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10 BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
11 LAHONTAN REGION
12

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14 In the Matter of:
PACIFIC GAS AND ELECTRIC)
15 COMPANY,) CLEANUP AND ABATEMENT ORDER
) No. R6V-2015-PROPOSED
16)

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18 **I. Introduction**

19 As the Advisory Team has taken on the unusual role of drafting and proposing the
20 subject Cleanup and Abatement Order (CAO), the standard hearing procedures have
21 been modified. In the process, stating who has the burden of proof of evidence,
22 identifying evidence, submission of evidence, and protecting the administrative record
23 require clarification. Since there is no opportunity to discuss or object to the Advisory
24 Team having added a party, this brief also addresses the subject. The Prosecution Team
25 objects to the hearing procedures because they are incomplete.
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1 **II. The Hearing Procedures Do Not Identify Who has the Burden of Proof of**
2 **Evidence at Hearing for which Portions of the CAO, Clouding the Board’s**
3 **Analytic Route from Findings to Directives.**

4 The State Water Resources Control Board Office of Chief Counsel has stated that
5 “[i]n an enforcement action, the Regional Board must have substantial evidence for each
6 element of the enforcement statutes in question,” and that “a party asserting something in
7 the affirmative has the burden of proving the affirmative matter.” (Mem. From Lori T.
8 Okun, Office of Chief Counsel, to Colorado River Basin RWQCB (Sept. 27, 2002), at p.6.)
9 The Office of Chief Counsel relied upon the standard of review on appeal addressed by
10 the court in *Topanga Association for a Scenic Community v. County of Los Angeles*
(1974) 11 Cal.3d 506 and California Evidence Code section 115.

11 The court in *Topanga* went on to conclude that in reviewing a case, a court is to
12 consider the “analytic route” that an administrative agency “traveled from evidence to
13 action.” (*Topanga, supra*, at 515.)

14 In the matter now before the Board, it is unclear in the record which party or the
15 Advisory Team has the burden of proving which portions of the CAO. The Prosecution
16 contends that more than substantial evidence was provided for the findings it agrees with
17 and that are similar to those proposed in its January 20th proposed CAO. The
18 Prosecution provided and posted on the web a Table of Exhibits in support of its proposed
19 CAO, and at hearing will move it and the referenced documents into the record as
20 evidence.¹

21 However, the Prosecution does not agree with all of the Advisory Team’s findings
22 and, therefore, is not obligated to provide evidence in support of those findings. The
23 Advisory Team has not clearly identified what evidence it is relying on to support the
24 contested findings, bringing into question whether there is substantial evidence in the
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26 ¹ The Table of Exhibits is available at:
27 http://www.waterboards.ca.gov/la_hontan/water_issues/projects/pge/cao/ under the heading “CAO
28 References.” The Table of Exhibits was put together and posted on the web by the Prosecution Team with
the intent it would become evidence, though it is not labeled as such.

1 record.² A reviewing body may not be able to reconstruct the Board's analytic route from
2 contested findings to directives as described in *Topanga*.

3 **III. The Hearing Procedures do not Identify What is Considered Evidence for the**
4 **Contested Hearing**

5 Typical hearing procedures proposed by the Prosecution Team include due dates
6 for the parties to submit evidence, technical and legal arguments or briefs, witness lists,
7 and then rebuttal evidence by the Prosecution Team since they would have the burden of
8 proof of evidence. The parties then move their evidence into the record at hearing and
9 the Board decides whether to include it or not.

10 The hearing procedures issued by the Advisory Team on October 16, 2015 for the
11 November 4, 2015 hearing date do not contain such descriptions or due dates. The only
12 due date they contain is for anyone to submit objections to the hearing procedures by
13 October 26, 2015. There is one reference to evidence in the subject line "Evidentiary
14 Documents and File" on page 4. The ensuing information states that related documents
15 can be found on the website and at the Water Board's Victorville office. The hearing
16 procedures fail to identify what the Board Members may consider including or excluding
17 as evidence at the hearing, or what is part of the administrative record should someone
18 petition the CAO.

19 None of the parties have had an opportunity yet to submit evidence they intend to
20 rely on at the contested hearing, or to review each other's evidence to determine its
21 credibility or admissibility. The hearing procedures reference the website and the file in
22 the Victorville Office; both are under the control of the Water Board and thus are not
23 available to PG&E or the Independent Review Panel (IRP) manager to modify.

