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

11 In the Matter of:

12 PALA BAND OF MISSION INDIANS,

13 **Petitioner,**

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

18 **Respondent.**
19

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

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

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

) Public Resources Code §§ 44307

20 **I.**
21 **INTRODUCTION**

22 The Pala Band appeals from a decision by the Solid Waste Hearing Panel that petitions
23 filed in San Diego a few months ago were time-barred. Those petitions asserted that
24 Respondent failed to act as required by law or regulation when the LEA did not order the
25 immediate removal of construction and demolition (C&D) debris (the "Barrier Debris") from
26 property owned by Gregory Canyon Ltd (GCL). Petitioner's Statement of Issues asks
27 CalRecycle to find (1) that the petitions were not time barred, (2) that the Barrier Debris
28 continues to be illegally disposed, and (3) that the LEA has a mandatory duty to issue a cease

1 and desist order requiring that the Barrier Debris be removed. In its October 7, 2014 Notice of
2 Hearing, CalRecycle stated that Petitioner’s appeal was accepted “for the limited purpose of
3 determining whether the claims before the Solid Waste Hearing Panel were time-barred pursuant
4 to Public Resources Code Section 44310....” Based on that instruction, only the Statute of
5 Limitation issue is addressed in this opening argument.¹

6 The Public Resources Code, at Section 44307, provides the general public unusually
7 broad access to an administrative challenge process. Any person can challenge any action or
8 inaction of an LEA on matters within the scope of the Public Resources Code. The only
9 limitation on the right to a hearing is a time limit, tied to a “should have discovered” standard set
10 out in subsection (a)(1)(B) of section 44310. The relevant portion of that subsection reads as
11 follows:

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

15 This provision is included in the Public Resources Code specifically to limit the ‘any
16 person, any LEA action’ challenge opportunity created a few sections earlier in the same code.
17 The authorization and the limitation must be read together.

18 The “reasonably should have discovered facts” predicate for applying this Statute of
19 Limitation was clearly met in this case. The Barrier Debris at issue was positioned as a vehicle
20 barrier in 2009 and 2010. The debris extended for more than 2,000 linear feet parallel to and
21 close to the State Highway that connects the Pala Band’s reservation to the nearest freeway.
22 The debris was in plain sight from that highway, and *for four years after that debris was in*
23 *place, the LEA did not require that the debris be removed.* The continued presence of this
24 debris at this site was the only “fact” Petitioner needed to “discover” to know that the LEA had
25 not required that the debris be removed. Because the petitions at issue were filed years after this

26 ¹ The LEA’ Response for the hearing panel proceeding is attached as Exhibit A, primarily
27 because exhibits attached to that brief are also referenced in this Opening Argument. The LEA’s
28 supplemental letter brief for the Hearing Panel on the *California Trout* case and related case law is not
attached. Instead, those issues are addressed in Section V of this Opening Argument. The transcript of
the hearing panel proceeding is attached as Exhibit B. Additional exhibits the LEA offered at the hearing
are attached as Exhibit D.

1 fact was obvious—rather than within 30 days—the Hearing Panel correctly determined that the
2 barrier debris claims in the petitions were time-barred.²

3 Petitioner also argues that the 30-day clock for filing was restarted twice, first when the
4 LEA wrote a letter to the Pala Band explaining its position on the Barrier Debris, and again
5 when the LEA issued an Official Notice to GCL concerning the Bunker Debris,³ and stated in a
6 parenthetical comment that it was not changing its position on the Barrier Debris. Those
7 communications were not new LEA actions or failures to act on the Barrier Debris. Moreover,
8 those communications did not suddenly reveal to Petitioner the facts on which their petition is
9 based. The fact that the Barrier Debris was in place and that the LEA had not required its
10 removal “reasonably should have been discovered” by Petitioner years earlier.

11 Petitioner also asserts that as a matter of law there should be no limitation on challenges
12 to an LEA’s alleged failure to act in accordance with law, if corrective action is still possible.
13 That assertion is nothing less than a statement that this law as written, and the policies behind
14 statutes of limitation generally, should be set aside to advance competing policies. Petitioner
15 seeks support for this radical suggestion in case law limiting the application of generic Statutes
16 of Limitation in Public Trust situations. But that case law does not support the very different
17 and much broader position proposed by Petitioners.

