

CCASE:  
CONTESTS OF RESPIRABLE DUST SAMPLE  
ALTERATION CITATIONS  
DDATE:  
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TTEXT:

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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS  
MASTER DOCKET NO. 91-1

ORDER GRANTING IN PART AND DENYING IN PART CONTESTANTS' MOTIONS TO COMPEL, AND DIRECTING THE SECRETARY TO SUBMIT DOCUMENTS FOR IN CAMERA INSPECTION

On July 26, 1991, Contestants Kentucky Carbon, et al., filed a motion for an order to compel the Secretary of Labor to produce 67 documents which she claims are privileged and therefore not subject to discovery. In the alternative, Contestants request that the Secretary be required to produce the documents for an in camera inspection by the court. A memorandum was filed in support of the motion. On July 26, 1991, Contestants Andalex Resources, Inc., et al., filed a similar motion and relied on the arguments advanced on behalf of Kentucky Carbon, et al. Contestants' position is that the Secretary has failed to meet her burden of justifying her claim of privilege with respect to all of the documents. The Secretary filed an opposition to the motions on August 9, 1991. She agrees to an in camera inspection if I am unable from the document description to determine the validity of the privilege asserted.

On August 13, 1991, Contestants Great Western Coal, Inc., and Harlan Fuel Company, filed a motion to compel, joining in the motion of Kentucky Carbon, et al., and filing a memorandum of law. Great Western requested that the motions be scheduled for oral argument.

On August 19, 1991, Contestants Horn Construction Co., Inc., et al, filed a motion to compel, joining in the motions filed by Kentucky Carbon, et al., and Great Western Coal Co., et al.

On August 9, 1991, the Secretary filed an Opposition to the Motion of Kentucky Carbon, et al., to Compel Discovery and filed a Memorandum of Law in Support of the Opposition. On August 26, 1991, she filed a Memorandum in Support of her opposition to the Motion of Great Western to compel discovery. On August 21, 1991, Contestants Kentucky Carbon, et al., filed a Reply Memorandum. On August 22, 1991, I ordered the Secretary to reply to the contention in the Motions to Compel, that the privileges must be formally asserted by the agency head after personal consideration

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of the documents for which privilege is claimed. On August 30, 1991, the Secretary filed an affidavit of Edward C. Hugler, Deputy Assistant Secretary for Mine Safety and health, U.S. Department of Labor. Secretary Hugler formally asserted the "deliberative" privilege with respect to certain documents, the "investigative" privilege with respect to others and, the attorney-client privilege with respect to yet others. He concurred with the assertion of the work product privilege made by the Solicitor of Labor. He also decided not to assert a privilege with respect to certain documents for which privilege was originally claimed.

Attached to Secretary Hugler's affidavit is an affidavit of Robert A. Thaxton, Supervisory Industrial Hygienist for MSHA, and an agent of Federal grand juries investigating allegations of the alteration of coal dust samples. He reviewed certain documents for which privileges have been claimed and asserts that release of those documents would reveal potential targets of criminal or civil investigations, the investigative techniques being utilized, or grand jury proceedings. Thaxton's affidavit provides additional descriptions of documents 326, 327, 328, 350, 353 and 406.

The affidavit of Secretary Hugler was stated to have been filed in accordance with my order of August 22, and is intended to supplement the Secretary's opposition to the Motion to Compel.

Contestants Great Western, et al., filed a reply to the Secretary's opposition on September 13, 1991.

## I

### PLAN AND SCHEDULE OF DISCOVERY

On June 21, 1991, the Secretary, in compliance with the Prehearing Order Adopting the Amended Plan and Schedule of Discovery, provided Contestants with a list of 406 documents which she revised on July 8, 1991, to include 425 documents. Of the 425, she claims that 67 are privileged and therefore not subject to discovery. On July 29, 1991, the Secretary filed an amended Generic and Privileged Document List, adding two documents to the privileged list. Contestants filed an additional Motion to Compel production of these documents, and the Secretary filed an opposition thereto.

