Earlier 2012 NOV. 10

 E. The Panel Violated Appellant’s Due Process Rights. 12

V. CONCLUSION. 13

Table of Authorities

California Case Authority

Anderson v Board of Dental Exam'rs,
27 Cal. App. 336 (1915). 9

Bode v Los Angeles Metro. Med. Ctr.,
174 Cal. App.4th 1224 (2009). 9

Brown v City of Los Angeles,
102 Cal. App.4th 155 (2002). 9

Freitas v. Shimoto,
2016 Cal. App. Lexis 763 (2016). 9

Lincoln Place Tenants Assn. v. City of Los Angeles,
130 Cal. App. 4th 1491 (2005). 8

Parker v City of Fountain Valley,
127 Cal. App. 3d 99 (1981). 9

Pipkin v Board of Supervisors,
82 Cal. App.3d 652 (1978). 9

Sustainability of Parks v. County of Solano,
167 Cal. App. 4th 1350 (2008). 8

Waste Management of the Desert v. Palm Springs Recycling,
7 Cal. 4th 478 (1994). 10

California Statutes

Public Resources Code,
Section 44002. 3-5

Public Resources Code,
Section 44000.5. 3-5, 8

Public Resources Code,
Section 44009. 8

Public Resources Code,
Section 44310. 11, 12

California Regulations

14 CCR §17380. 1, 8-10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Federal Case Authority

Schaffer v Weast,
546 U.S. 49 (2005)..... 9

1 I. BACKGROUND SUMMARY.

2 Samoa Pacific Group, LLC (the “Appellant”), respectfully requests a hearing for
3 CalRecycle to review the decision of the Humboldt County Local Enforcement Agency Hearing
4 Panel (the “Panel”) in upholding the Local Enforcement Agency’s (the “LEA”) issuance of its
5 Administrative Civil Penalty Assessment, Cease and Desist Order, Corrective Action and
6 Compliance orders.

7 Appellant’s diversion of materials away from California landfills is strongly promoted by
8 current California waste management policies. But instead of encouraging diversion from
9 entering the waste stream of a significant amount of material from California landfills, the LEA
10 and the Panel have made and upheld unsubstantiated decisions which are in contravention of the
11 state of California law, which if left in place would not only result in the material stockpiled by
12 Appellant to end up in the landfill, but necessarily puts at risk all such materials stockpiled by
13 contractors throughout the State of California, forcing those contractors to place such materials in
14 landfills rather than reuse them on other projects. Additionally, since such materials are retained
15 as valuable by the owners of the materials (in this case SPG/Danco) to require that the materials
16 be deposited into a landfill deprives the owner of the use of such valuable retained materials.

17 First, the LEA Panel misused the appropriate burden of proof placing it on appellant to
18 prove that it did not violate the statutes alleged by the LEA. In fact, at the inception of the
19 hearing, one Panel member commented that the Panel was there to determine if Respondent acted
20 reasonably and not if Appellant violated the statutes alleged by Respondent. Moreover, the legal
21 conclusions of the Panel’s finding state that Appellant had the burden of proving that the Notice
22 and Order 16-02 is erroneous. As discussed below, the party asserting the claim or making the
23 charges generally has the burden of proof in an administrative hearing.

24 Second, the materials in question are not considered “solid waste” unless and until they
25 have been discarded. As discussed more fully below, materials that are valuable and have been
26 retained by the owner are not considered “waste” under the Solid Waste Act. In this matter, the
27 contention by the LEA was that the LEA rejected the legal authority that the Act pertains to only
28 discarded materials instead stating that the definitions in 14 CCR §17380 define what “waste” is.