18 Acceptance of Petitioner’s theory would effectively nullify this Statute of Limitation. A
19 petition can only make a difference if the challenged LEA decision is still susceptible to some
20 corrective action. If the Statute of Limitation is not applied to those situations, there will be no
21 time limit on any petition except those that are already moot.

22 CalRecycle should also consider the practical consequences of adopting Petitioner’s
23 views. If any reversible action of inaction can be challenged at any time, almost no

24 ² Petitioner asserted a second, non-debris claim below: that the LEA failed to adequately
25 describe the boundary of the proposed landfill in the solid waste facility permit. (Petitioner does not
26 repeat this claim in its Statement of Issues, but incorporates its filings below by reference.) The Hearing
27 Panel correctly determined that the Statute of Limitation also applied to this claim. Petitioner
28 discovered the facts on which this allegation was based not later than December of 2012, when
Petitioner made the same claim in a lawsuit challenging the landfill permit (Superior Court Case No. 37-
2011-00055344-CU-WM-NC).

³ The Bunker Debris was stockpiled on the site solely for use in future landfill construction. This
debris was also visible from the highway.

1 determination by an LEA would be final. Challenges to discretionary LEA determinations could
2 be disguised as alleged failures to act as required by law, and could be filed at any time. Any
3 LEA application of a regulation to a set of facts, any LEA determination of whether a violation
4 had occurred, any decision to issue a permit or to include or not include a condition in a permit,
5 could be challenged by anyone, after any amount of delay. LEA practices that CalRecycle has
6 endorsed—such as graduated enforcement and setting enforcement priorities based in part on
7 potential for harm—could be challenged as not satisfying an alleged mandatory duty to
8 immediately issue a cease and desist order.⁴

9 Perhaps LEA's would prevail in most such cases, but correct final adjudications are not
10 the point of a Statute of Limitation. The function of every Statute of Limitation is to bar claims
11 based on the passage of time. The harsh result in tort and similar court cases is that some
12 wrongs are not fixed. The same purpose applies here—limiting actions--but the results of
13 applying this special Statute of Limitations are less harsh. This statute only limits a particular
14 kind of petition created in the Public Resources Code itself. These kinds of petitions involve
15 alleged LEA errors, not alleged harms to petitioners. Moreover, applying the Statute of
16 Limitation would not mean that significant LEA errors would remain uncorrected.⁵

17 In this particular case, we can also see the other side of the Statute of Limitation coin:
18

19 ⁴ The LEA's enforcement responses to other inert debris storage and processing operations is
20 described in Exhibit A, internal exhibits 7 (declaration of Merlos) and 8 (compiled case histories), in
21 Ms. Merlos testimony at the hearing below (Exhibit B, at 33:20 to 34:13), and in the testimony of former
22 LEA Supervisor Ms. Lafreniere also concerning the compiled case histories (Exhibit B at 23:9-24:2).
23 The LEA does not typically immediately initiate enforcement with a Cease and Desist Order requiring
24 the immediate removal of CDI debris, C&D debris or inert debris that the LEA discovers at unregulated
25 sites, nor does it typically take such action when storage time limits are exceeded at a permitted facility
26 or at an operation that has provided a required notification. The LEA has instead always exercised
27 enforcement discretion and graduated enforcement methods to resolve issues involving such debris.
28 CalRecycle reviews the LEA's enforcement program plan and plan implementation on a regular basis,
and has had no objections to the LEA's approach. Moreover, to the best of the LEA's knowledge, other
LEAs in California use a similar approach.

⁵ LEA's are subject to CalRecycle performance reviews and oversight, and in some enforcement
cases to CalRecycle initiating enforcement itself. Therefore, if CalRecycle concludes that an LEA has
erred and that a correction is needed, CalRecycle can compel a correction. Any person can also ask an
LEA to reconsider its position on an issue, at any time. Petitioner did so in this matter, and the LEA
responded with an effective Official Notice to GCL addressing the Bunker Debris.