## II

### DISCOVERY AND PRIVILEGE

Under Commission Rule 55(c), 29 C.F.R. 2700.55(c), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all

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relevant material not privileged is subject to discovery. The Commission and the Federal Courts have broadly construed the discovery rule to include relevant material, and conversely, have narrowly construed the claim of privilege. *Hickman v. Taylor*, 329 U.S. 495 (1947); *Secretary/Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (1984). The burden is on the party claiming that relevant material is not subject to discovery because of privilege. *In re: Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982). As contestants further point out, even if the Secretary has properly asserted a privilege, the material may be subject to discovery "where disclosure is essential to a fair determination of the case."

The Secretary claims that the documents involved here are not subject to discovery because they are covered by (1) the deliberative process privilege; (2) the investigative file privilege; (3) the attorney-client privilege; (4) the attorney work product privilege, and, with respect to certain documents, by more than one of the privileges. She also asserts that some of the documents are subject to Rule 6(e) of the Federal Rules of Criminal Procedure prohibiting disclosure of grand jury information.

Rule 501 of the Federal Rules of Evidence provides that "[e]xcept as otherwise required by the Constitution . . . or provided by Act of Congress, or in rules prescribed by the Supreme Court [i.e., Rule 26(b) FRCP] . . . , the privilege of a witness, person, government . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Therefore questions of privilege in cases before the Commission must be determined in the light of Federal Court case law, which may arise in connection with discovery disputes or in suits brought to enforce disclosure under the Freedom of Information Act, 5 U.S.C. 552.

Contestant Great Western argues that the Government's claim of privilege may only be asserted by a formal claim of the agency head supported by affidavit. In the reply memorandum of *Kentucky Carbon, et al.*, Contestants contend that the claim of privilege in this case may only be asserted by Secretary of Labor Lynn Martin after her personal consideration of the documents in question.

The case of *U.S. v. Reynolds*, 345 U.S. 1 (1953), involved an assertion of privilege based upon national security interests in a military aircraft accident report. The Supreme Court held that in such a case "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter [here the Secretary of the Air Force], after actual personal consideration by that officer." *Id.* at 7-8. Two cases from the District Court of Delaware, *Pierson v. United States*,

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428 F.Supp. 384 (D.Del. 1977) and *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D.Del. 1980) held that "executive privilege" (including the deliberative and investigative privileges) may be asserted only by the responsible agency head (the Commissioner of Internal Revenue and the Secretary of Energy in the two cases). The latter case also considered the attorney-client privilege and the work product privilege although they were asserted by Department of Energy attorneys. *United States v. O'Neil*, 619 F.2d 222 (3rd Cir. 1980) involved an administrative subpoena duces tecum issued by the United States Civil Rights Commission upon the Commissioner of the Philadelphia police department for certain records. Privilege was asserted orally by the city Solicitor based on claims of the Fifth Amendment privilege against self-incrimination, attorney-client and work product privileges and police officers' due process rights. The privilege was rejected because it was asserted orally, because it was not invoked by the head of the department, and because it was "a broadside invocation of privilege. . . ." In the case *Mobil Oil Corp. v. DOE*, 520 F.Supp. 414 (N.D. N.Y. 1981), the court stated that the department head may delegate the assertion of executive privilege, "but only to a subordinate with high authority," and then only after the head of the agency has issued "guidelines on the use of the privilege." *Id.* at 416.

In *Fowler v. Wirtz*, 34 F.R.D. 20 (S.D. Fla. 1963) the Court held that where the authority to make policy decisions relating to suits under the Labor Management Reporting and Disclosure Act was vested solely in the Secretary of Labor, the Secretary was required to file a formal claim of privilege against disclosure of governmental informers.