1
2 This contention by the LEA was upheld by the Panel wherein the Panel determined that
3 materials to be used at the location of the stockpile in question, are solid waste by definition
4 (under Title 14) and the Panel's determination that whether or not the materials were discarded
5 was irrelevant. However, as discussed briefly below, and which will be fully briefed later on, is
6 that this determination is not supported by statutory and/or case law or the record. The LEA's
7 presumption that the Project's operation to elevate portions of the "Town of Samoa" (which was
8 unanimously approved of by both the California Coastal Commission and County Board of
9 Supervisors) is no different than the operation of a garbage dump is not supported by California
10 law or the record. Moreover, the uncontroverted record demonstrates that the materials in
11 question were not, are not, nor have they ever been discarded materials, but are valuable
12 materials owned and retained by Appellant (Dan Johnson, SPG and Danco) for this project as
13 Dan Johnson/Danco is the contractor employed to do work on the project and is also the main
14 owner of Appellant SPG. The savings regarding the materials was first passed on to the former
15 owners of the materials by way of a reduced bid in exchange for transfer of ownership to Dan
16 Johnson, and then it was passed on by Appellant Dan Johnson operating as Danco, contractor, to
17 Appellant and Dan Johnson, owner.

18 The LEA provided no evidence of any damage to public health or of environmental
19 detriment by the retention of these materials by the owner for use in the owner's project. The
20 LEA instead simply asserted that the materials were waste by their definition of solid waste - a
21 definition not supported by California law.

22 Third, the Panel erred when it issued fines in excess of \$351,000 by basing the violation
23 date not as the date that NOV 16-02 was issued, but on an earlier NOV 12-04 which was
24 appealed and, therefore, in suspense until a final determination was made on 12-04. No final
25 determination on the earlier NOV 12-04 was ever made. The LEA disbanded the earlier Panel
26 that took testimony which was argued and submitted for decision on or about October 19, 2012.

27 Finally, Appellant's due process rights were violated not only by the above three points,
28 but by the relitigation of the exact same materials subject to an earlier 2012 NOV (see below)

1 and also by the very use of the Panel in a matter which does not involve the Denial, Suspension
2 or Revocation of a Solid Waste Facility Permit. Appellant was also denied due process by the
3 failure of the Panel to have the appropriate number of members, and the non-disclosure of the
4 fact that one of the two remaining panelists was the former LEA director and supervisor to the
5 LEA witnesses. Moreover, Appellants due process was violated due to the Panel's refusal to
6 allow Mr. Johnson to rebut the LEA witness testimony as well as the LEA's attorney directing
7 the planning department not to present rebuttal testimony to the Panel.

8 II. THE PROCEDURAL SUMMARY.

9 As the Administrative Record will demonstrate, on July 1, 2016, the Division of
10 Environmental Health ("DEH") issued Notice and Order 16-02 ("NOV 16-02") for
11 Administrative Civil Penalty Assessment and Cease and Desist, Corrective Action, and
12 Compliance against Property Owner Samoa Pacific Group, LLC ("SPG"/Dan Johnson) regarding
13 APN's 401-031-059 and 065. DEH asserted in 16-02 that a complaint had been made in 2011 for
14 the subject properties. The violations asserted in 16-02 are: 1) Public Resources Code section
15 44002(a)(1), Operating a Solid Waste Facility without a Permit; and 2) Public Resources Code
16 section 44000.5(a), Disposal of Solid Waste at an Unpermitted Solid Waste Facility.

17 The site is the Town of Samoa Project. The materials asserted to be "solid waste" are
18 "construction materials" specifically retained by the owner and contractor to be used as fill to
19 elevate portions of the area by at least three feet as required by state and local permitting
20 agencies.

21 Appellant was previously subject to the same two violations for the same two
22 APNs based upon these same materials in 2012 in Notice and Order 12-04, issued
23 August 17, 2012 ("NOV 12-04"). In the 2012 matter, after a full hearing on the matter, the 2012
24 LEA panel made no final determination of violation and but voted 2-1 at the 2012 hearing that
25 there was no violation at the site based upon the violations asserted by the LEA. The 2012 LEA
26 panel put the matter over for 60 days to see if the parties could work out some type of
27 compromise. After the 60 days lapsed, the LEA failed to bring the matter back before the 2012
28 LEA panel. On October 24, 2013, the LEA through their legal counsel (County Counsel)

1 determined that the 2012 alleged violations originally charged by the LEA, to wit PRC 44002(a)
2 and 44000.5, were improperly asserted as violations based upon the law and facts.