1 what allowing unlimited time frames for petitioning could mean. Petitioner has opposed the
2 proposed Gregory Canyon Landfill at every opportunity, in court and at the ballot box, and some
3 challenges are still in the appellate court. Petitioner has raised significant political,
4 environmental and legal issues in those challenges, and the landfill project is a better project as a
5 result. But the presence on the site of the small amount of inert debris challenged in these
6 petitions is both old news, and an insignificant part of the proposed project. The debris is
7 concrete that was already present on the property, as pavement. The debris is doing no harm.⁶
8 The debris has a current purpose, and will eventually be used in landfill construction.⁷ These
9 circumstances suggest a low priority for enforcement action by any LEA.

10 In addition, in this case the LEA has also determined that the Barrier Debris was not and
11 is not waste, and therefore is not subject to the LEA's jurisdiction.⁸ A situation in which the
12 LEA has no power to enforce cannot be an enforcement priority.

13 To protect and preserve its discretion, the LEA is opposing the pending Petitions. If the
14 Statute of Limitation is given effect, future petitions challenging old LEA determinations may
15 be deterred. If the Statute of Limitation is vitiated by CalRecycle, the LEA anticipates
16 additional petitions challenging prior LEA decisions.

17 Petitioner has an extraordinary right under the Public Resources Code to administratively
18 challenge any LEA determination. But under that same law, Petitioner may only do so within

19 ⁶ LEA staff testimony at the hearing established that this debris is not decomposing, and that it is
20 located in an area that has been highly disturbed by prior dairy farming activity. The area will be
enhanced as environmental mitigation for the landfill project when the landfill is constructed.

21 ⁷ A much greater volume of similar debris will be generated when the dairy facilities on the site
22 are demolished. That additional debris will also be used in landfill construction. However, demolition of
the old dairy cannot begin until an APCD Authority to Construct is issued for the landfill.

23 ⁸ The "waste or use" issue was not accepted by CalRecycle for consideration as part of this
24 appeal, and there was no ruling on this issue by the Hearing Panel. But there is a question of regulatory
25 interpretation here, not limited to the disputed facts in this case, that CalRecycle may want to address:
26 whether debris from construction and demolition activity that is being used is nevertheless regulated
27 solid waste. Petitioner apparently read the definition of "construction and demolition debris" at 14 CCR
17381(e) ("... 'C&D Debris' is solid waste...") and/or the definition of "construction and demolition
28 wastes" at 14 CCR 17225.15 as rules intended to classify all materials generated during construction or
demolition as "waste," regardless of use. The LEA instead understands these definitions to establish the
conditions under which some material that is "waste" is classified as benign enough to qualify for a
reduced set of regulatory requirements. In other words, the LEA's interpretations are that some wastes
qualify as C&D or CDI Debris, and that materials that are in use are not waste, regardless of their
source.

1 30 days after it reasonably should have discovered the facts on which the challenge is based. In
2 practice, that time limit on petitions is an important protection, helping LEAs to focus their
3 attention on current issues and priorities. That time limit is also the applicable law.

4 **II.**
5 **STATEMENT OF FACTS**

6 The LEA issued a Solid Waste Facility Permit (SWFP) to GCL for the proposed Gregory
7 Canyon Recycling Center and Landfill in 2004. That permit was rescinded pursuant to court
8 order in June of 2010. A new SWFP was issued on August 1, 2011; however, construction of
9 the landfill cannot begin until additional permits are obtained.

10 During late 2009 and early 2010, the “Orange Grove” natural gas pipeline was installed
11 across the GCL property. The pipeline parallels State Route (SR) 76 and the construction
12 project was visible from that highway. Concrete, asphalt, dirt, metal, and piping debris were
13 generated during this project. GCL used large pieces of concrete debris from the project to
14 construct a 2,075 foot linear vehicle barrier on the property, parallel to SR 76, to improve site
15 security. The Barrier Debris is visible from SR 76. This highway is the main access road from
16 Interstate Highway 15 to the Pala Band’s Tribal Reservation and casino facilities.

17 GCL also placed debris into a “bunker” on the property, for future use. The debris in the
18 bunker was also visible from the highway.

19 GCL stated in 2010 that the Barrier Debris was being used to increase site security, and
20 would later be used during landfill construction, and therefore was not waste. In a May 7, 2010
21 inspection report the LEA agreed, recording GCL’s statements and adding that the LEA had “no
22 issues” with this material. (Exhibit A, at internal exhibit 2.)