In the *Bright Coal Co.* case, *supra*, the Commission stated at page 2523:

There is authority for the proposition that the privilege (informant's privilege) can be invoked only through the filing of a formal claim of privilege and confidentiality by the head of the department with control over the matter, supported by affidavits attesting to facts sufficient to allow an independent judicial determination that the privilege exists . . . [cases]. The great weight of case law concerning the privilege, however, addresses and disposes of the issue without focusing on whether the privilege was "formally" raised.

In a more recent case, *Secretary v. Asarco*, 12 FMSHRC 2548 (1990), the Commission considered assertions of informant's privilege, attorney-client privilege and work product privilege raised by the Secretary's trial counsel, and did not hold that

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the privileges could only be invoked by the Secretary of Labor personally.

Because discovery of relevant material is favored, and a claim of privilege is narrowly construed, it is essential that privilege not be lightly claimed. Whatever the formalities required, its assertion must be made by a responsible governmental official. In a suit for damages for an alleged illegal eavesdropping operation by the FBI, plaintiff sought to discover FBI files. Executive privilege was claimed and an affidavit by the Attorney General who had not personally considered all the documents, together with an offer to produce the documents for in camera inspection by the court was held sufficient. *Black v. Sheraton Corp.*, 564 F.2d 531 (D.C. Cir. 1977). The Court said at page 545:

Even if the affidavit . . . was too imprecise to be used in a final determination of the scope of the privilege, it was adequate to reserve for the government an opportunity to interpose specific objections with respect to individual documents before their production was ordered. In our view the proper course would have been for the District Court to have accepted the proffered file for in camera inspection.

I take official notice that the Secretary of Labor is involved in a large number and variety of regulatory and enforcement matters. She may be a party at a given time in hundreds of proceedings in the courts and before administrative agencies. To require that she personally consider all the documents in these cases and invoke privileges such as are claimed in this administrative proceeding is in my opinion neither practical nor necessary. I hold that the claim of executive privilege invoked here by a high level official of the Department of Labor who has direct responsibility for the matters involved after personal consideration of the documents, is sufficient formal claim of privilege when coupled with the Secretary's offer to submit the documents (except those for which grand jury immunity is claimed) for in camera inspection.

The request for oral argument on the motions is DENIED.

### III

#### DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege is unique to the government. It seeks to insure that government agency subordinates will feel free to provide their superiors with uninhibited recommendations and opinions and to protect against

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premature disclosure of policies under consideration. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980). The documents in question must be "predecisional," NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975), and must indeed be deliberative. The agency has the burden of establishing the deliberative quality of the document. Id., at 868. The Sears Roebuck case was a suit under the Freedom of Information Act for disclosure of documents, rather than a discovery issue in a pending lawsuit, but the principles are the same: See Environmental Protection Agency v. Mink, 410 U.S. 73, 91: "Exemption 5 [of FOIA] contemplates that the public's access to . . . memoranda will be governed by the same flexible common sense approach that has long governed private parties discovery of such documents involved in litigation with government agencies." See also 2 Weinstein's Evidence 509.

Factual material contained in deliberative memoranda is not privileged from discovery by private parties in litigation with the Government. Environmental Protection Agency v. Mink, supra, Schwartz v. Internal Revenue Service, 511 F.2d 1303 (D.C. Cir. 1975). Memoranda prepared by consultants, not Government employees, recommending for or against proposed Government action may be part of the deliberative process of the agency and protected from disclosure. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert denied, 410 U.S. 926 (1972).

#### IV

##### INVESTIGATIVE FILE PRIVILEGE

Documents which are claimed to be privileged by a government agency because contained in investigatory files must not only be shown to have been prepared in the course of an investigation, but the agency must establish that disclosure would interfere with enforcement proceedings. Coastal States Gas Corp., supra. Where there is no prospect of law enforcement proceedings, Bristol Myers Col v. Federal Trade Commission, 424 F.2d 935 (D.C. Cir. 1970), cert denied, 400 U.S. 824 (1970), or where the government's regulatory action has already been taken, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), the materials are not privileged.