3 The 2012 LEA panel was never reconvened by the LEA even after the October 24
4 conclusions regarding the violations asserted by the LEA through their attorney County Counsel
5 were not appropriate as charged. Appellant then sought a judicial determination regarding the
6 LEA's "lack of jurisdiction" over these materials, but the court determined that the jurisdiction
7 issue was not "ripe" until there is a final determination by the Panel and/or Board. The 2012
8 LEA Panel was subsequently discharged by the LEA without ever having made any final
9 determination as required by the Administrative Procedures Act ("APA"). Those same
10 allegations, based upon the same construction materials cannot now be resurrected by DEH with
11 a new 2016 LEA panel.

12 As will also be shown by the Administrative Record, in 2016, after discussions with
13 County Counsel regarding issues surrounding funding for the Samoa Project, (that there was
14 never a final determination of the meritless 2012 allegations), Appellant raised the issue that
15 because the APA required the final decision to be issued within 30 days of the 2012 hearing and
16 that there was never any final decision made, and in addition with the discharge of the 2012 LEA
17 panel, the earlier allegations in NOV 12-04 could no longer be considered potential violations
18 because attempting to relitigate them would be in violation of APA rules and the Public
19 Resources Code. There was also discussion with County Counsel of how the LEA's NOV 12-04
20 incorrectly asserted jurisdiction over the construction materials as "solid waste" in the first place,
21 since such assertion would be in contravention of case law, statute, county ordinance and by
22 concession of the LEA through their attorney (County Counsel) in 2012. Following these
23 discussions between County Counsel, and Appellant (SPG and Danco's) legal counsel, the LEA
24 then issued NOV 16-02 improperly attempting to relitigate the same violations of the same
25 materials previously asserted earlier in NOV 12-04.

26 As set forth below and which will be discussed more fully in Appellants Brief, NOV 12-
27 04 may not be re-litigated now by reasserting the same facts and alleged violations in NOV 16-
28 02. That would be a clear violation of the APA and PRC governing the timing of the hearing and

1 the date requirements for final determinations. Also as will be discussed in Appellants Brief and
2 set forth briefly below, the asserted violations of PRC 44002(a) and 44000.5 are meritless based
3 upon LEA’s own legal counsel’s determination that SPG *was not, by law, operating a solid*
4 *waste facility in violation* of the previously alleged violations which are identical to that now
5 alleged in 16-02. As also will be discussed in Appellants Brief and set forth briefly below is that
6 Appellant’s Materials located on site are “CONSTRUCTION MATERIALS” which are valuable
7 to Appellant and which were retained by Appellant owner and contractor to be specifically used
8 on its project. The Materials are required by all of the state and local permitting agencies to
9 raise the elevation of the subject property. Those materials are *not* “WASTE” subject to state
10 statutes, local ordinances, case law, nor even CIWMB’S own regulations because these materials
11 are recyclable materials source separated by the owner and contractor for its own use in its own
12 project.

13 III. FACTS.

14 a. The History of the Development of the Town of Samoa.

15 In 2001, the Samoa Pacific Group LLC (the “Owner”) purchased the historic Town of
16 Samoa. It included approximately 220 acres of mostly former heavy industrial land and the
17 existing Town of Samoa. The Town of Samoa included approximately 100 existing residences –
18 vintage redwood mill worker cottages and other historic structures constructed between 1895 and
19 1930 that comprise classic examples of that period's architecture, a popular restaurant (Samoa
20 Cookhouse), commercial recreational amenities (a gymnasium and museum), a recycling facility,
21 and several brownfield sites. These lands also contained wetlands, rare plant habitat, coastal
22 scrub, forest, and dune habitats,
23 and public beachfront areas near the County's Samoa Beach Park.

