

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

November 1, 2007

FIFTH CASE MANAGEMENT ORDER

(Supplementation, Correction, and Changing of Privilege Logs)

This case management order addresses certain issues related to supplementing, correcting, and changing privilege logs.

At the outset, we note that within five hours of filing its initial primary privilege logs herein, the United States Department of Energy (DOE) filed a set of “supplemental” privilege logs.¹ This was a misnomer because, rather than supplementing the initial privilege logs by adding after-created or after-discovered documents to the logs,² DOE’s second filing was instead a correction which fixed certain errors or omissions in the initial privilege logs. For example, DOE’s second

¹ See The Department of Energy's Certification of Compliance and Certification of Availability of Documentary Material (Oct. 19, 2007); The Department of Energy’s First Supplemental Privilege Log (Oct. 19, 2007); Supplemental LWP Privilege Log (Oct. 19, 2007); Supplemental ACP Privilege Log (Oct. 19, 2007); Supplemental DPP Privilege Log (Oct. 19, 2007).

² See Section VI.A of Revised Second Case Management Order (July 6, 2007) at 21 (RSCMO) (Duty to Supplement. “Each potential party shall make a diligent good faith effort to include all after-created and after-discovered documents as promptly as possible in each monthly supplementation of documentary material, logs, and redactions....”).

filing changed and/or inserted new information for the data entered for various documents on the original privilege logs. Tracking these changes is problematic because the logs are hundreds of pages long and it is difficult to do a detailed side-by-side comparison of each initial log and its revision. Such corrections also create difficulties for the electronic privilege log tracking system on the digital data management system (DDMS).³ This order addresses how corrections are to be handled and reported.

In addition to corrections, similar confusion might arise with regard to monthly supplementation of privilege logs. Section VI.A of Revised Second Case Management Order (July 6, 2007) at 21 (RSCMO). For example, if a potential party files a 300-page privilege log covering 700 documents, and one month later files a supplement that adds thirty-five documents and withdraws five, then a system is needed so that the new entries and deletions will be highlighted or readily identifiable, rather than being buried inside such a massive document. This issue is more acute for members of the general public and those potential parties who do not use the DDMS privilege log tracking system.

For the foregoing reasons, the Pre-License Application Presiding Officer (PAPO) Board deems it necessary to specify the following rules regarding supplementing, correcting, or changing privilege logs. These rules apply for all purposes in this proceeding, including the interpretation of the RSCMO, Third Case Management Order (August 30, 2007) (TCMO), Fourth Case Management Order (October 5, 2007), and all other orders.

³ DOE's second set of privilege logs, filed on October 19, 2007, will be used as the "baseline" privilege logs for purposes of the DDMS. See The Department of Energy's First Supplemental Privilege Log (Oct. 19, 2007); Supplemental LWP Privilege Log (Oct. 19, 2007); Supplemental ACP Privilege Log (Oct. 19, 2007); Supplemental DPP Privilege Log (Oct. 19, 2007). Changes will be tracked from these versions.

A. Accurate Labeling of Changes to Privilege Logs⁴

During the course of this proceeding, a potential party might change its privilege logs in several different ways. First, a privilege log might be supplemented. The term “supplementation” refers to, and currently is limited to, the addition of after-created or after-discovered documents or documentary material.⁵ Where such new or newly discovered documents arise, supplementation is mandatory.⁶ Second, a potential party might withdraw a claim of privilege for a document on a privilege log.⁷ Withdrawals may occur unilaterally, after discussing a matter with another potential party and agreeing to withdraw the privilege claim, or after a potential party accedes to a ruling from the PAPO Board or the Commission. The term “withdrawal” applies only to the withdrawal or deletion of an entire document from a log, not to the withdrawal or deletion of elements of a privilege claim for a document. Third, a potential party might want to make other changes to the privilege log. Such changes could include correcting or changing a data element for a given document listed on the privilege log (e.g., deleting, adding, or changing a name to the list of recipients of a document), inserting a data

⁴ We note that secondary or sensitive unclassified information (SUI) privilege logs (which are submitted in response to a challenge or inquiry) should be designated by reference to the name of the privilege claimant, the name of the requestor, and the date of the request. For example: DOE SUI Privilege Log Submitted in Response to January 15, 2008 Document Request by the State of Nevada. Each such log will cover those documents requested. If another request is filed by the same, or a different party, a different SUI log, not a supplement, is prepared.

⁵ After contentions are filed, and the parties take positions, the duty to supplement will expand to a third category. This is because “documentary material” includes information a participant intends to rely on or cite “in support of its position in the proceeding” (Class 1) and information that “does not support that information or that party’s position” (Class 2), 10 C.F.R. § 2.1001, and parties cannot assess the full extent of these two classes of documentary material (and produce it) until contentions are filed and positions known. When they are, parties must promptly supplement their documentary productions on the LSN (and privilege logs) to add such after-encompassed documentary material.

⁶ See RSCMO VI at 21.

⁷ RSCMO II.J at 10 (withdrawal of privilege claims - correction of logs within 3 days).

element from a field that was previously empty (e.g., filling in a description of the author-attorney relationship where that field was blank on the previous log), or correcting typographical errors.⁸

The term “correction” means any change to a privilege log that is not a supplement or withdrawal. Every update or iteration to a privilege log must be clearly labeled as a supplement, withdrawal, correction, or some combination thereof.