#### V

##### ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest privilege known to common law. Weinstein, supra, 503[02]. It protects from discovery communications from client to attorney (including communications from a Government agency to a Government attorney) and communications from the attorney to the client. Coastal

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States Gas Corp., supra. Confidentiality must be maintained at the time of the communication and subsequently. Disclosure to an outside party will waive the privilege. Despite its venerable and honored state, it is, like all privileges, "narrowly construed and . . . limited to those situations in which its purposes will be served." Coastal States Gas Corp., at 862. The privilege is based on the assumption that it encourages clients to make the fullest disclosure to their attorneys, enabling the latter to act more effectively as officers of the Court. Upjohn Co. v. United States, 449 U.S. 383 (1981).

The privilege is limited to communications and focuses on the attorney-client relationship. Information other than communications between attorney and client is not covered by the privilege. In re: Sealed Case, at 808.

## VI

### THE ATTORNEY WORK PRODUCT PRIVILEGE

The attorney work product privilege first set out in the Supreme Court case of Hickman v. Taylor, and later in Rule 26(b)(3) FRCP is in one sense broader than the attorney-client privilege in that it protects from disclosure materials not constituting attorney-client communications. It includes materials gathered by or prepared by an attorney. In another sense, it is narrower because it applies only to work and materials performed or assembled in anticipating of litigation. Hickman v. Taylor, supra; Coastal States Gas Corp., supra; In re: Sealed Case, supra.

Its rationale is not protection of the client's interest, but rather "both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share." In re: Sealed case, at 808-9. The attorney work product privilege is applicable to Government attorneys and includes "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." NLRB v. Sears Roebuck & Co., at 154. Jordan v. United States Department of Justice, 591 F.2d 753 (D.C. Cir. 1978). It may include materials prepared or gathered by others and assembled in the work files of an attorney. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 462 (E.D. Mich. 1954): ". . . work files of an attorney, assembled in preparation for a lawsuit, are protected against deposition-discovery provisions of the Federal Rules of Civil Procedure . . . even though the materials were gathered by FBI investigators." The "documents must presently be part of the work files of an attorney before they are entitled to the protection of the work product rule." Id. at 465. A party seeking disclosure of such documents may obtain it "upon a showing that the party . . . has substantial need of the



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materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3). An order to disclose factual work product materials must "protect against disclosure of the mental impressions, conclusions, opinions, or legal themes of an attorney . . ." Id.

The Commission has held in *Asarco, supra*, that the work product rule may apply even to documents not prepared by or for an attorney, so long as they are prepared because "of the prospect of litigation."

## VII

### GRAND JURY SECRECY

Rule 6(e)(2) of the Federal Rules of Criminal Procedure generally prohibits the disclosure of matters occurring before the grand jury. As the Secretary notes, this prohibition extends not only to testimony before the Grand Jury but also to names of witnesses and identity of documents before the grand jury. Contestants *Great Western, et al.*, contend that Rule 6(e) is totally inapplicable to documents not in the actual possession of the grand jury and therefore is an inappropriate basis for objection.

Because I have found the documents claimed subject to grand jury secrecy privileged on other grounds, I need not decide at this time whether the Secretary has properly invoked Rule 6(e) of the Fed. Rules of Criminal Procedure mandating secrecy for grand jury documents.

## VIII

### QUALIFIED PRIVILEGES

Except for the attorney-client privilege and the rule mandating grand jury secrecy, all the privileges involved in this proceeding are qualified privileges. Therefore, even if the privilege is properly invoked, disclosure may be ordered if the needs of the party seeking disclosure outweigh the interests served by the privilege. *Committee For Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788 (D.C. Cir. 1971), cert denied, 404 U.S. 917 (1971); *Logan*, 6 FMSHRC at 2526. Therefore, I must decide whether the Contestants have shown that they require the withheld documents in order to fairly and adequately prepare for trial in these proceedings, and if they do, whether this requirement is of greater importance than the Government's interest in keeping the documents secret.