24 Following the purchase, development plans were the subject of a significant
25 planning process among the Appellant (Owner/Contractor), the County of Humboldt (the
26 “County”) and the California Coastal Commission (the “CCC”). The outcome of years of
27 planning and hearings resulted in the 2012 approval by the County and CCC of the Samoa Town
28 Master Plan (the “STMP”). The STMP resulted in the CCC unanimously approving the Project

1 on two separate occasions and by the CCC requiring an amendment of the County's Local
2 Coastal Plan Regulations (the "LCP") to allow construction under the STMP. Under the LCP
3 amendments, allowed development included up to 300 new single family residences, 105 new
4 apartment units, retention of the approximately 100 existing historic residences, a new,
5 approximately 19 acre business park, and a variety of general commercial, commercial
6 recreation, public recreation, public facilities, and natural resource areas.

7 The applicable Tsunami Safety Plan mitigation for the Town of Samoa required no
8 less than 30 feet of minimum habitable floor elevations for all permanent residential uses. As a
9 result, the new residential development areas required adding two to three feet of engineered fill
10 to reach the 30-foot minimum in certain areas around the subject property. However, the project
11 was further delayed, in part by a new desire to construct a significant number of the multi-family
12 residential units as low and moderate income housing and the realization that the project would
13 need to be phased in ways not allowed by the earlier 2012 amendments to the LCP. This
14 necessitated a March 2016 return to the CCC for further LCP amendments.

15 The new CCC action did change the phasing requirements to prioritize: (a) the
16 construction of new wastewater collection, treatment, and disposal facilities for the town to
17 replace the town's existing substandard wastewater facilities, (b) the development of an
18 affordable housing project within a portion of the town that is designated and zoned for multi-
19 family housing under the currently certified LCP, and (c) cleanup of contaminated soil and
20 groundwater in various locations in the town.

21 However, the CCC also required further changes in the project that included new
22 conditions as follows: (a) the installation of a minimum of one bus stop and pedestrian and
23 bicycle facilities along Vance Avenue to serve the Samoa area concurrent with the development
24 of improvements to Vance Avenue and prior to occupancy of any new residential development
25 and (b) specification that the only type of residential development that could be developed prior
26 to the various public access amenities would be the affordable housing. In addition, the
27 CCC required the voluntary merger of the 71 existing parcels into one parcel and then a re-
28 subdivision of the merged parcel into two parcels of 18.58 and 200.92 acres by parcel map.

1 The County took immediate action to make these changes to its LCP and, finally, on July
2 7, 2016, the County Planning Commission approved the required merger and re-subdivision of
3 the property. As a result, after 15 years of planning and public hearings, before the CCC and the
4 County, this project is now before the County Planning and Building Department for the issuance
5 of the permits required for the delayed construction to begin. One of these permits is the fill
6 permit to increase the building height elevation in certain areas for the construction of the low
7 and moderate income housing.

8 The on-site clean fill material that the LEA and now the Panel is considering to be “solid
9 waste,” consists of broken concrete and similar material, which will now be installed as an
10 engineered fill under the permits issued by the County of Humboldt. As is standard building
11 practice, the broken concrete and similar material will be ground into usable size and applied and
12 compacted as a part of the engineered land fill. This part of the project, like all permitted
13 activities within the construction project, will be overseen by the County’s Building and Planning
14 Department.

15 Appellant owns the subject property, and Appellant’s main member is Dan Johnson. The
16 construction company which will conduct the actual work is the Danco Group (“Danco”) of
17 which Dan Johnson the owner. The Materials in question were obtained by Dan Johnson for
18 value from other projects as the record demonstrated that Mr. Johnson reduced his bids for these
19 projects by requiring the other contracting party to transfer ownership of the Materials to Mr.
20 Johnson so that he may reuse these specific materials to reduce the costs in other projects.