23 The Barrier Debris is still in place. This debris is inert, and has not decomposed.
24 (Exhibit A at internal exhibit 7 (declaration of Merlos) at 2:26-28; Exhibit B, Transcript
25 (testimony of Merlos) at 32:25-28; Exhibit B, Transcript (testimony of Henderson) at 30:12-14.)

26 Nothing related to the Barrier Debris changed for four years. It remained in place, visible
27 from SR 76. (Exhibit A at internal exhibit 7 (declaration of Merlos) at 2:12-16; Exhibit A at
28 internal exhibit 6 (declaration of Henderson) at 2:18-27; Exhibit B, Transcript (testimony of

1 Merlos) at 32:16-24; Exhibit B, Transcript (testimony of Henderson) at 30:9-11.)

2 In a letter to the LEA dated June 9, 2014, Petitioner asserted that the pipeline project
3 debris that remained on the site was being stored illegally, and asked that the LEA order that the
4 debris be removed. By letter dated June 30, 2014 (attached as Exhibit C) the LEA stated that it
5 would “provide GCL with options to either remove the Construction Debris or to submit an
6 application to the LEA for an inert debris recycling center.” (Petitioner’s Statement of Issues
7 characterizes this as the LEA “stating in its letter that it would not take any action to require
8 GCL to remove the construction debris from its property.”) Two days later the LEA notified
9 GCL in the observations section of an inspection report that action was needed on the
10 “stockpiled debris” (i.e., the Bunker Debris). An unsatisfactory dialog with GCL followed,
11 culminating in an LEA “Official Notice” on August 7, 2014. (Exhibit A, at internal exhibit 1.)
12 The Official Notice led to the removal of the Bunker Debris.

13 The LEA’s Official Notice contained one parenthetical sentence concerning the Barrier
14 Debris: “(We agree however that the large pieces of concrete debris in use to create a barrier
15 parallel to SR 76 are in use, and are not waste.)”

16 Petitioner’s first petition was filed on July 28, within 30 days of the June 30 LEA letter.
17 Petitioner’s second petition was filed on August 28, 2014, within 30 days of the LEA’s Official
18 Notice.

19
20 **III.**
21 **PETITIONER DISCOVERED OR REASONABLY SHOULD HAVE DISCOVERED**
22 **THE FACTS ON WHICH THE ALLEGATIONS IN THE PETITIONS ARE BASED**
23 **MORE THAN 30 DAYS BEFORE THOSE PETITIONS WERE FILED**

24 Petitioner asserts that construction and demolition (C&D) debris that remained on GCL’s
25 property after a pipeline construction project was completed in 2010 was disposed, and that the
26 LEA had a mandatory duty to order that this debris be immediately removed and failed to do so.
27 These first-petition claims are time-barred. Section 44310 of the Act requires that any petition
28 alleging the LEA *failed to act* as required by law must be filed within 30 days from the date a
Petitioner discovered or reasonably should have discovered the facts on which the allegation is

1 based. Petitioner knew or should have known long before 2014, both from records and from
2 direct observation, that the debris from the pipeline project had not been removed from the site.

3 The LEA noted the presence of the Barrier Debris on the GCL property adjacent to the
4 landfill site in several inspection reports in 2009 and 2010. In its report for the May 7, 2010
5 inspection, the LEA summarized that situation: "...some [of the concrete and asphalt debris] is
6 being used as barrier material to restrict access to riparian areas." The inspection report stated
7 the LEA's determination regarding that debris: "No issues noted with this material." In
8 contrast, the same inspection report directed that other debris and materials—piping and metal
9 debris piles, and a pile of wood, a mattress and green waste—be addressed: "Remove and
10 dispose of properly." (Exhibit A at internal exhibit 2.)

11 Anyone reading the LEA's May 7, 2010 inspection report would know that the LEA was
12 treating different sets of debris differently, was requiring that some debris be removed, and was
13 allowing other debris to remain on site. The LEA does not assert that Petitioner was on notice
14 of these facts and of the LEA determinations merely because these statements were included in
15 an LEA inspection report. The LEA does assert that a project opponent that regularly requests
16 copies of inspection reports reasonably should have discovered what those reports said.
17 This inspection report was provided to Petitioner's legal counsel in response to one or more
18 Public Records Act requests. (Exhibit A at internal exhibit 7 (declaration of Merlos) at 3:16.)

