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High-Level Waste Repository
Pre-Application Matters

Docket Number: PAPO-00; ASLBP No.: 04-8239-01-PAPO

Location: Rockville, Maryland

Date: Tuesday, July 19, 2005

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD



In the Matter of: ||

U.S. DEPARTMENT OF ENERGY || Docket No. PAPO-00

(High Level Waste Repository: || ASLBP No.

Pre-Application Matters) || 04-8239-01-PAPO



Hearing Room T3BB45

U.S. Nuclear Regulatory

Commission

Two White Flint North

11545 Rockville Pike

Rockville, Maryland

Tuesday, July 19, 2005

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE THOMAS S. MOORE, Chairman

THE HONORABLE ALEX S. KARLIN, Administrative Judge

THE HONORABLE ALAN S. ROSENTHAL, Administrative Judge

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P-R-O-C-E-E-D-I-N-G-S

(9:00 a.m.)

1
2
3 CHAIRMAN MOORE: The Pre-License
4 Application Presiding Officer Board has convened this
5 case management conference this morning to discuss
6 with you, the potential parties, the issues raised in
7 the two motions for reconsideration of our second case
8 management order. Collectively, those two motions
9 raise six issues, two of which are duplicative,
10 leaving just four issues.

11 At this time, starting on my left, if the
12 Staff would all introduce themselves for the Court
13 Reporter, please.

14 MR. WEDEWER: I'm Harry Wedewer appearing
15 for the Staff. To my right is Janice Moore appearing
16 for the Staff, and to my left is Jeff Ciocco from the
17 Staff.

18 MR. IRWIN: Donald Irwin appearing for the
19 Department of Energy. With me to my immediate right
20 is Michael Shebelskie, also for DOE, and to his right
21 Kelly Faglioni, also representing DOE.

22 MR. MALSCH: I'm Marty Malsch for the
23 State of Nevada. With me also are Joe Eagan and our
24 Law Clerk Dan Smith.

25 MS. GINSBERG: Ellen Ginsberg, Nuclear

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1 Energy Institute. Tim Walsh, Nuclear Energy
2 Institute.

3 CHAIRMAN MOORE: Thank you. I would
4 remind all of you and all attendees of the agency's
5 security procedures, which first I will apologize for
6 the inconvenience, but should any of you who are non-
7 NRC employees leave the hearing room, you must be
8 escorted.

9 Instead of having formal argument on the
10 motions for reconsideration, the Board thought that it
11 would be more productive to address these issues more
12 informally in setting the case management conference,
13 and that's how we'd like to proceed this morning.

14 We don't intend to hold you long. We have
15 numbers of questions about one of the issues. The
16 others can be, we think, dispatched relatively
17 quickly, and I'd like to start with those.

18 Starting with the Staff, your challenge to
19 footnote 1 of the protective order, your point is well
20 taken, and the Board will accommodate your views and
21 change the language.

22 DOE, your concern regarding the definition
23 of the EPC document, the definition including the word
24 "regulatory," your point is well taken, and we will
25 delete that, substitute language probably along the

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1 lines of "a formal written" in lieu of "regulatory."

2 DOE, your concern regarding the need for
3 a schedule for the ECP documents, we had thought the
4 order was clear, but then again the authors of such
5 documents always think they're clear.

6 (Laughter.)

7 And the fact that there were schedules
8 listed in all the others and none there, and the
9 context in which it's written, we thought that they
10 were due at the same time the bibliographic headers
11 were due in the LSN. That was our intent. And unless
12 your cries of anguish are extreme, since we believe
13 that's a relatively small number of documents, now
14 those should be in the LSN at the time you certify.

15 MS. FAGLIONI: If I could just take a
16 minute to address it, I don't think our cry is
17 extreme, and I don't think that we need the same
18 schedule for redaction of all the documents. But if
19 we could perhaps get a little bit in between, a little
20 leeway, 30 days, I'll tell you that it is a small
21 number of documents, but the redaction process for
22 this particular set of documents is a bottleneck, if
23 you will.

24 You can't have a large number of bodies
25 doing this. It's one FOIA officer takes a look at it,

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1 who then confers with the heads of the respective
2 programs, who then run it through the counsel. So
3 there are three individual people who have to take
4 their look at it to confirm the redaction is
5 appropriate under FOIA.

6 And then, you have a little bit of
7 processing, not a great amount of processing, on top
8 of that. So you -- the process for this -- these
9 documents is longer. It's a much smaller number. We
10 could use a little leeway, perhaps 30 days, but --

11 CHAIRMAN MOORE: We had nothing close to -
12 - we thought they would be due at certification.
13 Having said that, my recollection is that you informed
14 us at some point -- and I, frankly, can't put my
15 finger on it -- as to the number, and it was down to
16 500.

17 MS. FAGLIONI: That's correct. And I
18 believe we're down slightly even from that into more
19 the 350 range. So you're correct that it is a small
20 number of documents. It's just that the set of people
21 that have to look at it, they're not just looking and
22 saying, "Can a Social Security Number come out?" I
23 mean, they've got to make a very subjective judgment
24 about what's identifying information, and it has to go
25 through several individual people to help contribute

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1 to that determination.

2 And then, you have to take the document
3 that has been redacted and create the right electronic
4 file to do that. And they've got many competing
5 demands on their time. The same people who are making
6 these very subjective individual determinations are
7 also being asked essentially to supervise and weigh in
8 on many of the redaction decisions while continuing
9 with their ongoing FOIA duties.

10 So it's not -- you're correct, it's not a
11 large number of documents. It's just a more elaborate
12 process to get to the end of the day.

13 CHAIRMAN MOORE: All right. We will amend
14 the second case management order to provide that the
15 redacted versions of the ECP documents must be placed
16 on the LS -- I'm sorry, must be provided to the LSNA
17 within 10 days of your certification.

18 The other -- next issue is the dual
19 concern shared by the Staff and DOE on the
20 supplementation and periodic certification to the PAPO
21 Board that you had so supplemented.

22 Frankly, speaking only for myself, I am
23 surprised at the outcry that such a simple provision
24 engendered. What we, frankly, had in mind was that
25 you all knew how to file motions for extensions of

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1 time, and that in consultation with the LSNA, if you
2 had a large number of documents that had to be
3 supplemented and added to the LSN, or documents that
4 had to be deleted from the LSN, that you would be in
5 consultation in a timely fashion, and you would find
6 out from the LSNA what time period that would take,
7 and you would have done -- started that consultation
8 sufficiently in advance of the first of the month that
9 you could easily take care of it.

10 And if it was not something that was
11 within your control, because the LSN was down or such
12 things, then you would seek an extension of time for
13 your certification.

14 We think that that's a very easy way to
15 deal with this situation. You're all very experienced
16 and know how to deal with the LSNA and certainly know
17 how to seek motions for extensions of time. And we
18 don't see any need to go further.

19 Now, I would also just note that,
20 obviously, if you had 15,000 documents that required
21 supplementation, then the cutoff time before the end
22 of the month obviously has to be a longer period than
23 if you have three such documents. Then, it might only
24 be a day or two before the end of the month.

25 We're expecting you to exercise sound and

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1 reasonable judgment, and we don't see any need to
2 amend the order in that regard, and trust that you
3 will all act reasonably in that regard. And the LSNA
4 stands ready to consult with you, as does his staff,
5 to work out any bumps in the road in getting materials
6 up on the LSN.

7 Are there any questions in that regard?

8 Judge Karlin would like to address the
9 substantial question of format of privilege logs.
10 Now, we asked that you bring a sample with you, so I
11 think we should probably start by having them thrown
12 up on the screen. And I guess my instructions weren't
13 understood by the Staff. I had intended DOE to sit
14 where Nevada was, so that the equipment is right next
15 to you.

16 MR. SHEBELSKIE: Ah. We noticed the
17 change in position.

18 (Laughter.)

19 CHAIRMAN MOORE: You never give us credit
20 for knowing what we're doing.

21 (Laughter.)

22 MR. SHEBELSKIE: There was a method to the
23 madness.

24 Well, Judge, I did bring hard copies for
25 each of the Judges, one for the Staff, and one for the

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1 State as well.

2 CHAIRMAN MOORE: Okay. Why don't you --
3 Jonathan, would you be so kind to fetch them? And we
4 can just put them up on the screen, and everybody turn
5 their monitor on, and they'll be in front of you on
6 the computers as well. Lower right button will turn
7 your monitor on.

8 Do you have one, Mr. Shebelskie, we can
9 place on the document camera?

10 MR. SHEBELSKIE: Yes. This one the State
11 can follow along with, and this one we can give to the
12 Staff.

13 CHAIRMAN MOORE: Which again, Mr.
14 Shebelskie, was why we said you only needed to bring
15 one set.

16 MR. SHEBELSKIE: Well, they fit in the --
17 (Laughter.)

18 Before we look at actual entries, Judges,
19 I'd like to make just a couple of introductory
20 comments. First, this is still a draft. As such, it
21 is still a work in progress. The legal privilege
22 reviews are going through a peer middle review, where
23 we start with all the documents, they're prescreened
24 at a certain level, they go to a group of attorneys
25 who are doing further screening and getting

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1 information, and then ultimately what will come out of
2 that process at that intermediate stage is a report
3 along the lines you see here that will then be
4 individually reviewed at a very high level for final
5 determinations, supplementing the information,
6 etcetera. So that's the process where we are now.

7 Second, since this is a draft, and as I
8 understand it we're providing this document here today
9 for purposes of making sure -- and part of this
10 conversation with the Board -- that we all have
11 consistent expectations and understandings, we would
12 like to have this back after the hearing, after we
13 discuss this issue, because at the end of the day some
14 of these documents we may determine are not relevant,
15 they don't go in the LSNA, or the LSN. We may decide
16 some of them are not privilege. We may enhance the
17 explanations of some, etcetera.

18 Also, with respect to the secondary
19 privileges -- I think this is an important point --
20 since the last -- I guess it was the last conference,
21 we have been undertaking the redaction review of
22 those, combined with further relevancy reviews.

23 And by and large, those numbers for those
24 documents have come down substantially, and virtually
25 all of the documents in those categories, especially

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1 the privacy and the business proprietary, would be
2 produced in a redactable form. And we're not seeing
3 large numbers at all of any documents in those two
4 privileges that would have to be withheld, and,
5 therefore, subject to a privilege law. Most of -- 95,
6 99 percent of them I think will be out there in
7 redacted form.

8 So I think that the issue that we are
9 discussing here today from our perspective doesn't so
10 much relate to the few documents in those other
11 categories, because I think by and large we don't
12 anticipate a lot of privilege challenges. We don't
13 see big burdens there for us to have to deal with.
14 But all --

15 JUDGE KARLIN: Well, on that point, Mr.
16 Shebelskie, let me ask, on the secondary privileges,
17 as I understand what you're saying, is that
18 approximately 95 percent of them you are going to
19 produce in redacted form?