21 Starting in or about 2011 through 2012, Dan Johnson (Danco), both as contractor and as
22 owner (SPG), gathered and transported clean fill material to property owned by Appellant (Dan
23 Johnson). As of July 1, 2016, at the time the current Notice and Order 16-02 was issued, the
24 same approximately 2000 cubic yards of materials from 2012 was still present on the site for use
25 once the permits were issued by the County. This compromises less than 1% of the required
26 cubic yards of clean fill material that will be needed pursuant to the LCP and CCC actions.

27 The record will demonstrate that neither Dan Johnson (Danco) as contractor nor Dan
28 Johnson (SPG/Appellant) ever intended to discard this material and does not intend to discard

1 this material now; it is a required building material for the project. Since 2012, no additional fill
2 has been transported to the subject property as the permitting process continues. As set forth in
3 the administrative record and which will be discussed more extensively in briefing, the permits
4 for the placement of the fill are being facilitated since the approval of the project by the planning
5 commission was obtained. In fact, the placement pursuant to the permits is likely to be within
6 six months.

7 IV. STATEMENT OF ISSUES ON APPEAL.

8 A. The LEA Hearing Panel Abused Its Discretion by Failing to
9 Proceed in the Manner Require by Law.

10 Failure of an agency to “proceed as required by law” constitutes an abuse of discretion.
11 *Lincoln Place Tenants Assn. v. City of Los Angeles*, 130 Cal. App. 4th 1491, 1502 (2005);
12 *Sustainability of Parks v. County of Solano*, 167 Cal. App. 4th 1350 (2008). An abuse of
13 discretion may also be found when the challenged action of the agency is arbitrary and capricious
14 and is lacking in evidentiary support.

15 Here, the LEA put the burden of proof regarding the alleged violations of PRC 44009 and
16 44000.5 on Appellant instead of on the agency asserting the violations.

17 Next the LEA Panel abused it’s discretion when it determined that the question of
18 whether any materials of the materials were discarded materials was “irrelevant” and that if the
19 materials were listed under 14 CCR 17380 they were always “waste”. The Panel erred in its
20 determination that the subcategories listed in 14 CCR 17380 always defined what waste was
21 irrespective of whether or not the materials had ever been discarded by its owner or whether the
22 materials were retained as valuable by their owner.

23 Finally, the LEA Panel abused its discretion in applying penalties back to 2012 and NOV
24 12-04 which had previously been before an earlier Panel and for which no penalties had been
25 imposed, instead of from the date that NOV 16-02 was issued until the time Appellant appealed
26 NOV 16-02.

27 B. The Burden of Proof in Administrative Hearings Is on the Agency
28 Asserting That There Has Been a Violation of the Public Resources

1 Code.

2 The party asserting the charges—generally has the burden of proof in an administrative
3 hearing. *Schaffer v Weast* (2005) 546 U.S. 49, 126 S Ct 528; *Bode v Los Angeles Metro. Med.*
4 *Ctr.* 174 Cal. App.4th 1224 (2009) (in hospital peer review disciplinary proceeding, hospital
5 bears burden of proof; *Brown v City of Los Angeles*, 102 Cal. App.4th 155 (2002); *Parker v City*
6 *of Fountain Valley*, 127 Cal. App. 3d 99 (1981) ; *Pipkin v Board of Supervisors*, 82 Cal. App.3d
7 652 (1978).

8 When the party having the burden of proof has established a prima facie case, the burden
9 of going forward may shift to the opposing party. *See, Anderson v Board of Dental Exam'rs*, 27
10 Cal. App. 336, 338 (1915). Even when the party having the burden of proof establishes a prima
11 facie case and the burden is shifted back to the opposing party, testimony by the opposing party
12 may then shift it back to the party which originally asserted the charges. *See, Freitas v. Shimoto*,
13 2016 Cal. App. Lexis 763 (5th District, Case No. F071533, Published September 14, 2016).