Contestants allege that the documents withheld directly relate to the central issue of the litigation, that they are

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exclusively in possession of the government, and that they consist largely of factual material. I must consider these contentions with respect to each document for which I uphold the claim of privilege to determine whether Contestants' need for the documents in the preparation of their cases outweighs the policies behind the privilege against disclosure. The burden of proof on this issue rests with Contestants.

IX

SECRETARY'S CLAIM OF PRIVILEGE UPHELD

In applying the foregoing principles to the documents claimed to be privileged among the listed documents provided in the Secretary's Amended Generic and Privileged Document List, I have determined that the Secretary's claim of privilege was properly invoked with respect to the following documents. I conclude that her description of these documents, while somewhat cryptic and lacking in detail, is sufficient for me to determine that the documents fit the privilege asserted.

Document 3. Letter from Warren Myers, Ph.D. [apparently a consultant] to MSHA regarding draft of the report [Document 1]. The deliberative process privilege includes memoranda prepared by consultants to agency personnel concerning proposed Government Action. See *Wu v. National Endowment*, supra. The document is privileged as part of the deliberative process of the Agency.

Document 4. Summaries of investigative work conducted on AWC's by West Virginia University and Pittsburgh Health Tech Center. I am upholding the privilege based on the deliberative process, which the document clearly fits, but not the claim of attorney work product since there is no showing that the summaries were prepared by or for Government attorneys, were part of the attorney work files, or prepared in anticipation of litigation. See *United States v. Kelsey-Hayes*, supra; *Asarco*, supra.

Document 5. Draft Report titled, Investigation of Dust Deposition Patterns on Respirable Coal Mine Dust Samples. I uphold the claim of privilege based on the deliberative process but not on the attorney work product for the same reasons as given for Document 4.

Document 17. Note to File from Assistant U.S. Attorney setting forth phone conversation with coal operators' attorney. The claim of privilege based on the attorney-client relationship is upheld. The note is to a file in MSHA's (the client's) possession.

Document 56. Letter from Associate Solicitor DOL and Assistant Secretary DOL to U.S. Attorney. This document is

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clearly a communication from client to attorney, and as such is privileged.

Document 111. Page 9119 of a memorandum from MSHA District Manager to MSHA Chief Division of Health containing notes of Ronald Franks concerning an investigative program being developed involving other potential violations of the dust sampling program. I uphold the claim of privilege as being part of an investigative file and not as attorney work product.

Document 113. Draft of a letter from U.S. Attorney to Peabody Coal Company with handwritten notes said to reveal deliberations and thought processes of U.S. Government Attorneys. I uphold the claim of privilege. The document appears to be part of the work product of a government attorney.

Document 119. MSHA internal memo concerning AWC investigation including information prepared for the Secretary reflecting opinions of Agency officials. I uphold the Secretary's claim based on deliberative process privilege.

Document 130. Letter from U.S. Attorney to MSHA concerning criminal investigation. The document is privileged as an attorney-client communication.

Document 131. Memorandum for the Secretary from the Assistant Secretary dated April 12, 1991, concerning potential agency action subsequent to the citations. The document is protected as part of the deliberative process. (It is not shown to be part of the attorney work product).

Document 132. Memorandum from Associate Solicitor DOL to Deputy Solicitor concerning criminal matters in AWC cases. The document is protected as part of the attorney work product.

Document 133. Memorandum from Assistant Secretary to Acting Secretary concerning criminal matters involving AWCs. The claims of privilege based on the deliberative process and investigative files are upheld.

Document 134. Memorandum from MSHA Chief Office of Investigation to Supervisory Special Investigator concerning data for U.S. Attorney. The privilege based on the document being part of an investigative file is upheld.