20 MR. SHEBELSKIE: Yes, sir.

21 JUDGE KARLIN: And there's five percent
22 that are some difficulty or something like that.

23 MR. SHEBELSKIE: That's not a number based
24 on the --

25 JUDGE KARLIN: Yes, yes, a rough -- rough

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1 number.

2 MR. SHEBELSKIE: Right.

3 JUDGE KARLIN: Well, our contemplation,
4 and I think the way the order -- second case
5 management order reads, is that, you know, all of the
6 secondary -- all documents for which a secondary
7 privilege is claimed are to be produced in a redacted
8 form, and then there might be instances where the
9 person receiving those documents, or looking at those
10 redacted documents, might challenge either the claim
11 of privilege in its entirety or the amount of
12 redaction, overredacted.

13 MR. SHEBELSKIE: Correct.

14 JUDGE KARLIN: And if there is a challenge
15 to the claim of privilege for that redacted document,
16 at that point, you know, the parties required -- the
17 privilege claimant is required to produce the
18 privilege log --

19 MR. SHEBELSKIE: Correct.

20 JUDGE KARLIN: -- for that.

21 MR. SHEBELSKIE: Yes, sir.

22 JUDGE KARLIN: Okay. So -- so producing
23 the redacted version is a given, in the sense it all -
24 - all of them are required to have redacted versions,
25 and then the privilege logs would only come at a

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1 second step.

2 MR. SHEBELSKIE: Yes, sir. Right. If I -
3 - if my comments suggested a contrary understanding,
4 I didn't mean to. What I was trying to convey the
5 notion is seeing the types of redactions that are
6 being made, like in the privacy information outside
7 the employees concern area, we find that, you know,
8 95, 90 -- a high percentage of them are in those
9 categories of information that the parties in our
10 discussion agreed are presumptively worthy of
11 protection of personal identifying-type information.

12 I don't anticipate challenges by people to
13 the propriety of redacting that information. So as a
14 practical matter, I don't -- from what I can see right
15 now -- foresee there will be lots of privilege
16 challenges to our claim of privilege on the secondary
17 privileges, or to the extent of the redaction.

18 Therefore, I don't see -- I would not
19 anticipate the need to do lots of privilege log
20 entries. And so our concern behind this motion for
21 reconsideration doesn't go towards those secondary
22 privileges. I think the number of instances will be
23 relatively modest. But we do, with respect to the
24 primary privileges, have to create a privilege log for
25 all of them, and that's what we go to.

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1 Now, another point is as we -- the
2 documents that we have -- of course, we have
3 electronic versions of all of our documents, because
4 they had to be created for this database for purposes
5 of document control and review and potential
6 production.

7 And the way the -- in my layman's
8 understanding of how this is set up, you have an
9 electronic document in our database -- the image of
10 the document, the text of it. Linked with it is a
11 series of fields and headers that could serve as the
12 header information. But if the document is relevant
13 and non-privileged, it would go -- it would accompany
14 it to the LSN and serve as the header. And that
15 document, then, throughout our systems and reviews,
16 those things all traipse together.

17 The header -- the fields in our
18 information track the fields for the headers that the
19 regulations require and that were expanded upon in the
20 -- through the auspices of the Advisory Review Panel
21 on the LSN guidelines. So all those various fields
22 like that.

23 So when a document comes to our reviewers
24 as part of our legal privilege review, they're looking
25 at the document, making an assessment whether it seems

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1 privileged or not, and at the current stage we're in
2 now they look at the header information, and if the
3 header -- existing header information doesn't seem
4 sufficient to identify authors and recipients, and a
5 subject matter description, their charge is to go to
6 the comment field section and write up a narrative
7 explanation of the document, explaining what it is.

8 And sort of the basic patterns that we see
9 is sometimes the title of the document will tell you
10 what the document is about -- for example, the very
11 first entry on our privilege log here, line -- row
12 number 2. The title of the document is "Seismic
13 Hazards Methodology Topical Report."

14 Now, that -- it is our way of thinking
15 that that title conveyed the subject matter of the
16 document. The author of this document is a Mr.
17 Echols, an attorney at Winston & Strawn. The person
18 who received the document is a Mr. Nesbitt, and we
19 have to -- I'll get to that in a second. And then, we
20 indicate what the privilege is is attorney-client
21 privilege, ACP. And we further break it down. This
22 is a communication from the attorney to the client.

23 And then, in this particular case the
24 comment field explains that these are the attorney's
25 confidential comments containing legal advice and

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1 analysis on that particular draft document.

2 We didn't have a separate subject matter
3 field set up historically in our database for this.
4 But we said, "Well, when you look at the title and the
5 comment field together, I think you fairly understand
6 what the subject matter of the document is and why
7 it's a privileged document."

8 In other instances, the title doesn't help
9 you, and you need a further explanation of the subject
10 matter. And if you would go down three more rows to
11 row number 5, and we see here this is a document that
12 actually had no title.

13 Now, footnote to that -- we are going back
14 through and adding titles to documents that don't have
15 titles. But historically, in real world, this
16 document didn't have a title that was picked up and
17 coded. But we see it's from a DOE lawyer to another
18 DOE lawyer, so it is an attorney-client communication,
19 it's part of litigation work-product.

20 And the comment field, though, gives you
21 the expanded explanation of the subject matter. In
22 this case, it's comments prepared by the lawyers at
23 DOE with respect to proposed changes to a particular
24 analysis or topic involving earthquake grounds motion.

25 So when we read the order that came out,

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1 I think it did require the privilege log -- for
2 example, attorney-client communications -- have
3 separate columns for each of the 11 or so delineated
4 items, as opposed to our understanding from the April
5 order, which was that the privilege log entries or --
6 I would say as a whole should fairly convey the
7 requisite information and give to the Board and to the
8 other participants a fair understanding of the prima
9 facie basis for claiming this was privilege.

10 Now, there are a couple of other columns
11 on here that aren't here yet, in addition to the
12 separate subject matter field, because that's how
13 we've addressed what I've just described. There is
14 the other requirement that the Board has about the
15 statement of confidentiality, which is not addressed
16 in these current headers -- these current columns
17 here.

18 Our approach to that would be to add a
19 column, if the Board wants it, on a document-by-
20 document basis. We can add a column to this that
21 gives a statement or explanation on that topic for
22 each of these documents.

23 Now, in many respects, the explanation is
24 going to be generic. For example, many of our
25 privilege documents will be e-mails. And the

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1 statement of the confidentiality given to the e-mails
2 will be sort of a generic statement about this was an
3 e-mail on a password-secured server, of a password-
4 protected account, on a firewall-protected server.

5 The policies and procedures of the
6 Department require people to maintain the
7 confidentiality of these e-mails, not to distribute it
8 outside the people who need to know, and we have no
9 evidence that it went beyond the people who need to
10 know.

11 So we can add some sort of generic
12 statements like that to the document to address that
13 point, but our biggest concern was thinking that we
14 had to have separate subject matter fields when really
15 the titles and the comments as a totality incorporate
16 it.

17 JUDGE KARLIN: Well, all right. I mean,
18 I think that was a helpful explanation. I mean, not
19 unexpected, I might say. I mean, this is kind of what
20 we have been trying to avoid from the get-go on this
21 proceeding, I think. And we've struggled with that,
22 and maybe, again, we haven't communicated very well.

23 But, I mean, if you go back to our January
24 24th order, first case management order -- and I think
25 this is something -- we don't have an adversarial

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1 situation here, but we're trying to work out the best
2 way --

3 MR. SHEBELSKIE: Absolutely.

4 JUDGE KARLIN: -- for the Board and the
5 parties to resolve privilege disputes expeditiously
6 and fairly, so that this discovery and this LSN
7 process can move forward quickly and fairly. And our
8 contemplation from the outset was -- and we ask you to
9 propose a proposed format for privilege logs.

10 We used the word "format" for privilege
11 logs four or five times in the paragraph or two where
12 we ordered the parties to provide something to us. We
13 were looking for a format, and we were looking for the
14 substance. We don't really want to elevate form over
15 substance. We want the substance certainly, and we've
16 gone through a process that identified elements, you
17 know, for each of the privileges.

18 But we've also gone through a process
19 looking for format, because this format is basically
20 what you showed us with the spent fuel litigation log,
21 as far as I can tell. The meaningful columns really
22 end up being the last two.

23 Most of the other information in the
24 entire thing is this simply identifies the document --
25 date, title, the session number. We do have authors,

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1 addressees, other receivers, copies. Those are
2 important and perhaps a bit different. But at the
3 end, the last two columns, what privilege are you
4 claiming. The penultimate column is -- just says,
5 "What's the privilege?"

6 And the comments column is where the meat,
7 it would appear, is, telling us whether or not it
8 meets the substance and the requirements of this. And
9 we thought it would be more useful to those who might
10 want to be concerned about challenging privilege
11 claims, and to us in terms of trying to evaluate the
12 validity of privilege claims, to require more than
13 just one long narrative paragraph, to break it out
14 into its component parts, which would serve to allow
15 the privilege claimant to think through the issue a
16 little more carefully and allow any privilege opponent
17 or challenger to perhaps be dissuaded from challenging
18 if those various components are broken out.

19 And so it was with serious intent that we
20 asked for formats and wanted it laid out in that way.
21 And I don't think there can be serious confusion that
22 that was what we asked for, you know, in January. And
23 the value of that, we think, is it will make the
24 proceeding go more quickly, that it will make the
25 privilege claimant think more seriously about making

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1 the claim, and it will deter inappropriate challenges
2 and encourage appropriate challenges to any privilege.

3 So tell us, if you can, what would be
4 involved in doing it -- breaking it out in the way we
5 have prescribed? Because, you know, you ultimately,
6 or whoever will be claiming a privilege has the burden
7 to carry that and substantiate that privilege prima
8 facie case.

9 And putting it into one long paragraph
10 will only tend to confuse people, and perhaps Judges,
11 and maybe make it more difficult for someone to
12 substantiate a prima facie case.

13 So what's involved in doing it the way
14 we've asked that it be done? How much time? How much
15 effort? That's what we really intended, and we think
16 there's a value in that. We'd like all of you to
17 speak to this issue, which is, do you understand the
18 value we have -- we thought would be there by doing it
19 this way? And do you conceptually, as I understand
20 it, do you represent that people, the State and the
21 Staff at least, have conceptually agreed with this,
22 with your proposed change?

23 But all that does is defaults us to the
24 normal privilege log we've seen a thousand times,
25 which really just puts it all into one big narrative

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1 paragraph. It's not what we intended.

2 MR. SHEBELSKIE: Believe me, our purpose
3 of raising this issue is to make sure that we are
4 simpatico with your expectations, because we did not
5 want to proceed blindly, make false assumptions, and
6 then after certification run into problems. So it's
7 in that spirit that I ask these questions.