14 In this matter, the Administrative Record will clearly show that the Panel expressly and
15 on the record placed the burden on Appellant and not on Respondent.

16 C. The LEA Hearing Panel Exceeded It's Jurisdiction as the There
17 Was No Underlying Jurisdiction for the Lea and the Hearing
18 Panel's Decision; the Decision Improperly Expands the Scope of
19 What Is Deemed to Be Solid Waste.

20 The Panel made its determination that the Materials are all solid waste subject to the
21 IWMA based upon the definitions in 14 CCR 17380 alone. The Panel outright rejected
22 Appellants argument and citation to authority that “waste” is defined as that which is
23 “discarded” or “thrown away.”

24 Appellant contends that case law clearly states that the Solid Waste Act and the LEA's
25 jurisdiction is limited to discarded materials (i.e., materials that are thrown away). Appellant
26 contends that *any* material which is valuable to its owner and is retained by the owner for an
27 intended use is simply not waste subject to the jurisdiction under the provisions of the Solid
28 Waste Act and Public Resources Code. Only after materials are discarded (i.e., thrown away) do

1 the subcategories in Title 14, of the Regulations as discussed in Appellant's Statement of Issues
2 before the Panel and will be further briefed in Appellant's Brief before this board then apply.

3 The subcategories of Construction and Demolition Debris under 14 CCR 17380 simply
4 do not define what waste is; waste is anything discarded. The subcategory only applies if and
5 when the materials are thrown away, not before. This is why Appellant cited to the Panel the
6 decision in *Waste Management of the Desert v. Palm Springs Recycling* (1994) 7 Cal. 4th 478. It
7 was in this case that the Supreme Court spoke quite clearly that material must be discarded by the
8 owner to fall under the provisions of the Act. As the court stated below:

9 "There is a distinction under the California Integrated Waste Management Act of
10 1989 (Pub. Resources Code, § 40000 et seq.) between the selling and discarding
11 of recyclable materials. Such property does not become waste under the act until
12 discarded, but the owner of the property cannot discard it as he or she sees fit,
13 since discarding is governed by the act. On the other hand, selling *and other*
14 *methods of disposition by which the owner receives or donates the value of the*
15 *recyclable materials are not discarding and are not subject to the act.* The
16 fundamental purpose of the act is to reduce the amount of material entering into
17 the waste stream, and the buying and selling of materials in the marketplace is
18 inapposite to that purpose because those materials remain in circulation and do
19 not enter into the waste stream." Id at 487-488

15 "Discard" means to throw away. It is not synonymous with the broader term
16 "dispose," which means to transfer or part with, as by giving or selling." Id at 488

17 "Solid waste handling" is defined as "the collection, transportation, storage,
18 transfer, or processing of solid wastes." (§ 40195, italics added.) "Processing" is,
19 in turn, defined as "the reduction, separation, recovery, conversion, or recycling of
20 solid waste." (§ 40172, italics added.) Put simply, solid waste handling includes
21 recycling--of solid waste. *If, as explained above, the owner does not discard his*
22 *property, it does not become waste in the first instance. Thus, even if the property*
23 *might be viewed as a feasibly recyclable material, it is not necessarily a*
24 *recyclable waste."* Id at 488, emphasis added.

21 It was an abuse of discretion for the Panel to dismiss the authority in *Waste Management*
22 *of the Desert v. Palm Springs Recycling* (1994) 7 Cal. 4th 478, in which this state's highest court
23 rejected the LEA's assertion and the Panel's legal conclusion that the definitions in Title 14
24 defined what solid waste was.

