

Item 6 LATE ADDITION

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

**MEETING OF NOVEMBER 4-5, 2015
BARSTOW**

**PROPOSED CLEANUP AND ABATEMENT ORDER (CAO) TO PACIFIC GAS AND
ELECTRIC COMPANY (PG&E) FOR ITS DISCHARGES OF CHROMIUM TO
GROUNDWATER IN THE HINKLEY AREA**

PLEASE ADD ENCLOSURE 9

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ENCLOSURE 9

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Lahontan Regional Water Quality Control Board

TO: Prosecution Team

FROM: Kimberly Cox, Chair 
Lahontan Regional Water Quality Control Board

DATE: October 30, 2015

SUBJECT: RESPONSE TO OBJECTIONS TO HEARING PROCEDURES AND
CLARIFICATION OF PROCEDURES FOR NOVEMBER 4, 2015 HEARING ON
CLEANUP AND ABATEMENT ORDER FOR PG&E

On October 26, 2015, the Lahontan Regional Water Quality Control Board's (Water Board) Prosecution Team submitted objections to the Hearing Procedures, requesting that the Advisory Team institute rules for evidence submission and designated party status to ensure a fair hearing and to protect the administrative record. No other party or interested person objected to the Hearing Procedures.

In response to those requests, the Water Board is providing this response and clarification.

1. Proceedings for the CAO Comply with Applicable Procedural Requirements

The proceedings for the adoption of the cleanup and abatement order (CAO) for PG&E's discharge of hexavalent chromium to the groundwaters of the Hinkley area are being conducted under the State Water Board's regulations governing adjudicatory proceedings. Article 2 of Chapter 1.5 of Title 23 of the California Code of Regulations (CCR) sets out the procedures for adjudicative proceedings, and explains that these provisions, along with chapter 4.5 of the Administrative Procedure Act (APA) (Gov. Code §§11400-11470.50), sections 801-805 of the Evidence Code, and section 11513 of the Government Code are to be applied. There is no requirement within the State Board's regulations, the APA, or any statute, however, that requires that a regional water board's hearing must follow any particular format. In fact, the Board may waive any requirements pertaining to the conduct of the proceeding, so long as those requirements are not mandated by state or federal statute or by the state and federal constitutions. (23 CCR §648(d).) One of those requirements mandated by state and federal constitutions is due process. Due process is the requirement that before a person is required by the government to do something or refrain from doing something, that person is provided a fair hearing. What constitutes a fair hearing depends on the circumstance, but generally requires the ability to present and refute evidence. As long as due process is provided, the format of the proceedings is inconsequential. "Due process is flexible and calls for such procedural protections as the particular situation demands" (*Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720, 725 as modified July 12, 2001 [internal citations and quotations deleted].) The State Water Board's regulations for adjudicatory proceedings are consistent with the flexible nature of due process. "Adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant

information expeditiously without unnecessary delay and expense to the parties and to the Board.” (Cal.Code Regs., tit. 23, §648.5)

Here, to ensure due process, the Water Board took the unusual step in separating its staff into a prosecution and advisory teams. This ensured that those that were advising the Water Board members as to the legal and technical issues were not the same individuals that were advocating for or against a particular position.¹ Additionally, to ensure that the public felt comfortable participating in the process and be consistent with the State Water Board’s Environmental Justice Program goals², which include the promotion of meaningful public participation, the Water Board pursued a collaborative process for the development of the CAO and the administrative record. To that end, the Water Board held several workshops, both before the proposed CAO was drafted and afterwards, in order to engage the public in a manner that was less intimidating than a formal prosecutor action in order to encourage participation. Its requests for comments and notices of the workshops and hearing were intended to be easy to understand and follow. The Water Board was intentional in moving the proceedings away from a trial-like procedure, in order to provide a process that was be less overwhelming to the public, but yet meet due process requirements that allow the submittal and examination of evidence. The process was successful and resulted in a consensus language being submitted by the parties, which resolved many of the disputed issues in the matter.

2. The Water Board is the Decision Maker on All Issues in the Proceeding

The Water Board, not the parties, will be the entity defending the CAO if it is challenged. The Water Board benefits from the knowledge and insight of the Prosecution Team and the thoughtful discussion of issues that comes out of the process of having comments on draft orders and at workshops. It can adopt the suggestions of the Prosecution Team, PG&E, the IRP Manager or the public in its final order, or completely rewrite the order, as long as the order is supported by adequate evidence in the record. The Board has wide latitude in making policy decisions. (*Hudson v. Board of Administration of Public Employees’ Retirement System* (1997) 59 C.A.4th 1310, 1328 (when statute imposes upon administrative body discretion to act under certain circumstances, mandate will not lie to compel exercise of such discretion in particular manner).)

