

VIA EMAIL

January 26, 2016

Hearing Officer Frances Spivy-Weber  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-2000

Re: The West Side Irrigation District Cease and Desist Order Hearing

Dear Hearing Officer Spivy-Weber:

The purpose of this letter is to respond to the following Prosecution Team emails:

- January 23, 2016 at 11:30 p.m.
- January 23, 2016 at 11:51 p.m.
- January 25, 2016 at 11:27 a.m.
- January 25, 2016 12:37 p.m.

As illustrated by the Prosecution Team's flurry of emails, it appears to be more interested in procedure and harassment than addressing the key issues in the hearing.

### **Objection to WSID Amended NOI**

The Prosecution Team objects to WSID's amended NOI because the deadline for submitting the WSID CDO Notice of Intent to Appear was October 2, 2015. The objection lacks merit. WSID filed its original notice of intent to appear in October including all witnesses that it was aware of at that time. It also reserved "the right to amend or supplement this draft witness list any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list". The amendment was necessary in order to (1) ensure the witnesses that testify have the required factual knowledge regarding WSID operations, and (2) coordinate expert testimony with BBID for the Phase 1 hearing to avoid duplication and improve efficiency.

WSID notes that other parties have filed amended Notices of Intent without objection. The Prosecution Team has not provided any evidence that it is prejudiced from WSID's amended witness list, and neither the Prosecution Team nor any other party is so prejudiced, nor can it.

### **Objection to Greg Young**

As noted in the email, WSID's Amended Notice of Intent to Appear lists Greg Young and Karna Harrigfeld, neither of whom were on WSID's original Notice of Intent to Appear in the WSID CDO matter. The Prosecution Team objects to the addition of Greg Young because it believes that WSID's sole purpose in adding Mr. Young is to obtain more time for his direct testimony. WSID has no such intention. In fact, despite adding witnesses to its list, WSID has reduced the time of testimony for its other witnesses so that the time requested for testimony has increased only 5 minutes.

WSID includes Mr. Young as a witness only to clarify that he will be providing direct testimony on the issue of water availability as to *both* BBID and WSID. As has been represented to the Hearing officer and the Prosecution Team since the first pre-hearing conference, BBID and WSID intend to coordinate their direct testimony and cross examination. As set forth in the December 16, 2015 Procedural Ruling from Hearing Officers Spivy-Weber and Doduc, hearing time limits will be addressed at the Second Pre-hearing Conference on February 8, 2016 and the Prosecution Team's attempt to limit testimony at this time is premature.

### **Objection to Karna Harrigfeld**

WSID is taken aback by the Prosecution Team's allegation that its intention in adding Ms. Harrigfeld as a witness "seems to be aimed squarely at preventing the Prosecution Team from conducting effective discovery," as this allegation makes little sense.

- Ms. Harrigfeld is an attorney at Herum\Crabtree\Suntag, and is WSID's general counsel. WSID originally listed its part-time General Manager Dave Kaiser as its witness on factual issues in its NOI. However, when preparing direct testimony WSID learned that Mr. Kaiser, who has been with the district for less than 3 years, did not have the requisite factual knowledge regarding the district's day-to-day operations or history. As a result, in order to provide factual testimony regarding the district's day to day operations WSID listed its operations manager, Rick Martinez, as a factual witness, and in order to provide factual testimony regarding the district's historical operations, WSID listed its general counsel Karna Harrigfeld. Ms. Harrigfeld's written testimony is expressly limited to factual testimony and without her as a witness, WSID does not have another witness to provide this testimony.
- Despite the Prosecution Team's assertions, it is not unusual for a party to place its attorney on the witness stand in a contested proceeding to testify on factual issues. Rather, a general counsel who has significant institutional knowledge regarding an entity is often required to do so.
- The Prosecution Team correctly states that Government Code §11513(b), provides that parties may cross examine opposing witnesses on any relevant topic, whether or not that topic was part of the direct testimony. However, the Prosecution Team fails to mention subdivision (e) which reads "The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing." Therefore, even if a witness is allowed to be cross-examined, the attorney-client privilege is not extinguished and can still be invoked.
- The Prosecution Team misstates the law when it asserts that when a party places its attorney on the witness stand that party waives the attorney-client communication privilege, and the attorney waives the work product privilege where necessary to allow other parties to