25 D. The Fines Were Inappropriately Assigned to Dates Prior to the
26 Issuance of NOV 16-02 and by the Relitigation of the Exact Same
27 Materials Subject to and Earlier 2012 NOV.

28 The August 17, 2012, NOV 12-04 which was heard on October 19, 2012, concerning

1 these exact materials cannot be resurrected now in NOV 16-02. Nor can fines be imposed prior
2 to the issuance of NOV 16-02, nor imposed during the appeals process. Pursuant to the Public
3 Resources Code, the Panel which heard the matter in 2012 did not finalize any decision. The
4 new Panel which heard this matter was reconvened to simply rehear what was previously heard
5 October 19, 2012, but never finalized.

6 Under Public Resources Code 44310:

7 (a)

8 (1) The hearing shall be initiated by the filing of a written request for a hearing with a statement
9 of the issues.

10 (A) If the hearing request is made by the person subject to the action, the request shall be made
11 within 15 days from the date that person is notified, in writing, of the enforcement agency's intent
12 to act in the manner specified.

13 (B) If the hearing request is made by a person alleging that the enforcement agency failed to act
14 as required by law or regulation pursuant to Section 44307, the person shall file a request for a
15 hearing within 30 days from the date the person discovered or reasonably should have
16 discovered, the facts on which the allegation is based.

17 (2) The enforcement agency shall, within 15 days from the date of receipt of a request for a
18 hearing, provide written notice to the person filing the request notifying the person of the date,
19 time, and place of the hearing.

20 (3) If that person fails to request a hearing or to timely file a statement of issues, the enforcement
21 agency may take the proposed action without a hearing or may, at its discretion, proceed with a
22 hearing before taking the proposed action.

23 (4) The enforcement agency shall file its written response to the statement of issues filed by the
24 person requesting the hearing with the hearing panel or the hearing officer, and provide a copy to
25 the person requesting the hearing, not less than 15 days prior to the date of the hearing.

26 ***(b) The hearing shall be held no later than 30 days after receiving the request for a hearing on***
27 ***the merits of the issues presented, in accordance with the procedures specified in Article 10***
28 ***(commencing with Section 11445.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the***

1 ***Government Code.***

2 ***(c) Within five days from the conclusion of the hearing, the hearing panel or hearing officer***
3 ***shall issue its decision. The decision shall become effective as provided in Section 45017.***

4 Cal. Pub. Resources Code § 44310.

5 The LEA cannot now reconvene a new LEA Panel to rehear what the 2012 LEA panel
6 that heard the evidence, argument, and took the matter under submission on October 19, 2012,
7 but for which it never issued a timely nor final decision. This panel has been discharged. Nor
8 could the 2016 LEA Panel issue any findings regarding what was charged and heard before the
9 prior 2012 LEA panel. That would violate Cal. Pub. Resources Code § 44310.

10 Pursuant to Section 44310 (b), the LEA simply could not convene a new LEA panel for
11 NOV 16-02, regarding the *same violations and the same materials alleged in August 17, 2012,*
12 *NOV 12-04;* that would *clearly violate the 30-day hearing date requirement and the mandatory*
13 *30 day decision after hearing.*

14 Even if the new Notice of Violation 16-02 can reraise the same claims regarding the same
15 materials in 12-04, imposing fines back to the issue date of 12-04 clearly violates both
16 subdivisions (b) and (c) of section 44310(b).

17 E. The Panel Violated Appellant's Due Process Rights.

18 In addition to the errors set forth above, Appellants due process was violated due to the
19 Panel's refusal to allow Mr. Johnson to rebut the LEA witness testimony. In addition, Appellants
20 rights to a fair hearing and opportunity to rebut the LEA testimony was further abridged by the
21 LEA's attorney directing the planning department not to present rebuttal testimony to the Panel
22 and by the hearing Panel's refusal to hear rebuttal testimony of planning staff especially when it
23 was brought to their attention that counsel for the LEA ordered planning staff not to present any
24 testimony to the Panel regarding the status of the permits.