8 Let's take subject matter, a separate
9 column for subject matter. All right. Let's take the
10 first document as an example. We have a title of the
11 document, and so we know that this is a report dealing
12 with seismic hazards methodology. Now, and it's
13 attorneys' comments on this particular document.

14 Now, one might say, "Well, the subject
15 matter of this document is seismic hazards." So would
16 we simply have a separate column that says subject
17 matter and repeat basically for subject seismic
18 hazards methodology, or would we have to go in, look
19 at the attorney's comments, and somehow give a more
20 refined description of what the attorneys are
21 commenting on?

22 But regardless of either of those two
23 scenarios, and certainly in the first one you might
24 think it's just, in a sense, redundant information, it
25 ultimately doesn't affect the validity of the

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1 privilege. This is an attorney's -- Winston &
2 Strawn's outside counsel's comments on a draft report
3 shared with the client. That is what makes it a
4 privileged document, as long as it has not been
5 distributed to anybody else.

6 JUDGE KARLIN: Well, there was a
7 discussion in the -- in this proceeding about some
8 documents don't have titles.

9 MR. SHEBELSKIE: Yes.

10 JUDGE KARLIN: And there was a point I
11 think you all made, and others did of the same -- and
12 we said, "Well, if among other things there might be
13 a situation where you might not have a title, when you
14 might put the title," no title. But there would be a
15 subject matter.

16 And it may be the subject matter is
17 redundant with the title, and it may be it's not. The
18 title may be very cryptic and not tell us what we
19 really need to know. So I think the appropriate, you
20 know -- so we're looking for more than just the title,
21 but maybe not a whole lot more, just something which
22 tells us what it's about.

23 MR. SHEBELSKIE: Agreed. And --

24 CHAIRMAN MOORE: And, Mr. Shebelskie,
25 there's another point that one must keep in mind.

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1 When we started down this road in January, we knew of
2 the enormous number of header-only documents in what
3 had the previous year been a DOE collection.

4 So because it's going to be electronic
5 document discovery, electronic privilege logs, there
6 has to be a way to meld the fact that it's being done
7 electronically to make sense of it for someone trying
8 to look at documents and determine whether or not they
9 wish to pursue a challenge to a claim privilege.

10 And some of this information is so that,
11 in the electronic world, you can quickly make these
12 determinations. And why the title and the subject
13 matter description become critical to any worthwhile
14 search mechanism in the privilege logs. It's as
15 simple as that and trying to use this, because we were
16 faced with 125,000 documents; 25- to 30,000 of them we
17 learned subsequently would be primary -- what we're
18 calling primary privileges in an electronic setting.

19 MR. SHEBELSKIE: Well --

20 CHAIRMAN MOORE: And so that was part of
21 our thinking as well, that we have to make this
22 usable.

23 MR. SHEBELSKIE: Yes, sir.

24 JUDGE KARLIN: And, actually, at the time
25 we issued the January order, we didn't have the 130-.

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1 We were thinking a million documents, because that's
2 how many were header-only in the first iteration.

3 MR. SHEBELSKIE: And right now, as a
4 practical matter, I think we're really dealing with
5 the primary privileges here, and I think that number
6 will be probably be under 20,000.

7 CHAIRMAN MOORE: And --

8 MR. SHEBELSKIE: Which makes a material
9 difference perhaps to your approach to this.

10 CHAIRMAN MOORE: Judge Karlin mentioned
11 something that we are confident in our judgment. You,
12 of course, would resist such a notion. But we knew
13 with those kinds of numbers when we started, as Judge
14 Karlin just pointed out, a million document -- claims
15 of privilege for those documents -- that if they were
16 to be carefully examined, that number would shrink
17 dramatically.

18 And part of our purpose was so that we
19 would take out of the litigation arena things that
20 didn't belong there.

21 MR. SHEBELSKIE: Yes, sir.

22 CHAIRMAN MOORE: And, yes, that's
23 obviously painful, but not nearly as painful as having
24 to litigate hundreds, if not thousands or tens of
25 thousands, frivolous privilege claims.

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1 MR. SHEBELSKIE: And I think we are -- we
2 have spent the last year, then, going through those
3 million documents, and we're now, as I said, on these
4 primary privileges probably in the under 20,000 range.
5 And here is the practical issue that's entailed.
6 Let's take, again, the first line as an example.

7 Because the database that was set up to
8 track documents -- and this goes back, obviously,
9 before the spring. I mean, it goes back a couple of
10 years where we're setting up. It doesn't have subject
11 matter. Our coders can't just pull that up. And even
12 though you might think, well, it's just repeating
13 what's in the title in this one example, and so it
14 seems easy, that can't be done on our existing
15 electronic system.

16 So what would have to be done is the
17 document get transported into an Excel program, which
18 this is printed in, that a column create it, and then
19 someone go back after the fact and make another look
20 at that entry, someone who wasn't necessarily the
21 reviewer who coded it the first time through, and go
22 and look at it, how they have to pull up the document
23 and then create the subject matter, a separate subject
24 matter field.

25 And so you're basically adding a second

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1 level of review to add a subject matter column on
2 this, whereas if the reviewer, who is looking at it on
3 the computer, is making -- filling in these entries,
4 that person can pull up the document, is looking at
5 it, and say, "All right. Is the title an adequate
6 description of the subject matter?" If not, I will
7 include the subject matter when I describe the
8 document as was done, say, in the fourth entry here.

9 That's really the practical concern that
10 we have.

11 JUDGE KARLIN: Well, I think you -- as I
12 hear you, we are talking about two different practical
13 concerns. One is, I mean, there is an existing -- you
14 have an existing database that is created to comply
15 with the LSN requirements headers, what the header
16 fields are for the LSN. So that's one concern, that
17 there may be additional fields that are now being
18 asked for or prescribed in a privilege log.

19 The second is the requirement that someone
20 -- or a process occur whereby someone evaluate whether
21 or not the document meets the 11 elements, or 13
22 elements, or whatever it might be, for that particular
23 privilege. That I think would have to occur anyway.

24 MR. SHEBELSKIE: You probably have to
25 state it as --

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1 JUDGE KARLIN: Yes. It is occurring, yes.
2 I mean, you all are working on that. And now what
3 we're talking -- so I think that is occurring in any
4 event, and the question is: well, does it create a
5 requirement to transport the LSN database with eight
6 fields into a new database with 12 fields and fill in
7 those additional four fields?

8 I understand that's additional work. That
9 is essentially what was contemplated, the purpose
10 being, among others, to require a more careful
11 articulation of -- and substantiation of the privilege
12 in question and allow all of the parties and the Board
13 to understand what's being claimed, and to put the
14 claimant on its onus to make the prima facie case. So
15 that's really, I think, what we contemplated from the
16 beginning.

17 Now, the question really is: how much
18 time and effort would it take for these 20,000
19 documents to do that, for you all to do that?

20 MR. SHEBELSKIE: Right. And against the
21 backdrop that if we were certifying on the August
22 certification date, that will obviously trigger the
23 requirement that the privilege logs complete within so
24 many --

25 JUDGE KARLIN: Yes.

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1 MR. SHEBELSKIE: -- a couple weeks or
2 three or four weeks afterwards. So we have to think,
3 all right, what we have to do -- we have to do one of
4 two things. Either we have to stop our privilege
5 review now, so our litigation support people at CACI
6 can come up with a new template, a new workflow
7 application, so the future documents -- the remaining
8 documents can be reviewed. And we're probably 90
9 percent through the documents and the primary
10 privileges.

11 JUDGE KARLIN: Well, we're not suggesting
12 that you change your privilege review. But just
13 simply, when you do claim a privilege, you display the
14 information in a way that's most usable for the rest
15 of us.

16 MR. SHEBELSKIE: Well, I guess the
17 fundamental question is -- let's take, for example,
18 the fourth line here, the one -- the comments from Mr.
19 Hellstrom to his fellow attorney, Mr. DiNunzio.

20 You know, why -- I mean, if you were to
21 ask the State, NEI, or the Staff, if they were looking
22 at this entry, why doesn't this description help them
23 understand whether or not this is a privilege
24 document, and is one that they couldn't prima facie
25 assess whether they wanted to challenge or not, that

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1 would be my question, because if it does -- if this
2 format does convey the information to them, I think
3 the objective has been achieved.

4 JUDGE KARLIN: Do we know that Mr.
5 Hellstrom is an attorney?

6 MR. SHEBELSKIE: Yes, because --

7 JUDGE KARLIN: It says he works for OGC.
8 It doesn't mean that that person is an attorney --
9 DiNunzio. I mean, perhaps what you're contemplating
10 is a supplemental list somewhere, as you originally
11 talked about some months ago, that would say, "These
12 people are attorneys."

13 MR. SHEBELSKIE: Right. I mean, I could
14 go through this --

15 JUDGE KARLIN: That sort of thing.

16 MR. SHEBELSKIE: -- program and simply put
17 "George Hellstrom, attorney." I mean, you could
18 programmatically substitute to put that --

19 JUDGE KARLIN: Right.

20 MR. SHEBELSKIE: -- after his name,
21 although we thought that by saying he was with OGC
22 that's what we intended to me. That wasn't clear.

23 JUDGE KARLIN: Well, I mean, this is
24 certainly a familiar format. I mean, obviously, this
25 is the norm. We were -- that privilege logs often are

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1 presented in. There is a column which says what type
2 of privilege is being claimed, and a column that has
3 comments. And that comment is a narrative discussion
4 where we've got to sort through and find out -- well,
5 let's see, where are each of these elements, you know,
6 established? Are they established here or not?

7 MR. SHEBELSKIE: And so I -- you know, the
8 question would be: is the description of the document
9 in the comment field -- is that the level of
10 information that satisfies the Board? I mean, I
11 understand you say you might want to know the common
12 subject matter.

13 But in terms of trying to describe the
14 document, have we had it altered by an attorney at
15 OGC, sent to a fellow member of the Office of General
16 Counsel fellow attorney, providing comments on this
17 particular document, and we described it this way, is
18 that sufficient? Because that is the basic paradigm
19 that we're using for our descriptions of the documents
20 for sure.

21 JUDGE KARLIN: Well, an attorney to an
22 attorney document probably, you know, is not going to
23 be a problem or an issue. I'm not sure whether that's
24 a perfect example. In fact, at one point I think you
25 all had proposed, and we had debated, whether or not

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1 intra-attorney communication should just be simply
2 deleted from --

3 MR. SHEBELSKIE: And as it turns out,
4 really by random happenstance, the next entry is an
5 example of one of those, the last entry on the first
6 page.

7 Now, we have to go through and clean up
8 any -- you look at the author's name. You see this
9 Ming Zhu, and you see all this stuff around it.

10 JUDGE KARLIN: Right.

11 MR. SHEBELSKIE: Now, that -- we will
12 clean that -- that's codes to us as to what
13 organization that person is in, and so that will get
14 cleaned up just like the DOE/OGC. But the basic
15 format here is this is an e-mail from Mr. Zhu, a non-
16 lawyer, to his fellow colleagues on working with him
17 on a particular subject matter, copied Sheldon
18 Trubach, who is an attorney, he indicated is an
19 attorney.