effectively prepare cross-examination. This is simply not the rule. The case cited by the Prosecution Team, *Handgards, Inc. v. Johnson & Johnson* (1976) 413 F.Supp. 926, does not support this proposition, and is inapplicable as WSID is not asserting an issue or defense based on advice or communication by counsel. *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 127 (1997); *S. Cal. Gas Co. v. Pub. Utils. Com.*, 50 Cal. 3d 31, 43 (1990); *Transamerica Title Ins. Co. v. Superior Court*, 188 Cal. App. 3d 1047, 1053 (1987).

First, *Handgards* addresses only attorney-client privilege, holding that a “waiver of the attorney-client privilege does not necessarily mean that the protection afforded by the work product doctrine is also breached.” (*Id.* at 929). The intent of the work product doctrine under California law is to allow attorneys to “prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of their cases” as well as to “prevent attorneys from taking undue advantage of their adversary’s industry and efforts. CCP §2018.020. Its purpose is to (2018.020(a)), and to “[p]revent attorneys from taking undue advantage of their adversary’s industry and efforts.” Any “writing that reflects an attorney’s impressions, conclusions, opinion, or legal research or theories” is not discoverable under any circumstances. Section 2018.030(a).

Second, *Handgards* addressed a situation of an implied waiver of the privilege, not present here, and found that waiver only:

where a party asserts that it relied on the advice of counsel or counsel's conduct, thus putting the attorney's state of mind or otherwise privileged communication directly at issue. See *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24-25 (9th Cir. 1981); see *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (“The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice”). “[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and [9] that disclosure is essential for a fair adjudication of the action.” *S. Cal. Gas Co. v. Pub. Util. Comm’n*, 50 Cal.3d 31, 40, 265 Cal. Rptr. 801, 784 P.2d 1373 (1990).

The scope of either a statutory or implied waiver is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver.” *Transamerica Title Ins. Co.*, 188 Cal.App.3d at 1052-1053.

*Liberty Mut. Ins. Co. v. Cal. Auto. Assigned Risk Plan* U.S. Dist. LEXIS 34547, 2012 WL 892188 (N.D. Cal. Mar. 14, 2012).

WSID has not waived the attorney-client privilege. Under Evidence Code § 912, it is the holder of the privilege who may waive the privilege, either by disclosing a significant part of the communication in question *or* by manifesting through words or conduct consent that the communication may be disclosed by another. WSID has not placed any legal advice communication between WSID and its attorneys at issue, and there is no “waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter.” *S. Cal. Gas Co.*, 50 Cal.3d at 41. Implied waivers are limited to situations where the client has placed into issue the decisions, conclusions, and mental state of the attorney who will

be called as a witness to prove such matters. However, WSID does not waive the attorney-client privilege where it is not defending itself on the basis of the advice it received. *Transamerica Title Ins. Co.*, 188 Cal.App.3d at 1048.

The burden of overcoming the privilege lies with the Prosecution Team. The party opposing the attorney-client privilege bears the burden of showing that the claimed privilege does not apply or that an exception exists or that there has been an expressed or implied waiver. *Wellpoint Health Networks v. Superior Court*, 59 Cal. App. 4th 110, 114 (1997). Where there is doubt about its application, we will construe it liberally. *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537, 1545 (1999). Under the theory of implied waiver of attorney-client privilege, the person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action. There is no waiver of the attorney-client privilege where the substance of the protected communication is not itself tendered in issue, but instead simply represents one of several forms of indirect evidence in the matter. *S. Cal. Gas Co.*, 50 Cal. 3d at 34.