19 Petitioner also could see the debris for itself. LEA staff stated in sworn declarations and
20 oral testimony before the Hearing Panel that the Barrier Debris was visible from SR 76.
21 (Exhibit A at internal exhibit 7 (declaration of Merlos) at 2:12-16; Exhibit A at internal exhibit 6
22 (declaration of Henderson) at 2:18-27; Exhibit B, Transcript (testimony of Merlos) at 32:16-24;
23 Exhibit B, Transcript (testimony of Henderson) at 30:9-11.) *There was no contrary testimony,*
24 *and no contrary assertion by Counsel for Petitioner at the hearing below.* SR 76 is the main
25 road to and from Petitioner's Tribal Reservation and casino complex, from Interstate
26 Highway 15. One can reasonably infer that the highway was frequently used by members of the
27 Pala Band. It has been continuously apparent since 2010 that the LEA had not required that the
28 Barrier Debris from the pipeline project be immediately removed and disposed. Petitioner

1 discovered or reasonably should have discovered these facts well before 2014.

2 ///

3 ///

4 ///

5 **IV.**
6 **THE LEA’S ORDER AND LETTER IN 2014 DID NOT RESTART**
7 **THE CLOCK ON THE STATUTE OF LIMITATIONS**

8 Petitioner’s statement of issues asserts that its petitions were timely because an LEA
9 letter to the Pala Band dated June 30, 2014 (Exhibit C) and the LEA’s “Official Notice,
10 Compliance Schedule and Notice of Compliance Status (No. 2014-04)” dated August 7, 2014
11 (Exhibit A at internal exhibit 1) “both allowed the Barrier Debris to remain on site...”
(Statement of Issues at 4:24-27.)

12 The relevant portion of the June 30, 2014 letter reads as follows:

13 When the Orange Grove gas pipeline was installed through the property some
14 construction debris was generated. GCL utilized some of this Construction Debris
15 for access control and stockpiled other Construction Debris (Concrete and
16 Asphalt) on site as material for future use at the Landfill. This was reviewed by the
17 LEA and approved as a valid reuse option for this material when construction
18 seemed imminent. However, at the current time the lack of progress on the
19 required landfill permits and Environmental Impact Statement indicates that
20 construction is not imminent. The LEA will provide GCL with options to either
21 remove the Construction Debris or submit an application to the LEA for an inert
22 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).

23 Standing alone, this discussion was not as clear as it could have been about what on site
24 debris was being discussed—the Bunker Debris or the Barrier Debris. Both the “access control”
25 and the “stockpiled” debris are mentioned. But in the context available at the time (and as
26 shown by later LEA actions) it is clear that the discussion of an inert debris recycling center
27 application and of additional processing and storage time applied only to the stockpiled Bunker
28 Debris. Any further processing of the Barrier Debris, from large chunks of concrete down to

1 crushed material, would have ended the usefulness of that material as a barrier.

2 This letter changed the LEA's position on the Bunker Debris. However, Petitioner's
3 appeal only applies to the Barrier Debris; the Bunker Debris has been removed from the site and
4 all claims related to the Bunker Debris are moot. This letter did not alter the LEA's position on
5 the Barrier Debris, and therefore was not a new action or failure to act as to that debris.

6 The LEA's August 7, 2014 Official Notice was unambiguously directed only at the
7 Bunker Debris. The sole mention of the Barrier Debris was a single parenthetical sentence,
8 intended both to remove any ambiguity about the scope of the Official Notice, and to confirm
9 that the LEA's determination as the Barrier Debris was not being changed: "(We agree however
10 that the large pieces of concrete debris in use to create a barrier parallel to SR 76 are in use, and
11 are not waste.)" This Notice and Order was not a new action or failure to act by the LEA. It did
12 not create or reveal any new facts necessary to support a petition. The relevant facts and the
13 LEA's determinations concerning the Barrier Debris were clear and unchanged from 2010
14 forward. Therefore, the Notice and Order did not start a new clock for the Statute of
15 Limitations.