20 And the privilege is this is an attorney-
21 client communication, and it also -- it's a
22 communication from the attorney to the client, and it
23 discusses the attorney's advice. And the description
24 explains what the document is -- that Mr. Zhu
25 forwarded -- that Mr. Trubach wrote an e-mail in

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1 response to a request for legal advice on the topic
2 about the commencement of the 10,000-year period, and
3 that he relayed that to Mr. Zhu, and Mr. Zhu then
4 forwards that to his colleagues.

5 That's an example of a communication that
6 we think is privileged. But, again, it tells the
7 reader who reads this what's going on in this
8 document.

9 JUDGE KARLIN: Okay. I mean, perhaps it
10 would be useful if we could hear from the State and
11 the Staff, perhaps the Staff -- the State first. I
12 understand you conceptually have agreed to this
13 approach. Do you understand where we were trying to -
14 - what we were trying to get to in the first place?
15 And do you -- you know, we think this will make it
16 easier for all of us to understand whether a privilege
17 claimed is truly deserving of the privilege.

18 Now, you are in the position of both a
19 party who presumably claimed some privileges, and a
20 party who may challenge some privileges. I mean,
21 everyone in this room probably is. What's your
22 assessment?

23 MR. MALSCH: Well, we did not ask for
24 reconsideration of this part of the Board's case
25 management order. So we're perfectly prepared to go

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1 along with the order as originally drafted. We were -
2 - we didn't object to the DOE's request for
3 reconsideration, because, based on the representation
4 that all of the information in the appendices would be
5 found in the way they were going to do the privilege
6 logs, although I would say we were a little concerned
7 about whether we would be hampered in actually
8 evaluating the privileges in that matter.

9 But we thought that, frankly, if all of
10 the information was there, and we opposed DOE's
11 reconsideration requests, we'd be accused of delay for
12 delay's sake.

13 It's hard to evaluate how this is going to
14 work out. If I look at the sheets here, some of them
15 may, in fact, contain all the information in the
16 Board's appendices. Others -- for example, I'm
17 looking at a few on page -- 37? The print is very
18 small. 31. Looking at the -- let's say the bottom
19 three entries. There appears to be lots of missing
20 information.

21 So, I mean, it's hard for us to evaluate
22 right now how DOE's proposal is actually going to work
23 in practice.

24 MR. SHEBELSKIE: And on that, Mr. Malsch,
25 no doubt, as I said, this is a draft, because at a

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1 very high level people sitting at this table even will
2 read these entries and make sure that the descriptions
3 are adequate.

4 The point here is, really, some of the
5 examples we looked at on the first page and throughout
6 this document. We aren't saying that each one of
7 these entries is perfect yet, but the point is, if you
8 had something like the two that we looked at on the
9 first page, two or three, is that -- does that convey
10 the meaning?

11 CHAIRMAN MOORE: Mr. Shebelskie, let me
12 express one of my many concerns, and this is not
13 directed at you or your privilege log. Just generally
14 speaking, privilege logs in the normal run-of-the-mill
15 litigation are -- when there's only a handful of
16 documents involved, everyone puts up with it. You
17 figure it out. It's kind of like doing the Sunday
18 crossword puzzle.

19 When we have the number of documents that
20 we're dealing with here, privilege logs tend to
21 obscure and obfuscate the information when they're
22 done in this manner, sometimes deliberately and
23 intentionally, to cover over the fact that a critical
24 element is missing. Or what we hear is, well, if you
25 take in column 3 this piece of information, and this

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1 piece of information from column 5, and this piece of
2 information from column 6, it has clearly implied
3 that.

4 Well, I'm the first one to concede that at
5 my age "clearly implied" is giving me a lot of
6 trouble. It's not always clearly implied to me, and
7 then we have to go through the drill of trying to
8 break these out.

9 What we had intended, starting in January
10 with the use of the word "format" where we used it
11 repeatedly, was to break the mold because of this is
12 unique litigation. This is not a hundred privilege
13 logs where everybody just makes do and puts up with
14 it, and mine are going to look like that, yours are
15 going to look like that, and we have a ladies and
16 gentlemen agreement that you don't ruffle feathers and
17 we won't ruffle feathers. And that's the way we've
18 all been practicing law for years.

19 This is a unique situation. And, frankly,
20 because it's done all electronically and these
21 privilege logs are going to only be able to be
22 reviewed electronically, which makes it in and of
23 itself a more difficult task, this model I think will
24 ultimately extend the amount of work that everyone
25 involved having to use it will have to put in.

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1 And I abhor the notion of making any party
2 do anything that is not needed just for the sake of
3 doing it. But I don't, frankly, see at this point how
4 the way this privilege log that you've put in front of
5 us, recognizing that it is a draft, is going to
6 clearly and distinctly set forth these elements, so
7 that there's no question of whether you did or you did
8 not meet that element and made your prima facie case,
9 which was the whole point of the exercise, and, I
10 might add, an exercise that we spent an enormous
11 amount of time and blood over in trying to come up
12 with a system that we thought would be eminently
13 workable, efficient, and fair to all.

14 That said, let's move on and hear what the
15 Staff has to say.

16 MR. WEDEWER: Your Honor, I have very
17 little to add. I'd like to state we did not object to
18 DOE's motion in this case. Having said that, like
19 DOE, we want to remain in conformance with what the
20 Board's substantive intent is with regards to this log
21 -- these logs. And I think, based on your comments
22 this morning, we're more appreciative of that.

23 So in total, Your Honor, we're prepared to
24 support whatever is done here.

25 JUDGE KARLIN: Well, there's an equation.

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1 There's an equation of work and effort, and there's
2 more work on the front end to do -- to break it out
3 into the separate elements by the parties claiming the
4 privileges. And all of you would be in that boat and
5 doing more work in that respect.

6 We think there is significant -- we think
7 there is less work on the back end in terms of
8 evaluating and resolving disputes concerning the
9 privileges if it's broken out in that way. As Judge
10 Moore said, I mean, in a normal case, 100 -- a
11 privilege log with 100 or 200 or 300 documents, the
12 attorneys usually work it out, understand what they've
13 got there. The privileges are just attorney work-
14 product, attorney-client communication, maybe a few
15 deliberative process privileges.

16 We're talking about quite a few others,
17 you know, in the secondary area. Hopefully there will
18 be few disputes on those, but there may be. And, you
19 know, rather than having one long field, our thought
20 was to break it out.

21 Now, I don't know that -- I can only speak
22 for myself. I'm not sure whether we're -- it's set in
23 stone, but it is something that is our contemplation,
24 and we want to do the most efficient thing we can to
25 manage this process going forward, recognizing only

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1 three of the parties, you know, are speaking here now
2 and have addressed this and asked clarification.

3 I don't know whether NEI has anything that
4 they -- they contribute or -- on this.

5 MS. GINSBERG: Your Honor, this will
6 probably not affect us in any marked way. But we are
7 concerned about the balance between the burdens and
8 the notion that, as you've described it, there's a
9 tremendous amount of up-front work that may need to be
10 done to clarify along the lines that you're talking
11 about versus what currently exists in DOE's proposal.

12 I think I would echo what has already been
13 said, which is that some of these entries seem to be
14 perfectly adequate, at least from our perspective,
15 with respect to obtaining sufficient information to
16 determine whether there would be a privilege
17 appropriately claimed and/or a need to challenge.

18 We labor under the -- a bit of a
19 problematic situation, because we don't have the log
20 in front of us. But at least from what we saw on the
21 board, it appeared that many of the entries were
22 sufficient.

23 JUDGE KARLIN: All right. Thank you.

24 I mean, we would be faced with a
25 situation, Mr. Shebelskie, I think that if we were to

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1 accept this privilege log, this format, then we have
2 the appendices, and someone would challenge, maybe
3 someone not at the table here today, a particular
4 claim and say, "Well, where is it shown that attorney-
5 client communication, Appendix A, Element 7, is
6 provided" -- the relationship between the person
7 listed in question 5 and question 6, or, you know, a
8 statement that the document was created and
9 subsequently handled in a privileged way with any
10 exceptions listed.

11 Now, I guess you said that you'd add a
12 column for that.

13 MR. SHEBELSKIE: We'd add a column on
14 that.

15 JUDGE KARLIN: But if they come forward
16 and say -- and challenge the prima facie case, and
17 point to a particular element, and you can't point
18 right back to something that satisfies that element,
19 you lose and that element is produced.

20 MR. SHEBELSKIE: On Element 7, for
21 example, taking the fourth row, you would say, "What's
22 the relationship?" Well, it's one attorney in OGC.
23 It's a document sent from one attorney at the Office
24 of General Counsel to a fellow attorney at General
25 Counsel. That describes the relationship between

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1 them.

2 JUDGE KARLIN: Well, let's go to the last
3 one on the first page where Mr. Zhu is e-mailing to Rob
4 Howard, Gene Younker, blah, blah, blah. They're all
5 with RW/DOE. What's their relationship? Are they
6 superiors? Inferiors? Equals? You know? Clients?
7 Attorneys?

8 MR. SHEBELSKIE: They are non-attorneys in
9 the Office of the Repository Development, which is
10 what you need to know for the privilege issue.

11 JUDGE KARLIN: No. I'm not so sure
12 whether that's sufficient. I mean, we did have a
13 discussion about the communications, intraclient
14 communications of attorney-client advice, attorney
15 advice.

16 MR. SHEBELSKIE: Right.

17 JUDGE KARLIN: And one of the points I
18 think that that communication needs to go to perhaps
19 the control or to someone who is has a reason -- a
20 need to know that information in some way related.
21 And that just doesn't tell us that. It just says it
22 was -- these are other people in the same office. Are
23 they part of some key group that need to receive that?

24 I mean, if I'm working in a corporation,
25 and legal advice is obtained and then is shared with

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1 the Board of Directors, that's one thing. If it's
2 shared with, you know, the general staff, that's a
3 different thing. So I don't know that you would meet
4 that element of this particular one.

5 MR. SHEBELSKIE: And you might say this is
6 the way it ended up at the end of the day. You might
7 say, "Well, Shebelskie, you didn't provide enough
8 information."

9 JUDGE KARLIN: Right.

10 MR. SHEBELSKIE: That's fine. If that
11 were the outcome --

12 JUDGE KARLIN: I mean, one of the --

13 MR. SHEBELSKIE: -- I could accept that,
14 but the question is: if you put into this comment
15 field, all right, this is an e-mail from -- I mean,
16 after their names and the authors and recipients
17 fields, we're going to indicate the organizations that
18 they're with.

19 You say, all right, this is an e-mail from
20 Mr. Zhu to his colleagues working on this topic,
21 forwarding Mr. Trubach's e-mails. You know, again,
22 we're not trying to say whether a particular entry on
23 this draft is sufficient --

24 JUDGE KARLIN: Right.

25 MR. SHEBELSKIE: -- but whether if the

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1 comment field encompassed the description that was
2 appropriate.