Document 135. Memorandum for MSHA District managers titled "Special Investigation" concerning direction and development of potential criminal investigation. This document is privileged as part of the Government's investigative files. It is not shown to be part of any deliberative process.

Document 136. Letter from U.S. Attorney to counsel for

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trial litigation SOL. Although the description of the document does not at all indicate the subject matter of the letter, I assume that it is relevant to these cases and concerns the alleged dust sample alterations. It is privileged as a confidential communication from attorney to client.

Document 137. Memorandum for the Secretary from the Solicitor titled "Peabody Dust Fraud Investigation." This also is privileged as a confidential communication from attorney to client.

Document 138. Memorandum from Associate Solicitor to MSHA Administrator for Coal Mine Safety and Health concerning referral of special investigation to U.S. Attorney. This document is privileged as a confidential communication from attorney to client.

Document 141. Memorandum from Associate Solicitor to Solicitor titled "Peabody Dust Fraud Investigation." This document is privileged as part of the attorney work product.

Document 142. Memorandum from Acting Counsel for Trial Litigation to Associate Solicitor regarding Dust Fraud Investigation. This document is privileged as part of the attorney work product.

Document 145. Memorandum from Acting counsel for Trial Litigation to Associate Solicitor concerning AWC criminal investigation. This document is privileged as part of the attorney work product.

Document 146. Memorandum from Administrator Coal Mine Safety and Health concerning special investigation and referral of cases to U.S. Attorney. This document is privileged as part of a government investigative file.

Document 147. Letter from Administrator Coal Mine Safety and Health and Associate Solicitor to U.S. Attorney concerning AWC Criminal investigation. This document is privileged as a confidential communication from client to attorney.

Document 148. Memorandum from MSHA Special Investigator to Chief Office of Investigations concerning referral of tampered dust samples to U.S. Attorney. This document is privileged as part of the deliberative process and the government investigative file.

Document 149. Unsigned document giving the status of a special investigation of AWC indicating developments and potential direction of criminal investigation. This document is privileged as part of the deliberative process and the government's investigative file.

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Document 152. List of mine operators and AWC occurrences prepared at the direction of and for the assistance of the U.S. attorney. This document is privileged as part of the attorney work product and as part of the investigative file.

Document 155. List of mine operators with handwritten marks prepared at the direction of and for the assistance of the U.S. Attorney. This document is privileged as part of the attorney work product.

Document 156. List of mine operators and AWC occurrences prepared at the direction of and for the assistance of the U.S. Attorney. This document is privileged as part of the attorney work product.

Document 157. Memorandum concerning criminal investigation and studies to be performed to assist the U.S. Attorney in criminal investigation of possible dust tampering. This document is privileged as part of the attorney work product.

Document 160. Memorandum from Assistant Secretary to Secretary concerning AWC investigation discussing past deliberations and potential future actions of Agency. This document is privileged as part of the deliberative process.

Document 200. Note to file concerning FOIA request which includes advice received from SOL. This document is privileged as including confidential communication from attorney to client.

Document 201. Memorandum for District Managers from Chief Division of Health concerning processing of dust samples and referring to investigative program being developed. This document is privileged as part of the investigative file.

Document 203. Notes of telephone conversation with MSHA Arlington Health Division concerning new void code for dust samples reflecting opinions and deliberations of Agency officials. This document is privileged as part of the deliberative process.

Documents 326, 327, and 328. These were originally described as a printout of dust samples, a printout of "AWC tally," and a printout of certified dust samplers. The privilege claimed for each document was work product, but there was no indication that they were prepared in anticipation of litigation. However, the affidavit of Robert Thaxton, attached as Exhibit 1 to Deputy Assistant Secretary Hugler's affidavit states that each of these documents was prepared at the request of United States Attorneys' offices and is related to criminal investigations. On the basis of Thaxton's amended description, I hold these documents are privileged as part of the attorney work product.

