

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.