3 JUDGE KARLIN: It might. It might. I
4 mean, what I think we're -- I'm saying is that
5 initially it was seen that that one would not be
6 sufficient. And as we've written the case management
7 order, you would not get a chance to supplement and
8 say, "Oh. But, Your Honor, Mr. Howard is so and so,
9 and Ms. Younker is so and so. And now we're going to
10 explain to you why those people are in the, you know,
11 control group, or somehow need to know this legal
12 advice."

13 You can't supplement. You're out. You
14 lost.

15 JUDGE ROSENTHAL: Let me ask you this
16 question, so that I fully understand your position.
17 Are you saying that your format ensures that all of
18 the information that would be reasonably required by
19 other parties and by the Board will be provided
20 through the comment section?

21 Or are you saying that, on a cost-benefit
22 balance, given the -- what you say is the substantial
23 additional work that would be required to conform to
24 what was stipulated in the second case management
25 order, that on that cost-benefit balance that we

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1 should consider your format as being sufficient, given
2 what you would include by way of comment?

3 MR. SHEBELSKIE: It is the former. It is
4 a question. It is not a concern based on substance
5 and a need to meet the substantive elements that the
6 Board has set forth. Rather, it is a question and the
7 format -- the packaging of that information.

8 Because what we are endeavoring to do --
9 the way our system has been set up historically
10 permits us -- does not permit us, through our existing
11 electronic database, to have a format that comports to
12 11 columns for attorney-client communications, maybe
13 11 or 12 of the litigation work-product, and maybe a
14 different 15 for deliberative process.

15 Not only do we have to change our existing
16 electronic database, we have to create different
17 templates for each of these three different primary
18 privileges.

19 So, instead, our point is if the comment
20 field provides the additional substantive information
21 that is needed to fill out the picture, to meet
22 whatever the requisite elements are for the privilege
23 at issue, we would suggest that that satisfies the
24 objective. It provides the substantive information
25 the Board says it needs for a prima facie case, and it

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1 enables us to operate in the existing structure that
2 we have.

3 JUDGE ROSENTHAL: There might be a
4 difference of opinion over whether what you've chosen
5 to include in a particular comment segment didn't
6 cover all of the elements.

7 MR. SHEBELSKIE: Absolutely. But just
8 that they're -- that same difference of opinion may
9 exist. Even if we had, say, the 11 columns for
10 attorney-client privilege, no doubt people may
11 disagree whether what we put into those 11 columns was
12 adequate, but that goes to the substantive adequacy of
13 our information.

14 JUDGE ROSENTHAL: I appreciate that, but
15 isn't it likely that there would be less room for
16 serious question as to whether the entire waterfront
17 had been covered if these various additional items
18 were included?

19 MR. SHEBELSKIE: With all respect, Your
20 Honor, I don't see that, because if you're looking at
21 a comment field, I mean, you have the title, the
22 recipients, what organizations they're with, whether
23 they're attorneys or non-attorneys, titles, and the
24 comment. You read it.

25 Judge Karlin was easy -- was readily able

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1 to say with respect to this last example on page 1
2 that he didn't think that with this intracommunication
3 among non-attorneys that that was adequate. You know,
4 if we had broken it out into 11 columns with this --
5 and had kept this level of detail on it, again, you
6 would have had presumably no problem saying it doesn't
7 -- it's not there.

8 JUDGE KARLIN: No, I'm not so sure. I
9 think if you had broken it out and explained the
10 relationship between the persons listed, you know, it
11 might have been helpful. We might have had a
12 substantiated privilege.

13 MR. SHEBELSKIE: And if we did that same
14 breakout and description that Mr. Zhu is a non-
15 attorney, works -- he works in subject matter,
16 whatever capacity he has --

17 JUDGE KARLIN: Well, I mean, how would we
18 tell from this entry whether or not the people to whom
19 he had forwarded this e-mail with the legal advice
20 were in the circle of people who needed to know that
21 information? Is it implicit? Are we just supposed to
22 assume that --

23 MR. SHEBELSKIE: No.

24 JUDGE KARLIN: -- obviously that's true?
25 How do we know whether all three or eight of these

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1 people meet those criteria? Maybe he's telling it to
2 some colleagues who he is going on a fishing party
3 with the next day, and they want to yuk about it or
4 something. I don't know.

5 MR. SHEBELSKIE: I understand your concern
6 with the level of information provided in this one
7 example. But if we answered -- gave you even the
8 Nirvana description that you imagine for this document
9 in this comment field, that data is there -- are there
10 in that comment field.

11 CHAIRMAN MOORE: But take the example
12 Judge Karlin just had, in your going through that
13 exercise, you would have either put -- and
14 supplemented the information so that it was there, if
15 it was available; or, two, you would have -- if acting
16 in good faith, withdrawn the privilege claim, which is
17 one of the points of the exercise.

18 Turn to page 32. You'll need a magnifying
19 glass to find your page. The last entry, I believe it
20 -- the little numbers, I guess it would be 141.

21 MR. SHEBELSKIE: Yes.

22 CHAIRMAN MOORE: Now, the first column has
23 an ALA and a number of digits. And that's a DOE
24 number? Where's the LSN number for that document?

25 MR. SHEBELSKIE: That actually raises a

1 question. Actually, the State had independently
2 identified and talked -- we talked about this morning.
3 The LSN participant of session number may not be
4 available on the document up front and at times.

5 Obviously, these documents are being
6 tracked in our system. Some of these documents are in
7 the system from a long time ago.

8 CHAIRMAN MOORE: Okay.

9 MR. SHEBELSKIE: Before they ever get on
10 it. So for our internal tracking purposes, we are
11 following them along by participant or session number,
12 because not all of these have been indexed and --

13 CHAIRMAN MOORE: Okay. But the only way
14 a user on either -- if they get trained and get a
15 password for the major players, such as the State, on
16 a DDMS, or if they drill down in the EHD where these
17 will be chunked up into somewhat usable sizes, can
18 track it -- trace a document from using the LSN, where
19 there's a bibliographic header only, and see that
20 there's a privilege claim and then follow it over to
21 the privilege log to examine it, is through the LSN
22 number, without adding an enormous number of steps
23 they have to go through, because it's an electronic
24 system.

25 Secondly, let's take that last -- last

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1 column. Now, you're claiming a litigation work-
2 product privilege. Could you just take that one and
3 run through the Appendix B elements?

4 MR. SHEBELSKIE: No. Because I said none
5 of -- cannot look at any particular entry here and
6 say, "We will, at the end of the day, rest on this."
7 This is still a draft, and that's why I hesitated in
8 giving it out, but certainly gave the warning on it.

9 CHAIRMAN MOORE: I understand. But from
10 what I'm looking at, though, with the comment field,
11 this document contains specific comments on SAR
12 Section 5915. No particular author or participant is
13 noted in the document.

14 Now, that said, and you look at the
15 elements on Appendix B, you're going to have to --

16 MR. SHEBELSKIE: We couldn't stand on that
17 kind of statement. I'm not suggesting that we were.
18 The point is: these documents are coming through a
19 process. Remember, we had the million documents. So
20 you have a reviewer pulling up this document, looking
21 at it, and is providing the information to us as to
22 what this document is about.

23 If this person says, "We don't know who
24 the author is, we don't know the date it was -- we
25 don't know who the author is, we don't know if it was

1 an attorney/non-attorney," we can't provide that
2 information, then, no, we can't claim privilege on it.

3 JUDGE ROSENTHAL: All right. Well, let me
4 ask you this question. I realize this is a draft and
5 shouldn't be taken as representing what you would, in
6 fact, submit. Now, let us suppose that we adopt or
7 accept your proposed format. And with respect to some
8 items in which you employ this format, we were to
9 decide in response to a challenge to the claim of
10 privilege, that what you have provided using your
11 proposed format is unsatisfactory, in that we don't
12 think that you've covered in your privilege log using
13 your format all of the required elements. Then,
14 you're just out of luck, aren't you?

15 MR. SHEBELSKIE: If the privilege
16 challenge is based on the fact that we did not set
17 forth all the elements, as I understand the order,
18 that is correct.

19 JUDGE ROSENTHAL: So that what you're
20 saying, I guess, is that you're assuming that
21 employing your format you're going to be able to
22 ensure that, with regard to any items for which you're
23 claiming privilege, that that format will enable you
24 to cover all of the elements.

25 MR. SHEBELSKIE: Yes, sir.

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1 CHAIRMAN MOORE: Mr. Shebelskie, can a
2 prima facie case be made with an implication? By
3 that, I mean, when you're not spelling out each of the
4 elements as we've spelled out in Appendices A, B, and
5 C, of the second case management order, but, rather,
6 you lump things together in a comment field where they
7 may or may not be clearly spelled out, and then the
8 argument is, but if you take the first sentence in the
9 comment field and combine it with this phrase in the
10 fifth sentence and the last sentence, it is implied X.
11 Can that meet a prima facie case?

12 MR. SHEBELSKIE: I'm not sure how to
13 answer that. I'm not trying to suggest that we are
14 advocating that.

15 CHAIRMAN MOORE: I'm --

16 MR. SHEBELSKIE: It's a very general,
17 abstract question.

18 CHAIRMAN MOORE: I see this problem as one
19 brewing. And, frankly, it's one that I and my
20 colleagues worked very hard to make sure we wouldn't
21 have to confront, because so much of it in that case
22 is in the eye of the beholder. And we're deeply
23 troubled by that, and by spelling these things out it
24 takes all of those elements out of the picture.

25 Much the same way that Judge Karlin raised

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1 before, well, how do we know that this person is one
2 that's in the circle of need to know?

3 MR. SHEBELSKIE: But that issue goes to
4 the substantive sufficiency of the description or
5 information provided. Whether it's formatted in a
6 comment field or a separate column --

7 JUDGE KARLIN: Well, I think ultimately
8 that's true. But if we break it into a separate
9 column, it makes it all the more apparent to everyone
10 -- I mean, to you, and well, maybe we didn't. We
11 really shouldn't claim privilege on that document.

12 Or if you've, in fact, filled in that
13 column, you know, showing the relationship of the
14 parties, say, "Well, these people are in the need to
15 know. These -- you know, this gentleman is forwarding
16 this legal advice to the Board of Directors or to the
17 senior management."

18 MR. SHEBELSKIE: Right.

19 JUDGE KARLIN: Hoping that makes it clear.

20 MR. SHEBELSKIE: I have two comments. One
21 is, of course, the order imposes on participants who
22 are interested in making challenges and meet -- and
23 confer obligation to meet and confer in good faith.
24 So if someone -- you know, someone looks at a
25 privilege log and really wonders who Secretary Bodman

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1 is, and doesn't understand why he might be in a
2 control group, okay, they can call and meet with us.