16 **V.**
17 **CASE LAW DOES NOT SUPPORT SETTING ASIDE**
18 **THE STATUTE OF LIMITATION IN THIS CASE**

19 Petitioner's statute of limitation argument has two equally essential parts. First,
20 Petitioner asserts that the LEA's mandatory enforcement obligations are continuing obligations,
21 as long as relevant illegal conduct continues. The LEA agrees. If the Barrier Debris is illegally
22 disposed solid waste, and the LEA has a mandatory obligation to issue a cease and desist order
23 in such situations, GCL does not acquire a right to continue to violate the law through LEA
24 mistake or inaction or the passage of time. Similarly, the LEA is not excused from any duty it
25 has to take enforcement action to end that illegal conduct.

26 The second essential element of Petitioner's argument is an assertion that the statute of
27 limitation at issue in this case does not apply because if the LEA has an enforcement obligation,
28 the statute of limitation should be set aside. The LEA disagrees. Whether the LEA has an
enforcement obligation is a different question than whether Petitioner has a right to a hearing.

1 In this case, the LEA’s decision not to take enforcement action is based on a conscious
2 interpretation of the law and the facts. The decision was made in 2010 and was both recorded in
3 an inspection report that Petitioner received, and was obvious because the Barrier Debris
4 remained in place in plain sight. Petitioner discovered or reasonably should have discovered
5 years ago that the LEA had allowed and was going to allow the Barrier Debris to remain in
6 place. Therefore, if the “should have discovered” language in the statute of limitation is applied,
7 the petitions are time barred. The question then becomes whether case law requires CalRecycle
8 to ignore the plain language of the Public Resources Code.

9 Petitioner relies upon *California Trout v. State Water Resources Control Board*, 207 Cal.
10 App. 3d 585 (1989) (“*California Trout*”). That case dealt with two kinds of statutes of
11 limitation: a focused Water Code statute of limitation,⁹ and two generic (Code of Civil
12 Procedure) statutes of limitation.¹⁰

13 The court found the Water Code statute to be inapplicable to the type of agency decision
14 at issue, based entirely on a close textual analysis.¹¹ Petitioners quote *California Trout*’s
15 statement (at 628) that “no statute of limitation prevents remediation.” But that statement
16 followed and summarized the court’s determination that the specific statute of limitation in the
17 Water Code was inapplicable based on its location within that statute. The statement was not
18 based on any broader principle. *California Trout* therefore did not reach the issue CalRecycle
19 must consider: does a *specific and clearly applicable* statute of limitation, tied to a “discovered
20 or should have discovered” trigger, apply when a regulatory agency is alleged to have a
21 “continuing” obligation to act?

22
23 ⁹ Former Water Code section 1360 was summarized in *California Trout* (at 627) as follows:
24 “Any person interested in any application may, within 30 days after final action by the board, file a
petition for a writ of mandate”

25 ¹⁰ I.e., Code of Civil Procedure section 338(a) (three years for a liability created by statute) and
section 343 (four years for relief for which period not otherwise specified).

26 ¹¹ “Section 1360 has nothing to do with licenses, let alone the revocation of licenses, the relief
27 sought by plaintiffs. It applies only to the initial, i.e. *application*, stage of the process by which the
28 permit to appropriate water is secured. . . . Hence, section 1360 is not a statute of limitations applicable to
these licenses and none of the potential limitation-of-action provisions in the Water Code pertain to
petitioners.” *California Trout* at 627-628.

1 The court then moved on, and distinguishing and setting aside the generic statutes of
2 limitation, stating that these general limitations had no presumed applicability to all “special
3 proceedings”.¹² But the proceeding before CalRecycle is a special proceeding, created by and
4 limited by the Public Resources Code