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25 ² For example, finding 9.b) on page 3 of the proposed CAO (Agenda Packet page 6-11), the Advisory Team
26 writes that "PG&E has submitted evidence disputing the assertion that the Cr(VI) is conclusively linked to its
27 discharge or remedial activities and claiming that there is Cr(VI) naturally occurring in the northern area." At
28 this point in time, neither PG&E nor the Advisory Team has proffered any evidence. It is impossible for any
interested person to cross-reference what documents the Advisory Team is relying upon and therefore
cannot prepare fully to refute at hearing.

1 There is no limit to when evidence may be proffered, which may lead to unwanted
2 surprise at hearing. For example, PG&E is expected to submit its 3rd Quarter data on
3 October 30, 2015 to the Water Board. It is reasonable to want to use
4 that data at the November 4 hearing, but unjust to expect the other parties to have
5 reviewed, analyzed, and be prepared to discuss an approximate 1,500 page report within
6 five calendar days of receiving it. At this time, there is no indication from the Board
7 whether that report, or any material from the other parties, will serve as the basis for the
8 Board's findings.

9 As stated above, the Prosecution intends to move its Table of Exhibits and
10 referenced documents into the record at hearing. They have been available to the public
11 since January 2015. However, those documents do not support all of the Advisory
12 Team's proposed findings, and no other evidence by any party or the Advisory Team has
13 been put forth for the Board's consideration. A reviewing body may not be able to
14 reconstruct the Board's analytic route from contested findings to directives as described in
15 *Topanga*.

16 **IV. Adding the Independent Review Panel (IRP) Manager as a Party is**
17 **Unnecessary and Unfounded**

18 Typical contested hearing procedures provide an opportunity for any person or
19 group of people to request Designated Party status. The person explains in writing the
20 basis for the request, such as how the person is affected by the Board's decision, and
21 why the current parties to the action do not represent the person's interests. The Advisory
22 Team and Board Chair consider the Designated Party requests and grant or deny them.
23 If a party is granted Designated Party status, it is treated equally to the original parties to
24 the action: it is prohibited from having ex parte communications; it may submit evidence,
25 policy statements, legal briefs; it may present at hearing; it may call witnesses and cross-
26 examine other party's witnesses, among other privileges.

1 There are several persons, formal groups, and informal groups in the Hinkley
2 community that the Board may consider being affected by the proposed CAO and whose
3 interests are not represented by the Prosecution Team or PG&E at the contested hearing.
4 There has not been any opportunity for any person or group to learn about how to seek
5 Designated Party status. However, the IRP manager was deemed a party by the
6 Advisory Team's hearing procedures.

7 The Prosecution Team does not object at all to having the IRP manager make a
8 presentation at the contested hearing; in fact, it is much encouraged. The purpose of
9 seeking a discussion on Designated Parties is to make a record that demonstrates the
10 Board made efforts to ensure equal opportunities for all persons. To protect the process,
11 the Prosecution is requesting that the Board and its Advisory Team either provide an
12 opportunity for others to seek Designated Party status, or in the alternative, remove the
13 IRP manager as a party and not have any person have Designated Party status. Since
14 the IRP manager has not been engaged in drafting the consensus language (July 8, 2015
15 draft proposed CAO³), or has been refraining from ex parte communications that we know
16 of (both the Prosecution and PG&E have been refraining from ex parte communications
17 with the Advisory Team as a precautionary measure), the Prosecution prefers that the
18 Board not consider the IRP manager a party but allow him to speak at the hearing. The
19 Prosecution Team does not have a preference as to whether the Board should allow the
20 IRP manager to call witnesses or cross-examine other witnesses.

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27 ³ The cover memo is available here:
28 [http://www.waterboards.ca.gov/lahtontan/water_issues/projects/pge/cao/docs/consensus_changes_memo.p
df](http://www.waterboards.ca.gov/lahtontan/water_issues/projects/pge/cao/docs/consensus_changes_memo.pdf), and the draft proposed CAO with the consensus language is here:
http://www.waterboards.ca.gov/lahtontan/water_issues/projects/pge/cao/docs/cao.pdf.

1 **V. Conclusion**

2 The hearing procedures put forth by the Advisory Team in this contested hearing
3 require refining to provide the parties, interested persons, and the general public a fair
4 hearing with an opportunity to prepare for it with no surprises. The Prosecution Team
5 requests the Board Chair and the Advisory Team consider instituting rules for evidence
6 submission and designated party status to ensure a fair hearing and to protect the
7 administrative record.

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9 Dated: October 26, 2015

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14 Attorney for Prosecution Team
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