3 But the other point -- ultimately, this
4 boils down --

5 JUDGE KARLIN: Let me stop you on that
6 one. I mean, let's -- if I'm challenging your claim
7 of privilege, and I say I'm going to meet and confer,
8 I'll call you up and ask you, this doesn't cut it, Mr.
9 Shebelskie. It doesn't seem to make the grade. This
10 element here requires you to explain, and this doesn't
11 explain it.

12 And you say, "Oh, oh, well, let me explain
13 to those people. I'll tell you who they are. They're
14 so and so." And I say, "Well, yes, but you didn't
15 make a prima facie case on this piece of paper." So
16 I'm still going to have my challenge. Would that be
17 appropriate for that person to do at that point? Say,
18 "Well, if a prima facie case is not made, then some
19 supplementary explanation doesn't -- is not allowed to
20 get it over the threshold."

21 MR. SHEBELSKIE: We understand that's how
22 the order works with respect to that.

23 JUDGE KARLIN: Okay.

24 MR. SHEBELSKIE: But ultimately, you know,
25 this does go to a timing, a manpower, and resources

1 question. We did some calculations here, say 20,000 -
2 - because to go out and now format separate privilege
3 log formats for the three primary privileges, because
4 there are different elements for each, so we can't
5 just have even one unified electronic template on our
6 database. We have to have at least three, and
7 sometimes documents are going to be covered by
8 multiple privileges, have to go out through each of
9 those systems.

10 But let's just take the simple scenario
11 where what we would do is use our existing database
12 structure, print out a report like we have here, and
13 then say, "All right. We're going to add columns and
14 supplement based on the appropriate privilege." If
15 you just took 20,000 documents and assume you spent a
16 very conservative 10 minutes per document, which is
17 six documents per hour to supplement this, and that's
18 -- that's -- I think it's 3,300 hours of work to do,
19 which is the equivalent of one and a half manyears of
20 labor, on the assumption that a person works 1,800
21 hours a year.

22 JUDGE KARLIN: Well, I think we --

23 MR. SHEBELSKIE: So it's not an idle
24 undertaking to go back and reformat this into all of
25 the different structures.

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1 JUDGE ROSENTHAL: So what you're saying,
2 again, is, one, that there's a substantial amount of
3 work involved in complying with the second case
4 management order in this respect.

5 Two, that insofar as you're concerned, it
6 is possible for you, on the format that you suggested,
7 to cover all of the elements of the particular
8 privilege being claimed clearly, so there can be no
9 doubt about it.

10 And, three, that you assume the risk of
11 our determining, with respect to a particular item,
12 that notwithstanding your expectation we do not find
13 that all of those elements are included in your
14 format.

15 MR. SHEBELSKIE: Yes, sir. All true.

16 JUDGE ROSENTHAL: Is that --

17 MR. SHEBELSKIE: Yes.

18 JUDGE ROSENTHAL: -- the bottom line of
19 what you're telling us?

20 MR. SHEBELSKIE: Yes, sir.

21 JUDGE ROSENTHAL: Okay.

22 MR. EAGAN: Your Honors, could I add
23 something from the State's point of view? I've been
24 getting educated myself as to why -- what it is you
25 want, and why it's of great benefit I believe. I

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1 think that what DOE is proposing would result in
2 Nevada essentially doing a review of their privilege
3 log to see whether it complies with your appendices,
4 which is a very different kind of review than we
5 otherwise would have done if the requirement were to
6 follow the appendices in a column form.

7 Where there we would be looking at
8 substantive challenges, like do we really believe -
9 even though they have met all of the requirements of
10 your appendices, do we really believe it's still
11 privileged? Or do we believe that like 90 percent of
12 this document ought to have been redacted and provided
13 to us, for example?

14 So it seems to me that if -- if we leave
15 it in the format that DOE is now proposing, we could
16 end up, out of 25,000 documents, saying the following
17 3,000 we believe do not meet your appendices. And it
18 seems that we would be going through these documents
19 one at a time to see whether or not they adhered to
20 every one of the subsections of your various
21 appendices.

22 Whereas if the requirement were to apply
23 that kind of discipline in the review up front, it
24 seems to me there would be very few challenges, and
25 they would be only substantive.

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1 CHAIRMAN MOORE: Well, that was what we
2 had in mind back in January when we started using the
3 word "format." Then, we were faced with this enormous
4 number of challenges, probably unlike any litigation
5 before. And that the burden is on the privilege
6 claimant in every instance to sustain the privilege.

7 And if I understand you, Mr. Eagan, it's
8 not our intent by prescribing a format that your
9 determination is whether or not this is a document
10 that's useful to you, you're going to still challenge
11 it because they didn't meet the format.

12 MR. EAGAN: That's exactly right. I mean,
13 it seems to me a huge liability for DOE as far as I'm
14 concerned, because I -- I would think it would be very
15 difficult to meet all of these requirements in this
16 sort of a format.

17 JUDGE ROSENTHAL: Well, DOE claims they're
18 able to do it, and it's at their peril, is it not?
19 If, in fact, they follow this format that they've
20 suggested, we agree to it, and it turns out that that
21 format is not a satisfactory vehicle for covering all
22 of the elements with respect to certain items, maybe
23 many items, they lose if there's a challenge.

24 CHAIRMAN MOORE: Mr. Eagan, do I
25 understand you correctly that in your view, if DOE, in

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1 fact, in doing its log, under its currently claimed
2 privilege document group, many of them would -- they
3 couldn't find privilege for, because they couldn't do
4 this?

5 MR. EAGAN: That's what I believe. I
6 believe that that kind of discipline up front and a
7 checklist with all these columns for every
8 subrequirement of every appendix, you just go down the
9 list, do you meet them? If you don't, it's out. I
10 mean, you don't put it in, and so --

11 CHAIRMAN MOORE: Well, that's precisely
12 one of the three reasons that we set out on this
13 course, knowing that the privilege claimant had that
14 burden. Too, it would seem to me -- and I believe my
15 colleagues -- that anyone viewing the log would
16 instantly recognize that, no, this one is not worth
17 challenging, because they've made a prima facie case,
18 unless I have affirmative evidence that shows that the
19 privilege was waived or something else. That would be
20 an enormously small subset.

21 And, finally, when in that small subset of
22 cases it came to us, we could decide them very, very
23 quickly. That was the point of this exercise. And
24 you essentially concur that that would be the outcome.

25 MR. EAGAN: Yes, sir. I -- you know, I

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1 don't dispute that DOE could have an amazing comment
2 field that itself had all of the checklists in it that
3 might go all the way down the page for one document.
4 But I don't think that's likely, and it seems to me
5 that we would end up here challenging a very large
6 swath of documents, which would have to be gone
7 through one at a time.

8 JUDGE KARLIN: Can I -- if I may change
9 the subject. I mean, I think there is, as Judge
10 Rosenthal has pointed out, you know, sort of -- you've
11 assumed the risk, or you're proposing to assume the
12 risk of this approach, Mr. Shebelskie.

13 And, of course, that would be inherent
14 anyway, I think, you know, if we would go that way.
15 But let me talk about Appendix E and Appendix F. You
16 know, those are the ones where, you know, let's say
17 proprietary protection -- here, again, we have a
18 number of elements.

19 Would you contemplate the privilege log be
20 the same document, you know, as we've got here, and
21 just the last two columns would say the type of
22 privilege and a comment field that would then fill
23 that in?

24 MR. SHEBELSKIE: The numbers of documents
25 in those secondary privileges are relatively small.

1 And the number of documents in that -- those small
2 categories that we think will be the subject of
3 challenges to the underlying privilege, as opposed to
4 the extent of the redaction, will be even much
5 smaller.

6 I mean, for example, order of magnitude,
7 we're probably down to 2,000 business -- relevant
8 business proprietary documents, maybe 3,500 relevant
9 privacy documents. As I said, you know, the vast, if
10 not all of them, being redacted, because it's the sort
11 of no questionable -- no doubt privilege privacy
12 information, identifying information.

13 So we don't see, at this point -- we could
14 create ad hoc privilege logs for challenges, if
15 they're brought in good faith, to those documents,
16 because we think the number of good faith privilege
17 challenges in those secondary categories are going to
18 be minuscule.

19 And we don't -- and we haven't already
20 started the process of creating those privilege logs,
21 because we're doing the redactions, unlike the fact
22 that we're, you know, 90 percent through going through
23 the primary privilege documents.

24 JUDGE KARLIN: Okay.

25 CHAIRMAN MOORE: Mr. Shebelskie, in the

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1 event that we were to accept your view at this point,
2 and then there are challenges engendered, speaking
3 only for myself, I think we're into a pay me now or
4 pay me later situation.

5 And any brief defending that privilege by
6 DOE, I would expect each of the elements in these
7 appendices to be spelled out and paired up with the
8 precise information in this privilege log to show how
9 you met that -- those elements.

10 MR. SHEBELSKIE: Right. And if we're
11 responding in a brief to a good faith motion to
12 compel, that's a far lesser burden than saying we have
13 to do it up front for all 20,000 documents when I
14 really think that the vast lion's share of them will
15 not be subject to any challenge.

16 CHAIRMAN MOORE: If we were to accept your
17 approach, what changes to the second case management
18 order would be necessary to implement that?

19 MR. SHEBELSKIE: Because this motion for
20 reconsideration did not go to the elements -- we
21 previously briefed our position on the elements, and
22 the Board has made its position on that. I think just
23 the language that you have -- that we proposed in our
24 motion, which was that the privilege log needs to
25 adequately address each of those elements for purposes

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1 of making the prima facie claim. You already have
2 other provisions in the order.

3 The consequence is if you don't make the
4 prima facie claim, or if it's a challenge on a prima
5 facie basis, you can't supplement, etcetera, etcetera.
6 I think it's just one -- the one modest change that
7 will be put in our motion.

8 JUDGE KARLIN: Well, no, actually --

9 MR. SHEBELSKIE: Okay.

10 JUDGE KARLIN: -- there will be three
11 pretty substantive changes. Paragraph Roman
12 numeral II(i), format of privilege logs, lays out
13 pretty explicitly the privilege log formats to follow
14 what we've laid out, III(e) and --

15 MR. SHEBELSKIE: Wait a minute, Judge.
16 You're going too fast for me. The first one again
17 was?

18 JUDGE KARLIN: The first one is Roman
19 numeral II(i). I mean, we're not going to write it
20 here. We're certainly just discussing it. But there
21 are three pretty substantial changes.

22 On page 8, format of privilege logs, "The
23 format of each privilege log shall include separate
24 fields, columns," blah, blah, blah. That whole
25 paragraph -- much of that paragraph goes.

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1 Roman numeral III(e) -- let's see, what
2 page is that? Page 13. Form and format for primary
3 privileges. There we will need some changes. The
4 second sentence, a rating of -- of format, I think you
5 cited that in your -- your concern.