- The Prosecution Team asserts that had WSID listed Ms. Harrigfeld as a witness in a timely manner, the Prosecution Team certainly would have sought discovery of her records. In fact, the Prosecution Team has conducted discovery of all relevant WSID records, which included all records held by Herum\Crabtree\Suntag that are not protected by privilege. The Prosecution Team is entitled to nothing more; Government Code §11507.6 states that “Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.” There has been no waiver of this protection.
- The Prosecution Team also indicates that had WSID listed Ms. Harrigfeld as a witness in a timely manner, the Prosecution Team “likely” would have sought deposition, and argues that because it was not able to do so it is “severely prejudiced in its ability to prepare effective rebuttal or cross-examination of Ms. Harrigfeld”. To the contrary, the Prosecution Team has not sought deposition of any witnesses listed by WSID, and has previously indicated to WSID that it did not intend to conduct deposition until after witness statements were submitted. Ms. Harrigfeld, along with other witnesses listed by WSID, is available for deposition.

WSID is interested in nothing more than insuring it receives a fair hearing before the State Water Resources Control Board, and that includes an opportunity to present the witnesses necessary to present its defense. WSID has no intentions of playing games, or making it difficult for any party to obtain information or conduct discovery. Once again, other than blustering, the Prosecution Team has not provided any evidence that it is prejudiced from WSID’s witnesses, nor can it. To the contrary, denying WSID’s requests to add Ms. Harrigfeld as a witness, and striking her testimony would severely prejudice WSID and prevent it from providing required factual testimony.

## **Motions**

The Prosecution Team also objects to WSID’s submittal of two motions to dismiss and its motion for summary judgment and statement of undisputed facts supporting the summary judgment motion. The Prosecution Team asserts that the Hearing Team’s January 14, 2016, email provides that WSID “may submit a motion to dismiss or motion for summary judgment, or a combined motion, not exceeding ten pages of total briefing”. Actually, the January 14, 2016 email provides:

**(1) Motions to dismiss and/or motions for summary judgment.**

Motions to dismiss or motions for summary judgment may be submitted by BBID in the BBID proceeding and by WSID in the WSID proceeding. The Prosecution Team may file a motion for summary judgment in both proceedings. The motions must be received by the Board by Noon, January 25, 2016. The briefs may not exceed ten pages in length. The motions may include a motion for summary judgment. . . .

The language is clear that the Board anticipated “motions” would be filed, and that it anticipated both motions to dismiss “and/or” motions for summary judgment would be filed. The page limit is expressly applicable to “briefs” – in the plural – and does not state that all motions must be presented in one combined brief, nor would that make any sense.

In addition, and as discussed at the September 25, 2015 prehearing conference, the State Board represented to the Santa Clara Superior Court that WSID would have a full opportunity to raise *all* issues, including due process issues, before the State Board at its Enforcement Hearing. However, to the extent the Hearing Team considers the Prosecution Team’s objection or motion to strike, WSID requests a formal hearing on the objection / motion to strike in order to develop a proper record for judicial review.

**Subpoena Duces Tecum**

All nonprivileged records of Herum\Crabtree\Suntag have already been reviewed and disclosed to comply with the October, 2015 subpoena served by the Prosecution Team. There is nothing further to be disclosed by WSID or Herum\Crabtree\Suntag in response to the Subpoena served by the Prosecution Team on January 25, 2016. The subpoena’s direction to “produce all DOCUMENTS responsive to this Subpoena *duces tecum*, regardless of any claim of attorney-client communication and/or attorney work product privilege” is outrageous, and would subject the Prosecution Team to sanctions in a court of law. Neither Ms. Harrigfeld nor WSID has waived the attorney client privilege or the attorney work-product doctrine simply by submitting Ms. Harrigfeld’s testimony on factual circumstances surrounding WSID.

**Conclusion**

WSID respectfully request that the hearing officer dismiss the Prosecution Team’s objections and allow WSID to proceed with the merits of its case.

Very truly yours,



JEANNE M. ZOLEZZI  
Attorney-at-Law

**SERVICE LIST OF PARTICIPANTS  
 THE WEST SIDE IRRIGATION DISTRICT  
 CEASE AND DESIST ORDER HEARING  
 (October 8, 2015)**

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