The Board does not expect the Prosecution Team to provide any additional evidence in this matter, in support of the Advisory Team’s findings or otherwise. The Prosecution Team has cited only one example of findings that it believes are unsupported. Finding 9.b) is supported by evidence cited in Finding 10. Moreover, the Board may exercise its discretion to wait for the results of the USGS Background Study before making a decision on whether PG&E is responsible for the disputed plume in the north and, if so, the schedule for the cleanup.

3. The Administrative Record upon which the Water Board will Base its Decision is All Materials Submitted during the Development of this Order

All of the parties have had multiple opportunities to submit evidence and to review each other’s evidence. The Prosecution Team submitted evidence as part of its initial draft of the CAO, in response to the request for additional information, in its comments on the subsequent draft CAO, and during the May and September workshops. Similarly, PG&E has had the opportunity to submit evidence in its comments on the draft CAOs, in response to the request for additional

¹ Separation of functions does not mandate that the Water Board issue specific hearing procedures and conduct the hearing in the same manner as is typically done for enforcement hearings on administrative civil liability, for example.

² http://www.waterboards.ca.gov/water_issues/programs/outreach/education/justice.shtml

information, and during the May and September workshops. This information was made available to the parties and interested persons via Lyris and on the Water Board's website. All of the written materials and public comments at recorded meetings that have been submitted thus far by the parties in the development of this CAO is part of the administrative record of the Water Board's Order.

There is no requirement under Water Board regulations or Chapter 4.5 of the APA requiring a trial-like means of introducing evidence into the record. Section 11513 of the Government Code states that the "hearing need not be conducted according to technical rules relating to evidence and witnesses... Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." Similarly, section 648.3 of title 23 of the California Code of Regulations allows parties to introduce evidence by reference, without the necessity of supplying copies to the Board and other parties, provided the original or a copy is in the possession of the Board and the specific file folder or other exact location where it can be found is identified.

4. No Additional Written Evidence may be Submitted without Board Chair Approval

The Prosecution Team has expressed concern that PG&E may try to bring in information from its Third Quarter 2015 Report, which may lead to unwanted surprise at the hearing. The notice for the November 4 hearing did not allow submittal of additional written evidence. The notice was intended to limit testimony at the hearing to summaries of previously submitted evidence, comments or testimony and comments or testimony on the Advisory Team changes to the September 1, 2015 draft Order. While the notice could have been clearer, no person has indicated any intent to submit additional written materials. Therefore, if any party or interested person offers new written materials, they will only be accepted into the record if the Board Chair allows the submittal after consideration of its probative value and the potential prejudice to the parties and the Board. Persons seeking to submit previously available written documents should be prepared to explain why they could not have submitted the documents sooner.

As of the date of this letter, an email was sent by Dr. Izbicki from the United States Geological Survey (USGS), providing several comments on how the USGS Background Study was referenced in the CAO. Those comments are accepted into the record.

5. Party Status does not Limit Ability to Participate in Proceedings

Section 648.1 states that the parties to an adjudicative proceeding before the Water Board include the "person...to whom the agency action is directed and any other person whom the Board determines should be designated as a party. The hearing notice *may* specify a procedure for designation of the parties to a particular adjudicative proceeding." (Emphasis added.) Being a party to a proceeding is important in proceedings where party status confers procedural rights not otherwise available to non-parties, such as providing witnesses, testimony, and evidence, and having the opportunity to cross-examine witnesses. In this proceeding, in light of the subject cleanup's impact on the community and their active participation in this matter, the Water Board has allowed all interested persons to submit information, provide comments, and ask questions. As reflected in the revised Hearing Procedures (see below), the IRP Manager is not a designated party to these proceedings, but will have extra time to make a presentation at the Board meeting in light of the IRP Manager's unique role. Therefore, despite the fact that no member of the public or community representative has requested designated party status, the inclusive process that has been followed has allowed members of the public to provide meaningful input regarding the Order.

6. Water Board Members and the Advisory Team Have Refrained from Ex Parte Communications with All Interested Persons

Whether or not someone is designated a party has not affected the Water Board's implementation of the ex parte rules. Section 11430.10 of the Government Code prohibits communication from not just parties, but from "an interested person outside the agency." This would include not only the IRP Manager, but also members of the public. In fact, although I have been requested to meet with at least member of the Hinkley community, I have not done so in order to comply with the ex parte requirements.