6 I think we have the same situation on,
7 what is it, 18 in -- in the secondary privilege arena,
8 Roman numeral IV, I guess it would be (e), form and
9 format for secondary privileges, a parallel paragraph,
10 you know, laying that out.

11 I mean, we tried to be relatively
12 explicit. That's what we wanted. You're suggesting
13 something else. I think it's ultimately --
14 personally, I think it's ultimately a cost-benefit
15 sort of analysis. Either do the work up front or do
16 more work later in the process perhaps.

17 CHAIRMAN MOORE: Mr. Shebelskie, one other
18 thing that will happen by the carefully laid plan that
19 we put forth, because it is an electronic media, and
20 which all will be working, by uniformity, then, across
21 the different collections, they would have all been
22 done the same way.

23 So that when one is using the EHD, if one
24 isn't permitted to come onto the DDMS, there would be
25 uniformity and not utter chaos and confusion, because

1 each collection's privilege log will be totally
2 organized differently.

3 Now, if we were to accept what you say,
4 every other party is entitled to do the same thing,
5 and engender that -- and organize it any way
6 willynilly they want through the electronic media.
7 How do you respond to that?

8 MR. SHEBELSKIE: Of course, the practical
9 issue is what we've heard before, at least the State
10 says they may have 1,000 privilege documents over the
11 course of the proceeding, not even at their initial
12 LSN certification. I think the Staff's numbers were
13 approximately the same over the course of the
14 proceeding.

15 And I would think that they are the second
16 largest collections of any other likely participant,
17 as far as I know. So the -- let's take the worst-case
18 scenario, then. What we're talking about is a -- at
19 some point over the course of a three-year proceeding,
20 a privilege log from the State getting up to 1,000
21 entries. I don't think that that's such a volume that
22 it creates a practical issue of chaos.

23 CHAIRMAN MOORE: Well, here is the
24 problem. When these are in the EHD, which is the only
25 avenue most potential parties at distant locations

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1 will have coming in through the agency's EHD, these
2 will appear.

3 MR. SHEBELSKIE: These privilege logs.

4 CHAIRMAN MOORE: Privilege logs will
5 appear, and one will have to be using the LSN
6 bibliographic header and the privilege log to make any
7 determination -- and drill down, because they will be
8 just chunked up in the EHD for most small users, and
9 to go through and make any sense of that process.

10 The privilege logs for the primary
11 privileges and, indeed, any secondary privileges that
12 subsequently come into play, will be presumably
13 different, and perhaps markedly so, by the State of
14 Nevada from the DOE collection, from the NRC
15 collection, from anybody else's collection.

16 So that puts into the mix another factor
17 of making it most difficult in an electronic world for
18 people to use these.

19 MR. SHEBELSKIE: If I understand the
20 concern, though, Your Honor, if I am some other
21 participant not at this table here, and I want to look
22 at DOE's privilege logs, potential challenges, I go to
23 the -- we file our privilege log on the EIA, it goes
24 into an electronic document I suppose, I pull up the
25 DOE privilege log with -- I don't know how many

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1 columns there are. There are 10 or whatever. And
2 what's important to me --

3 CHAIRMAN MOORE: No, no, it won't show up
4 when EHD is like this. You can't possibly get all
5 that information in -- come onto a computer screen.
6 It'll be broken into multiple pages contained within
7 many, many multiple pages.

8 Assume you have 25,000 pages of a
9 privilege log as the DOE privilege log. That will
10 have to be chunked up in the EHA and call them, just
11 hypothetically, arbitrarily, 1,000-page increments.
12 So there will be 25 different sections, and you'll
13 then have to drill down through that to find the
14 particular one you want, and it will be on multiple
15 pages because all this information with your columns
16 won't fit an EHD coming off a pdf file format on the
17 screen.

18 So if yours looks different than anybody
19 else's, you've just -- it's one more complicating
20 factor. Now, that may well serve some parties'
21 purpose in eliminating challenges, because people
22 won't be able to figure it out.

23 MR. SHEBELSKIE: No.

24 CHAIRMAN MOORE: But that's not our
25 intent.

1 MR. SHEBELSKIE: I don't want to -- it is
2 beyond my level of expertise, to say the least,
3 talking about the electronic formatting issues. But
4 I think your point goes to this question. If DOE's
5 privilege log had 10 columns, and the State's had 11
6 columns, does that create some kind of chaos for
7 people?

8 I don't think the fact that there may be
9 a different number of columns matters.

10 CHAIRMAN MOORE: No. And the organization
11 of those columns.

12 MR. SHEBELSKIE: Well, even so, even then,
13 because if I'm a participant wanting to know whether
14 I should challenge a DOE privilege claim, I'm going to
15 pull up the DOE privilege log, whether it's 10 columns
16 or 11 columns, and I'm going to look within the four
17 corners of that privilege log. I'm going to link it
18 up to the LSN header for that document, as additional
19 information, I suppose, if you wanted to do that. And
20 that's what matters.

21 It doesn't matter to me in doing that
22 analysis whether the Staff's privilege log has eight
23 entries and the State's privilege log has 25 entries.

24 CHAIRMAN MOORE: My colleague's famous
25 Alloy 22 example -- I'm interested in intervening in

1 this proceeding, and I want to find across the
2 spectrum of all the collections the Alloy 22 documents
3 that the participants are claiming privilege for.
4 That's the way these searches are going to be done in
5 most instances. There's going to be subject matter,
6 and they're going to drill down.

7 So now I'm working in the DOE collection,
8 and I get 300, and I deal with them as best I can in
9 the EHD. I turn to the State -- I'm sorry, the NRC
10 collection for the same purpose, trying to trace
11 through what documents, because Alloy 22 is a critical
12 subject to me.

13 And I'm faced with a totally different
14 privilege log, organized in a way that could be
15 totally foreign to the way that DOE has put their
16 information together, because there is no constraint
17 on how it's done. And I guess I recognize that DOE
18 certainly has the largest collection, but I'm not sure
19 that that, in and of itself, should dictate how this
20 is done.

21 MR. SHEBELSKIE: I think it ought to bear
22 on the question of whether, given the relative largest
23 collection of ours, that the burdens that are imposed,
24 that they don't really bring a material advantage to
25 people's substantive understanding of our privileges,

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1 whether we are beginning to elevate form over
2 substance.

3 MR. MALSCH: Judge Moore, could I just
4 make two small comments? One would be that you
5 mentioned this is an equation, it's a pay me now, pay
6 me later situation. Just to point out, though, that
7 the time, effort, and resources on the front end get
8 discounted in my view a little bit, because there's no
9 time deadline, there's no statutory deadline on the
10 front end.

11 But in the pay me later situation, you're
12 operating under a statutory time deadline. So I think
13 that has to be borne in mind.

14 The second thing is that we did not
15 disagree with DOE's request for reconsideration on the
16 understanding that every single element of the
17 appendices would, in fact, be in DOE's privilege logs.

18 Now, looking at what we've seen this
19 morning as a representative sample, it strikes me that
20 they've got a long way to go perhaps in meeting that
21 commitment. And so it's not clear to me that if we
22 were to stick with the Board's format, in fact, we're
23 talking about any large time delay, since it strikes
24 me that they have a lot of work to go anyway.

25 JUDGE KARLIN: Well, can we focus on the -

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1 - one question. How much time would it take to do it
2 the way we've -- the way the order reads now? Are you
3 suggesting there would be a delay?

4 MR. SHEBELSKIE: Absolutely there would
5 have to be a delay.

6 JUDGE KARLIN: I mean, you gave us, I
7 guess, 3,300 hours or something like that.

8 MR. SHEBELSKIE: Can we take a break and
9 confer with our IT personnel on that?

10 CHAIRMAN MOORE: Yes. Let's take a 15-
11 minute recess. It's now 10:35. We'll reconvene at 10
12 minutes of 11:00.

13 MR. SHEBELSKIE: Okay. Thank you.

14 (Whereupon, the proceedings in the
15 foregoing matter went off the record at
16 10:34 a.m. and went back on the record at
17 10:49 a.m.)

18 MS. FAGLIONI: They sent me back alone.
19 They thought you might have some --

20 (Laughter.)

21 CHAIRMAN MOORE: May I assume that they
22 only want a single execution, not a --

23 (Laughter.)

24 MS. FAGLIONI: I'm afraid at this point in
25 time it's too late for that. It will be double, no

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1 matter what.

2 (Laughter.)

3 CHAIRMAN MOORE: How many centuries, Mr.
4 Shebelskie?

5 (Laughter.)

6 MR. IRWIN: We haven't got a calculator
7 that's quite that finely tuned yet, Judge Moore. What
8 the Board is asking DOE to do is make, in essence, a
9 strategic call. We do believe, quite frankly, that
10 the information which we would provide in the
11 privilege logs, in the format that we are currently
12 using, would satisfy the substantive requirements of
13 the privilege log that the Board has laid out in its
14 case management order.

15 We also have heard both the Board's
16 expressions of its concern about using a less
17 structured format for presentation of that
18 information, and the representations of the parties
19 about their subsequent likely conduct. Those are
20 important issues in a proceeding where there is
21 significant possibility for contention, and,
22 obviously, a desire to eliminate as much of that
23 opportunity up front as possible.

24 It is absolutely clear that backfitting a
25 huge amount of data entry will have logistic

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1 implications for the timing of certification. We
2 don't know exactly how much, and I wouldn't want to
3 represent to you. It will not be days, it will not be
4 years, it will be months. It will be fewer than six
5 months. How much fewer, I don't know.

6 We would, frankly, like to be able to give
7 the Board a definitive response to the obvious
8 question whether we'll follow its format or stick to
9 the proposal we've made tomorrow morning. We really
10 need to talk with people, and I can't give you a
11 serious answer to a very serious question on the kind
12 of time we've had to discuss it, sir.

13 And by the way, we have conferred with our
14 client at a fairly high level on this matter during
15 the break. And I'm conveying the client's request.

16 CHAIRMAN MOORE: Would you care to suggest
17 what we should do at this point?

18 MR. IRWIN: Yes, sir. Give us until
19 tomorrow morning.

20 CHAIRMAN MOORE: Until? I didn't hear
21 you.

22 MR. IRWIN: I'm sorry. We would like to
23 be able to give the Board a definitive response by
24 noon tomorrow.

25 CHAIRMAN MOORE: One moment, please.

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1 What the Board will do is we will have a
2 telephone conference tomorrow at 11:00 a.m., and you
3 can then, Mr. Irwin, tell us at that time what you
4 can't tell us now. And we will then, in light of that
5 information, go forward.

6 Does the Staff have any problem with that
7 approach?

8 MR. WEDEWER: No, Your Honor, we don't.

9 CHAIRMAN MOORE: Does the State of Nevada?

10 MR. MALSCH: No. No.

11 CHAIRMAN MOORE: Does NEI?

12 MS. GINSBERG: No, Your Honor, with one
13 caveat. We are extremely interested in seeing DOE
14 move forward with Yucca Mountain, as is obvious to
15 everyone who has understood what our position is from
16 the outset. That having been said, obviously we are
17 concerned about and respectful of your concerns
18 regarding this privilege log.