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Document 339. Document titled "AWC Test Case" prepared by counsel for Trial Litigation SOL. This document is privileged is part of the attorney work product. (There is no indication that it is a confidential communication to the agency-client).

Document 340. This document was prepared by attorneys in SOL office titled "Dust Case (Civil)." It is privileged as part of the attorney work product.

Document 365. Letter 3-16-90 from G. Tinney to Dr. Warren Myers re-draft report on sampling filter abnormalities reflecting deliberations and opinions prior to completion of Report (Document No. 2). This document is privileged as part of the deliberative process.

Document 366. Letter from G. Tinney to Dr. Warren Myers redraft report on sampling filter abnormalities. This document is privileged as part of the deliberative process.

Document 367. Draft of report of Dr. Myers and Allen Wells with handwritten notations reflecting Agency thought processes and deliberations concerning altered dust samples. This document is privileged as part of the deliberative process.

Document 384. Notes of Robert Thaxton MSHA of conference call with U.S. Attorney and SOL, includes discussion of opinions of agency officials and direction of investigation. This document is privileged as part of the investigative file.

Document 394. Monthly Planner Calendars maintained by Robert Thaxton December 1989 to January 1991, including information concerning the direction of criminal investigation of altered dust samples. This document is privileged as part of the investigative file.

Document 401. File marked PHTC Report containing draft of PHTC study and deliberations prior to PHTC report identified as Document No. 1. This document is privileged as part of the deliberative process.

Document 402. Report titled "Tampered Samples Summary for Southern West Virginia" prepared for U.S. Attorney's Office. This document is privileged as part of the attorney work product.

Document 403. Notes of telephone conversation between G. Tinney and Robert Thaxton discussing AWC investigation and including opinions and deliberations of agency and advice received from Solicitor. This document is privileged as part of the deliberative process.

Document 406. 19 Manila File Folders containing documents prepared at the request of the U.S. Attorneys' Offices in

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connection with ongoing criminal investigations. The Secretary has withdrawn her claim of privilege with respect to certain portions of this document as detailed in Attachment A to the Affidavit of Deputy Assistant Secretary Hugler. The remaining documents are privileged as part of the attorney work product.

Document 407. 1991 Monthly Planner Calendar Robert Thaxton including information concerning the direction of the criminal investigation of altered dust samples and indicating the thought processes and deliberations of the Agency. This document is privileged as part of the investigative file.

Document 424. Draft titled "List of Tables" 9/29-10/5/89 with notations indicating results of Agency testing of dust filters preliminary to report identified as Document No. 1. This document is privileged as part of the investigative file.

Document 426. Monthly planning calendars of Robert Thaxton 1988 to January 1990 including information regarding the criminal investigation of altered dust samples. The documents are privileged as part of the investigative file.

Document 441. Letter April 4, 1989 to FBI from Robert Thaxton concerning respirable dust samples submitted to FBI in ongoing criminal investigation. This document is privileged as part of the investigative file.

X

SECRETARY DIRECTED TO SUBMIT DOCUMENTS  
FOR IN CAMERA INSPECTION

In *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert denied, 415 U.S. 977 (1974), the court stated at 826 that it "will no longer accept conclusory and generalized allegations of exceptions [in FOIA] . . . but will require a relatively detailed analysis in manageable segments." This direction was repeated in *Coastal States Gas Corp.*, at 861. In the Motion filed by *Kentucky Carbon, et al.*, counsel suggests as an alternative to ordering production of the documents that I should conduct an in camera inspection to determine which documents or portions of documents are truly privileged. The Secretary agrees to an in camera inspection of any document concerning which I cannot determine from the Secretary's description the validity of the privilege asserted, with the exception of certain portions of Document 406 which involve grand jury investigations.