5 In setting aside the general statutes of limitation, the court discussed and relied on the
6 State’s Public Trust obligations and interests, and the State’s constitutional power to set
7 priorities among competing uses of water. It is not too surprising that generic statutes of
8 limitation would yield when State interests of this kind are at issue. The *California Trout* court
9 repeatedly noted that the agency was arguing for a result that would have undermined a
10 legislative policy intended to protect fish.¹³ Agency action was necessary to implement that
11 policy, and was being withheld, undermining legislative policy.¹⁴ Significantly, the policy
12 involved implicated Public Trust resources. Courts have long held that the Public Trust interests
13 of the state were in the nature of a state “property” interest, and “One may not oust the state
14 from such an interest by operation of a statute of limitations.” *California Trout* at 630-631,
15 citing *People v. Kerber*, 152 Cal. 731, 732-736 (1908). This ancient common law rule
16 originated in *Hoadley v. San Francisco*, 50 Cal. 265 (1875), and had been “often repeated” by
17 1908 and the *Kerber* decision. Later cases refer to it as the *Hoadley* Rule, and that term is used
18 below. The rule protects the State’s public trust interests from being lost by the passage of time.

19 ¹² “[Notwithstanding] the positive and comprehensive language of *sections 343 and 363*, if
20 taken literally, there can be no doubt that they cannot apply to all special proceedings of a civil nature. .
21 . . from the very nature of [certain] proceedings it is obvious that [they could not] be subject to such
22 limitation.” (*Estate of Hume*, 179 Cal. 338, 342-343 (1918).) The proceeding here is of such a nature
23 that it is outside the ambit of the generic statutes of limitation which the Water Board proffers.”
24 *California Trout* at 628.

25 ¹³ “The Legislature’s policy choice of the values served by a rule forbidding the complete drying
26 up of fishing streams in Inyo and Mono Counties in favor of the values served by permitting such
27 conduct as a convenient, albeit not the only feasible, means of providing more water for L.A. Water and
28 Power, is manifestly not unreasonable. Accordingly, we have no warrant to override the Legislature’s
rule in *section 5946* concerning that balance.” *California Trout* at 625.

¹⁴ “The purpose of *section 5946* is to obtain the release of sufficient water in the future to sustain
fish in streams in District 4 1/2 from which water is appropriated. That is to say, the purpose is to
maintain fisheries in such streams on an ongoing basis. Hence, the failure to affix to the licenses
language conditioning future diversion upon such releases presents a continuing violation of the statute
as to which no statute of limitations prevents remediation.” *California Trout* at 628.

1 The *Hoadley* Rule controlled the *California Trout* case.¹⁵ However, that rule has no
2 applicability to the present dispute, because the present dispute does not involve the potential
3 loss of a State Public Trust interest, or anything remotely similar.

4 *California Trout* also discussed the continuing duties of regulatory agencies. Petitioner
5 emphasizes that *dicta*, and argues that *California Trout* stands for the proposition that no statute
6 of limitations should stand when an agency has a continuing duty to act. That proposition would
7 be a significant extension of *California Trout*. It would be beyond the authority of this panel to
8 extend the judicially-created *Hoadley* Rule to protect an otherwise-barred remedy, when the
9 only competing “public interest” at stake is the alleged inappropriateness of using concrete
10 debris to create a barrier to vehicle travel on private property. Interpreting *California Trout* that
11 way would also be contrary to the legislative deference principles that the *California Trout*
12 decision recites and respects.¹⁶

13 The discussion in *California Trout* of “continuing duty” and continuing nuisance, on
14 which Petitioner primarily relies, must be interpreted and applied in this context. The
15 continuing duty discussion was entirely within the context of generic statutes of limitation, and
16 the “special proceeding” before the *California Trout* court was simply “outside the ambit” of
17 those statutes. Moreover, the result in the case was compelled by the *Hoadley* Rule. For both
18 reasons, the discussion of continuing duty was unnecessary to the holding in the case.

19 *California Trout* also drew an analogy to continuing nuisances. But that analogy has no
20 applicability to LEA duties.¹⁷ Perhaps most importantly, the fundamental outcome in *California*
21

22 ¹⁵ *California Trout* does not reference *Hoadley*, but is a *Hoadley* Rule case. *Marin Healthcare*
23 *Dist. v. Sutter Health*, 103 Cal. App. 4th 861, 886 (2002) summarized a collection of *Hoadley* Rule
24 cases, including *California Trout*, simply and clearly: “The remainder of the cases relied upon by the
25 District simply hold that the passage of time does not prevent the state from recovering public-use
26 property that the state has no right to alienate. ... *California Trout, Inc. v. State Water Resources*
27 *Control Bd.*, 207 Cal. App. 3d 585, 631 (1989)...”