19 What we are -- our position at this point
20 is that elevating form over substance, if the
21 substance of what is necessary can be achieved in a
22 way that doesn't cause significant delay, we would
23 strongly encourage the Board to consider that and
24 consider that as a very important feature of this
25 proceeding as a whole.

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1 CHAIRMAN MOORE: Thank you. Then, we will
2 have a telephone conference tomorrow morning at 11:00
3 a.m. We will have someone from the -- our staff
4 contact you as to how that conference will be set up,
5 either by telephone contact or an e-mail, whether we
6 do it by having you call in to a bridge number, we'll
7 have to see how we can set it up.

8 How many parties do we have on the
9 telephone conference call? Staff, how many people?

10 MR. WEDEWER: Anticipate two, Your Honor.

11 CHAIRMAN MOORE: DOE?

12 MR. WEDEWER: My mistake, Your Honor.

13 Just one line.

14 MR. IRWIN: DOE would need either one line
15 or at most two.

16 MR. MALSCH: I think we only need one
17 line.

18 MS. GINSBERG: A single line.

19 CHAIRMAN MOORE: Six. We will -- someone
20 will be in touch with you this afternoon on the
21 arrangements for the telephone conference.

22 MR. MALSCH: Judge Moore, I do have one
23 small issue, additional issue I wanted to raise when
24 we're finished with this one.

25 CHAIRMAN MOORE: Certainly. Judge Karlin

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1 raises the question on this short order how we have
2 notice, so that the public is entitled to listen to
3 the -- in to the telephone conference. We will issue
4 this afternoon -- and it'll be put on the EIE service
5 mechanism -- that this will take place tomorrow.
6 We'll do that this afternoon, and that is, I think in
7 the circumstances, the best that can be done in that
8 regard.

9 Mr. Malsch, you have a --

10 MR. MALSCH: It's just a matter that Mr.
11 Irwin alluded to earlier. As we looked at the case
12 management order, we anticipated that there could be
13 some difficulty in being able to file the privilege
14 logs with the LSN numbers. And I'm assuming that if,
15 for whatever reason, we can't get the numbers from Mr.
16 Graser on a timely basis, that would be a basis for us
17 to simply ask for more time.

18 CHAIRMAN MOORE: Is this in filing your
19 privilege logs?

20 MR. MALSCH: Yes. But I think it would
21 extend to all the other parties, because under your
22 formats one of the entries calls for inclusion of the
23 LSN number, which, as you indicated, serves an
24 important function here.

25 CHAIRMAN MOORE: Well, it's also the only

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1 reliable tracking mechanism for any dispute as it --

2 MR. SHEBELSKIE: Well, we checked with our
3 IT consultants on the break, and they say that each
4 participant's -- participant of session number is in
5 the LSN header, and can be used to link the LSN header
6 to a privilege log entry using the participant of
7 session number.

8 Now, you've exhausted my IT knowledge, but
9 I pass that along.

10 (Laughter.)

11 CHAIRMAN MOORE: But that requires, then,
12 an additional step by the user to get an LSN number.
13 It would probably be best, in any and all
14 circumstances, that it's understood that if you go
15 forward with documents by a date certain, and don't
16 have that information, that you immediately supplement
17 it, so that the LSN number is present, because for
18 tracking purposes it's the LSN number that we will
19 need to work with.

20 MR. SHEBELSKIE: Unrelated to that, there
21 was a housekeeping matter that popped into my head as
22 we were talking about other things. Under the order,
23 it calls on participants who have certified to
24 designate by July 22nd their points of contact for
25 privilege challenges.

1 And in context, I didn't know whether you
2 all meant that applied to DOE in light of the granting
3 of the motion to strike our certification last year,
4 whether we are -- whether you expect us to certify --
5 to name those people by July 22nd, or do we wait until
6 we recertify?

7 CHAIRMAN MOORE: I think the sooner we can
8 get these little matters out and up on the LSN, there
9 will be less to do --

10 MR. SHEBELSKIE: Later. That's fine. I
11 just wanted to make clear so that when we -- we'll
12 give someone's name on the 22nd. But since we don't
13 have our privilege documents out, we're not
14 stabilized. We don't want a torrent of privilege
15 challenges to start coming in suddenly.

16 CHAIRMAN MOORE: Well, I guess that's just
17 a risk you'll have to bear.

18 (Laughter.)

19 JUDGE KARLIN: Well, one of the things we
20 point out I think is that, in page 23, no tolling of
21 the time periods. The pendency of a challenge doesn't
22 toll any time period or any -- and so, as we've
23 discussed before, if there are documents on the LSN
24 now, at least it's my opinion that that is why we want
25 a point of contact now.

1 MR. SHEBELSKIE: Right.

2 JUDGE KARLIN: Because there's an LSN now
3 that's over -- out there that people can access.

4 MR. SHEBELSKIE: The only documents that
5 we have provided to date that are publicly available
6 in the LSN, that have been crawled, are non -- are
7 non-privilege documents. We have some documents that
8 remained header-only on our own web server, but under
9 the ruling from last year that's not --

10 JUDGE KARLIN: That's fine.

11 MR. SHEBELSKIE: Okay.

12 JUDGE KARLIN: Very good.

13 CHAIRMAN MOORE: One final point, Mr.
14 Shebelskie. You had asked that we return all of
15 these, correct?

16 MR. SHEBELSKIE: Yes, sir.

17 CHAIRMAN MOORE: Would it be possible for
18 the Board to retain one copy to give to the LSNA who
19 won't be back in town until week after next, to see if
20 -- my concern is, because of the --

21 MR. SHEBELSKIE: Yes.

22 CHAIRMAN MOORE: -- DDMS, that it had to
23 do programming --

24 MR. SHEBELSKIE: Yes.

25 CHAIRMAN MOORE: -- and it's best to know

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1 sooner rather than later --

2 MR. SHEBELSKIE: Yes, sir.

3 CHAIRMAN MOORE: -- where it's going to
4 bite us.

5 MR. SHEBELSKIE: That's fine.

6 CHAIRMAN MOORE: But it will go no further
7 than to Mr. Graser.

8 MR. SHEBELSKIE: That's fine.

9 CHAIRMAN MOORE: And his immediate staff.
10 Does anyone have any other matters they
11 wish to bring to our attention? Yes.

12 MR. EAGAN: Judge Moore, I'd like to bring
13 to your attention a matter that has come up that seems
14 to have no answer now, but the Board may be interested
15 in addressing, which is the concept of the interested
16 governmental entity.

17 Nevada has been in discussions with the
18 city of Las Vegas --

19 CHAIRMAN MOORE: Could you speak into the
20 microphone, please?

21 MR. EAGAN: Nevada has been in discussions
22 with the city of Las Vegas and Clark County as to
23 whether or not those entities are going to participate
24 -- attempt to participate in the proceeding as either
25 a party or an interested governmental entity.

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1 And it's my understanding from the
2 regulations that an interested governmental entity
3 still has to comply with the LSN requirements. But
4 what's interesting and has come up as a big question
5 for these prospective governmental entities is, are
6 they subject to the case management order? And if
7 they are, what are the affirmative requirements on
8 them?

9 CHAIRMAN MOORE: I think we are all of the
10 view that that certainly was our contemplation, that
11 it -- the first -- early on it applies to all
12 potential parties, and I believe -- and governmental
13 entities. There's --

14 JUDGE KARLIN: Well, yes. The definition
15 of potential party to which this case management order
16 applies includes interested governmental participants.
17 So, yes.

18 MR. EAGAN: Okay. Thank you, Judge.

19 CHAIRMAN MOORE: At a subsequent case
20 management conference, the Board will address the two
21 outstanding matters of safeguards and document
22 retention matters. But at this point, we have a
23 number of other items on our platter that we'll be
24 moving forward with, and at the appropriate time we
25 will schedule such a conference and deal with those

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1 matters.

2 MR. WEDEWER: Your Honors? Your Honor?
3 The Staff had just one question, Your Honor. That's
4 with regards to the date of our certification of our
5 first monthly supplementation, and whether we could
6 make that 1 September, being that it's 19 July. That
7 just would allow us a little bit more leeway to get
8 our internal procedures in place to make that
9 certification properly.

10 CHAIRMAN MOORE: I'm sorry. I'm at a loss
11 as to understand your question.

12 MR. WEDEWER: The order requires us to
13 certify our supplementation of the LSN, on a monthly
14 basis it contemplates. Being that we're the only
15 party right now that's going to be subject to that, at
16 least initially, our question is on what date that we
17 need to start certifying to the Board? And we would
18 like to try to do that 1 September.

19 JUDGE KARLIN: I think we -- let's look at
20 that particular provision.

21 MR. WEDEWER: Okay.

22 JUDGE KARLIN: Do you have the page number
23 on supplementation?

24 MR. WEDEWER: Yes, Your Honor, I do.

25 JUDGE KARLIN: Which one is that?

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1 MR. WEDEWER: It's 21 and 22.

2 JUDGE KARLIN: Okay. Great. 21 and 22?

3 MR. WEDEWER: Yes, sir. It just mentions
4 the first of each month, and --

5 CHAIRMAN MOORE: Will the Staff be filing
6 another certification?

7 MR. WEDEWER: No, Judge. Just
8 certification of our supplementation, Your Honor, is
9 what we would be filing.

10 CHAIRMAN MOORE: Because we previously
11 learned that you have somewhere in the neighborhood of
12 -- if my recollection is correct, of 500 to 1,000
13 privilege header-only documents that are not on the
14 LSN.

15 MS. MOORE: Your Honor, may I speak?

16 CHAIRMAN MOORE: Yes. Mr. Smith made that
17 estimation in either the first or the second case
18 management conference.

19 MS. MOORE: Yes. I believe what he said
20 was that you had asked for an estimate of potential
21 privilege documents, and he stated that currently we
22 have no privilege documents on the LSN, but he
23 estimated that at some time during the proceeding we
24 could have as much as 500 to 1,000 privilege
25 documents.

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1 CHAIRMAN MOORE: All right. All right.
2 The Staff may make its first supplementation on
3 September -- the 1st of September as opposed to the
4 1st of August?

5 MR. WEDEWER: Thank you.

6 CHAIRMAN MOORE: Is there anything else?
7 Then, we stand adjourned. We will talk to you all at
8 11:00 a.m. tomorrow morning, telephone conference.

9 (Whereupon, at 11:08 a.m., the
10 proceedings in the foregoing matter were
11 adjourned.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of:

Name of Proceeding: U.S. DOE High-Level Waste
Repository

Pre-Application Matters

Docket Number: PAPO-00;

ASLBP No.: 04-8239-01-PAPO

Location: Rockville, MD

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
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transcript is a true and accurate record of the
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