25 Appellant was also denied due process by the failure of the Panel to have the appropriate
26 number of members (three), and the non-disclosure of the fact that one of the two remaining
27 panelists (Mr. Clark) was the former LEA director, had acted as the LEA, was a former acting
28 director and supervisor of the LEA witnesses before his retirement in 2008 and was discovered

1 that he had been appointed by the Humboldt County at the request of the attorney for the LEA at
2 after the prior 2012 LEA Hearing Panel failed to deliver the 2012 decision consistent with the
3 wishes of the LEA in 2012.

4 V. CONCLUSION.

5 The LEA issued violations in contravention of the law and without substantial evidence.
6 The Appellant's project site is a stockpile of its own valuable materials for use in a validly
7 permitted project. Appellant's project will result in significant public benefit, both in diverting
8 material from landfills, as well as assist the County of Humboldt and the State in complying with
9 its requirements for low income housing. For the foregoing reasons, Appellant respectfully
10 requests that the LEA's decision be overturned.

11
12 DATED: September 26, 2016

Respectfully submitted,

HARLAND LAW FIRM LLP

13
14
15 
16 _____
Allison G. Jackson

17 Attorneys for Appellant
18 SAMOA PACIFIC GROUP, LLC
19
20
21
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 I am a citizen of the United States, employed in the County of Humboldt, over the age of 18
3 years, and not a party to this action. My business address is 622 H Street, Eureka, California, 95501-
4 1026.

5 On this date, I served the following on the interested party(ies) listed below:

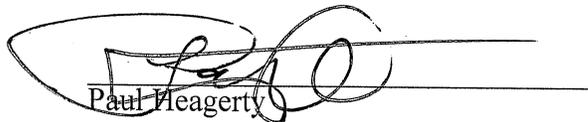
6 **REQUEST FOR HEARING; APPEAL OF HUMBOLDT COUNTY LOCAL ENFORCEMENT**
7 **AGENCY HEARING PANEL DECISION**

- 8 **(By Mail)** I placed a copy of each document in an envelope for each addressee, sealed the
9 envelope and, with postage thereon fully prepaid, placed each envelope for deposit with the U.S.
10 Postal Service at Eureka, California.
- 11 **(By Overnight Delivery)** I placed a copy of each document in an overnight delivery package for
12 each addressee, sealed each envelope and, with delivery fees fully provided for, placed each
13 package for deposit in a box regularly maintained by the overnight delivery service at Eureka,
14 California.
- 15 **(By Personal Service)** I personally delivered, or caused to be personally delivered, a copy of
16 each document to the party(ies) and at the addresses set forth below.
- 17 **(By Personal Service- Facsimile)** Pursuant to stipulation of counsel, or pursuant to C.C.P. §
18 1005(c), I caused each document to be transmitted to each addressee at the facsimile number set
19 forth below. Confirmation of receipt at each addressee's facsimile machine was made by sender's
20 facsimile machine.
- 21 **(By Email or Electronic Transmission)** Pursuant to a Court order or agreement of the parties, I
22 caused each document to be sent to each addressee at the email address set forth below. I did not
23 receive within a reasonable time after the transmission any electronic message or other indication
24 that the transmission was unsuccessful.

25 I am readily familiar with this firm's practice for processing items for mailing or overnight
26 delivery; each item shall be deposited with the U.S. Postal Service or with an overnight delivery service
27 this same day in the ordinary course of business.

28 I declare under penalty of perjury under the laws of the State of California that the above is true
and correct.

Dated: September 26, 2016



Paul Heagerty

JEFFREY S BLANCK
ANNE H NGUYEN
OFFICE OF HUMBOLDT COUNTY COUNSEL
825 5TH ST RM 110
EUREKA CA 95501-1107

MEGAN A YARNALL
JANSSEN MALLOY LLP
730 5TH STREET
EUREKA CA 95501