For the reasons given by Judge Gesell in *Military Project v. Bush*, 418 F.Supp. 876 (D.D.C. 1976), I am reluctant to order an in camera inspection of documents claimed to be privileged. Judge Gesell was apparently unsuccessful however in obtaining

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more specificity in document description, see 418 F.Supp. 880, and I would not expect greater success if I ordered the Secretary to provide better and more complete description of some of the documents. I conclude that an in camera inspection will save time and trouble. Therefore, I will order the Secretary to submit the following documents to me for an in camera inspection to determine whether the privileges were properly invoked.

Document 55. Letter 11-1-89 from Chief General Litigation and Legal Advice Section, Criminal Division, DOJ to U.S. Attorney.

Document 112. Undated memorandum setting forth substance of meeting with U.S. Attorney involving development of criminal investigation.

Document 116. Letter 1-18-91 from J. Davitt McAteer, Occupational Safety and Health Law Center to Assistant Secretary with handwritten notes. The letter itself is not privileged, but the handwritten notes may be.

Document 120. Undated draft briefing paper reflecting "the thought processes and deliberations of the Agency."

Document 139. Unsigned note to file concerning case referral to U.S. Attorney's Office.

Document 143. Undated memorandum concerning criminal AWC investigations.

Document 144. Sample citation and memorandum concerning AWCs.

Document 154. Undated memorandum concerning criminal AWC investigation "which apparently was prepared prior to the issuance of the citations and which concerns the thought processes and scope of direction of investigative activities."

Document 161. Unsigned handwritten notes concerning AWC investigation.

Document 169. Unsigned handwritten notes concerning April 18, 1991, meeting with MSHA.

Document 350. AWC statistical breakdown.

Document 353. Printout summary of altered dust samples with handwritten date of October 13, 1989, concerning criminal investigation.

Document 375. Memorandum 3-15-89 from Leighton Farley to Robert Nesbit (not identified) re: request for direct referral to



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U.S. Attorney, possible tampering with respirable dust samples, Eastern Associated Coal Co.

Document 425. Unsigned notes of Andrew Gero, not otherwise identified, with handwritten notations.

XI

SECRETARY'S CLAIM OF PRIVILEGE DENIED  
ORDER TO PRODUCE DOCUMENTS

With respect to the following documents, the Secretary's claim of privilege is not justified by the document descriptions, and the Secretary is ORDERED to make them available to Contestants by placing them in the Document Depository.

Document 116. The letter without the handwritten notes (concerning the handwritten notes, I have directed the Secretary to submit the document for in camera inspection).

Document 163. Briefing materials for the Secretary for use in preparation for Secretary's testimony before Congress. These documents obviously are not part of the work product. There is no indication that they were prepared in anticipation of litigation. Their relationship to the deliberative process is tenuous and wholly based on conclusions.

Document 176. FBI "invoice" to the PHTC. Nothing in the description indicates that the document is part of the deliberative process or investigative files.

Document 329. Printout listing of AWC sampling and documents used to prepare list. Nothing in the description of this document reportedly shows that it is part of the attorney work product, prepared in anticipation of litigation.

Accordingly, IT IS ORDERED:

1. The Secretary's claim of privilege is upheld with respect to Documents 3, 4, 5, 17, 56, 111, 113, 119, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 142, 145, 146, 147, 148, 149, 152, 155, 156, 157, 160, 200, 201, 203, 326, 327, 328, 339, 340, 365, 366, 367, 384, 394, 401, 402, 403, 406, 407, 424, 426, 441.

2. The Secretary shall submit the following documents to me for in camera inspection: 55, 112, 116 (handwritten notes), 120, 139, 143, 144, 154, 161, 169, 350, 353, 375, 425.

3. The Secretary shall produce the following documents: 116 (letter without notes), 163, 176, 329.

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4. After I have reviewed the documents submitted for in camera inspection, I will determine which privileged documents, if any, are to be disclosed as being essential to the adequate preparation of the operators' cases.

James A. Broderick  
Administrative Law Judge