28 ¹⁶ “Ordinarily, absent a plain constitutional mandate, a conflict in public policy between the view
of the judiciary and the Legislature must be resolved in favor of the latter. (See e.g., *Gin S. Chow v. City*
of Santa Barbara, 217 Cal. 673, at 698 (1933).)” *California Trout* at 624.

¹⁷ Petitioners try to equate the presence of the Barrier Debris on the GCL site to a continuing
public nuisance case for statute of limitations purposes. But the analogy is false. Petitioners would bear
the burden to prove a continuing public nuisance that affected them specially—and would have to
proceed against GCL, not the LEA.

1 *Trout* was to protect State interests of constitutional importance against loss due to the passage
2 of time.

3 The present case is quite different. The statute of limitations at issue in the present case
4 is specific not generic: it limits a specific and unusual remedy created mere paragraphs earlier
5 in the same statute. The present case does not involve the public trust or public trust assets, so
6 this specific statute of limitations is not trumped by the *Hoadley* Rule. Finally and most
7 importantly, the specific statute of limitation at issue here is itself a clear legislative policy,
8 which the judiciary (and CalRecycle) are obliged to respect. The existence of both a continuing
9 agency duty to enforce, and of a limitation on actions by “any person” at any time to assert that
10 duty, is not an inconsistency between policies that CalRecycle must sort out—it is a clearly
11 articulated legislative choice. The legislature mandated some enforcement by LEAs, but also
12 placed a time limit on “any person” petitions to challenge LEA failures to act.

13 Petitioner’s Statement of Issues cites two additional cases on this issue. The entire
14 discussion of the issue in *Santa Monica Municipal Employees Association v. City of Santa*
15 *Monica* 191 Cal.App.3d 1538 (1987), is the single sentence Petitioner quotes from p. 543 fn. 2.
16 *Appalachian Voices v. McCarthy*, 989 F.Supp.2d 30 (D.C. Cir 2013) involved a six year statute
17 of limitations, and an agency obligation that expressly renewed every three years. The cases are
18 neither binding nor persuasive.

19 In summary, Petitioner is challenging an LEA determination made in 2010, that the
20 concrete debris in the vehicle barrier was being used, and had not been disposed. Petitioner
21 disputes the LEA’s determination, but this was the LEA’s decision to make, not Petitioner’s. If
22 section 44310 of the Public Resources Code does not apply here to quiet challenges, that statute
23 of limitations will have little meaning: any LEA determination implicating a “mandatory” LEA
24 action could be challenged at any time, by any person who disagreed with the LEA
25 determination. The *Hoadley* Rule and *California Trout* do not reach that far.

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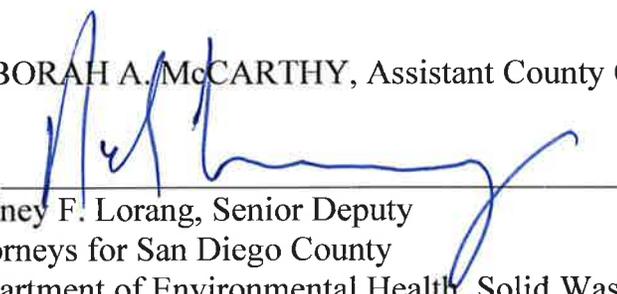
**VI.
CONCLUSION**

Petitioner's claim is time barred. It was readily apparent in 2010 that the LEA had not ordered the removal of the Barrier Debris from this site. The Public Resources Code allowed Petitioner 30 days from when they knew or should have known that fact to file their petition. The LEA's 2014 letter and Official Notice did not change the LEA's 2010 determination concerning the Barrier Debris and did not reveal any new facts necessary to a petition, and therefore did not restart the clock on the Statute of Limitations. Finally, there is no State Public Trust interest or faithful service interest at issue in this case, and this is not a continuing public nuisance case. Therefore there is no basis in case law for overriding a clearly applicable statute of limitation. CalRecycle should apply the Public Resources Code as written, and find that these petitions were time barred.

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Respectfully submitted,

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