B. Due Diligence, Accuracy, and Care

Potential parties and their attorneys and representatives must exercise due diligence and care in preparing and filing their privilege logs. As with all pleadings and discovery filings, each time a log is submitted (or supplemented or corrected) it must be accompanied by a certification by the attorney or other representative that “to the best of the signer’s knowledge, information and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for the document is, inter alia, correct.” See RSCMO II.D. and Appendix A. This certification is a serious matter, and although perfection is not required, see LBP-04-20, 60 NRC 300, 313 (2004), mistakes are strongly disfavored and should be rare.

C. Form and Format for Supplements, Withdrawals, and Corrections to Privilege Logs

Earlier orders specify the general form and format for privilege logs, both the PDF format and the concurrent submission of an electronic file for the DDMS.⁹ The same requirements apply to supplements.¹⁰ See RSCMO VI.B. Now, however, we address additional form and format

⁸ Some changes are prohibited. For example, potential parties are precluded from claiming additional privileges for a document. RSCMO III.B at 12.

⁹ RSCMO III.E at 13 (primary privilege logs), IV.E at 17 (secondary privilege logs) and TCMO V.D at 12 (sensitive unclassified information privilege logs).

¹⁰ Note, however, that the duty to supplement applies mostly to primary privilege logs. This is because privilege logs are not required for secondary privilege documents or sensitive unclassified information (SUI) documents until someone requests specified documents and challenges the claim of privilege for those documents. See RSCMO IV.D.2 at 16 (the privilege claimant shall respond to a request within ten days, providing, inter alia, a privilege log); TCMO V.C.2 at 19 (privilege claimant shall respond to a request within ten days, providing, inter alia, a privilege log). Thus, secondary and SUI logs are reactive and document specific,

requirements for supplements, withdrawals, and corrections, to assure that the new or different information is not buried in the new iteration of the log, but instead is highlighted and made reasonably apparent. In this regard, we set the following rules:

1. Form and Format for PDF Versions of Supplements and Changes: Once a potential party files an initial privilege log, each subsequent filing of the PDF version of that privilege log that contains any supplement, correction, withdrawal, or change of any kind, shall be submitted in two separate but related documents. The first PDF document shall be a full and restated iteration of the entire privilege log, incorporating all prior and current corrections, supplements, and changes of any kind to the log, up to and including the date of the log. This document shall not be redlined. This document shall have a title stating, in order, the name of the party filing it, the date of the update, the type of changes it covers, and the type of privilege log being updated (e.g., DOE February 1, 2008, Supplement and Correction to Litigation Work Product Privilege Log).

The second PDF document shall have the same title, except the title will begin with the word "Addendum" and the document shall contain (a) a section, denominated "Supplements," reiterating and providing the full entries for each document being added to the log in that iteration, (b) a separate section, denominated "Withdrawals," listing the LSN numbers for each document for which the claim of privilege has been withdrawn or deleted in that iteration, and (c) a separate section, denominated "Corrections," providing the full text of all entries for every document on the log which has had any entry changed, altered, or corrected in that iteration, with red-lining or some other form of highlighting to clearly reflect the corrections.¹¹

corresponding to a specific request for specific documents. Such logs generally would not need to be supplemented simply because other secondary privilege documents or SUI documents are after-created or after-discovered.

¹¹ If a given update is only a supplement, then although the addendum will include separate sections for "Withdrawals" and "Corrections," these sections will merely state "none."

Thus, each new iteration of the PDF version of the privilege log (whether it be a supplement, correction, withdrawal, or a combination) must provide both a single consolidated version of the log,¹² current as of its date, and an addendum with separate sections showing the changes and revisions since the prior iteration.

2. Form and Format for Electronic File Supplements and Changes: The electronic file supplements are to reflect the data set that was used to generate the restated iteration of the privilege log and submitted to the Licensing Support Network Administrator (LSNA) in an agreed upon format.¹³ Documents where the privilege claim has been withdrawn are not to be included in the data set.
- D. Rules Regarding Corrections to Logs
1. General Rule - Prompt Corrections Required: If a potential party realizes that one of its privilege logs contains materially incorrect or misleading information, then the potential party shall inform the PAPO Board and correct the logs, as follows. If the corrections to initial privilege logs are filed within twenty days of the initial privilege log's filing or if corrections to supplements are filed within ten days of the supplement's filing, then a motion and leave of the PAPO Board are not required. No other corrections will be accepted unless preceded by a motion for leave to file corrections showing good cause and an affirmative ruling from the PAPO Board.
 2. Exception - Mutually Agreed Corrections: After a challenge has been registered, a potential party may correct the privilege log concerning a document, if both the requester and the privilege claimant agree to the changes. For example, after consultation, a

¹² If each iteration of the PDF version of a privilege log only included the new information, then a reader could not comprehend the current status of a privilege log (e.g., whether a given document is on the privilege log and what the nature of the privilege claim) without reading all iterations of the log. This is unworkable, given that this proceeding will continue for several years, and numerous monthly supplements will likely be filed.

¹³ The LSNA and DOE have agreed upon XML format for the transmission of the primary privilege log data set.

privilege claimant may realize that it omitted relevant information that the requester thought was necessary. If the potential parties agree on the appropriate correction, then they shall file a joint statement reflecting this agreement, and the correction may be made, without regard to the deadlines specified in the preceding paragraph.¹⁴ This is to encourage amicable resolution of such matters without the need for PAPO action.

It is so ORDERED.

The Pre-license Application
Presiding Officer Board

/RA/

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/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 1, 2007

¹⁴ See RSCMO II.J (withdrawal of privilege claim - correction of log within 3 days).

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(High-Level Waste Repository:)
Pre-Application Matters))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD FIFTH CASE MANAGEMENT ORDER (Supplementation, Correction, and Changing of Privilege Logs) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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