7. Conclusion

In conclusion the Hearing Procedures comply with the State Water Board regulations for adjudicatory proceedings. As long as due process is provided, there is no requirement that the hearing must follow any particular format. Here, the Water Board has intentionally pursued a process that is accommodating to the public in order to encourage public participation. The Hearing Procedures are hereby modified as follows:

- The administrative record in this proceeding consists of all the evidence that has been submitted and relied upon in the development of this Order, including recordings or transcripts of all Board meetings and workshops on the CAO. All of the files are available on the Water Board's website at http://www.waterboards.ca.gov/lahontan/water_issues/projects/pge/index.shtml and on Geotracker at http://geotracker.waterboards.ca.gov/profile_report.asp?global_id=SL0607111288
- No additional written evidence will be accepted at the hearing absent a ruling by the Chair. Parties and the public may summarize previously submitted comments and provide oral comments or testimony on changes to the September 1st draft. New written evidence will only be accepted if the Board Chair determines that the newly submitted evidence has probative value to the issues at the hearing and that its acceptance into evidence will not prejudice the parties. The October 27, 2015 email from Dr. Izbicki is accepted and will be part of the administrative record.
- The IRP Manager is not a designated party to these proceedings, but will be allowed to provide a twenty (20) minute presentation to the Water Board to summarize previously submitted comments and comment on changes to the September 1, 2015 draft and ask questions of the other presenters. Members of the public will also have the opportunity to speak for three minutes and to ask questions of the presenters.
- The ex parte prohibition continues to apply to all interested persons, regardless of party status. No party or interested person may engage in ex parte communications with the Board members or Advisory Team during the pendency of these proceedings. An ex parte communication is any communication, direct or indirect, regarding any issue in the proceeding, without notice and opportunity for all parties to participate in the communication. Communications about uncontested procedural matters, and communications between the Advisory Team and Board members, are permitted.

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9
10 BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
11 LAHONTAN REGION
12

13
14 In the Matter of:
PACIFIC GAS AND ELECTRIC)
15 COMPANY,) CLEANUP AND ABATEMENT ORDER
) No. R6V-2015-PROPOSED
16)

17
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
25

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27 ¹ The Table of Exhibits is available at:
28 http://www.waterboards.ca.gov/la_hontan/water_issues/projects/pge/cao/ under the heading “CAO
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.

24 _____
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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26 _____
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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12 Laura J. Drabandt, Senior Staff Counsel
13 Office of Enforcement
14 Attorney for Prosecution Team
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From: [Kemper, Lauri@Waterboards](mailto:Kemper.Lauri@Waterboards)
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Subject: Comments on Proposed CAO for PG&E, Hinkley
Date: Tuesday, October 27, 2015 3:44:20 PM

At the request of Dr. Izbicki, United States Geological Survey, I am submitting the following email received today from Dr. Izbicki to Anne Holden, Water Board Prosecution Team Geologist into the record for the PGE CAO hearing November 4, 2015. Please distribute to the Water Board members, its Advisory Team, PG&E, and other interested persons.

Hi Anne--

Thanks for addressing our concerns on the phone.

There are two sections of the CAO that reference the Background Study that I had concerns about. I've made suggestions for alternative language.

1. Pg 6: This finding states, in part, "**The USGS is scheduled to produce a Background Study Preliminary Results Report no later than September 2017 and a Final Background Study no later than June 2019.**" At present the content of the "interim report" as presented in the proposal with a draft due in September 2017 is undetermined. Data from the Background study available at that time that has been presented to the Technical Working Group (TWG) will be evaluated to determine if there is actionable information or preliminary results suitable for release. I suggest deleting this sentence. It would be okay to add at the end of the paragraph "If actionable data, information, or results are available before the completion of the USGS Background Study, this information will be made available to the RWQCB."
2. Pg 10: "The USGS Background Study is intended to provide sufficient evidence that can be used to determine if the chromium in the northern disputed plumes is **directly and unequivocally** linked to PG&E's historical discharge or if it is naturally-occurring." The standard "directly and unequivocally" is pretty high. Please delete those words.

We should make the "CAO references to USGS Background Study" a topic for the Nov 5th TWG meeting. This would allow for 1) a group consensus, 2) bring everyone up to speed, and 3) manage the groups expectations concerning the timing and delivery of results, and the expected timing of RWQCB actions on results.

Thanks
Izzy

