

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 30, 2003

CDK CONTRACTING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-420-RM
	:	Citation No. 7935401; 4/23/2001
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	:	Docket No. WEST 2001-421-RM
	:	Order No. 7935402; 4/23/2001
v.	:	
	:	Docket No. WEST 2001-422-RM
	:	Order No. 7935403; 4/23/01
	:	
	:	Docket No. WEST 2001-423-RM
	:	Order No. 7935404; 4/23/2001
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2001-424-RM
ADMINISTRATION (MSHA),	:	Order No. 7935406; 4/23/2001
Respondent	:	
	:	Docket No. WEST 2001-425-RM
	:	Order No. 7935407; 4/23/2001
	:	
	:	Docket No. WEST 2001-426-RM
	:	Citation No. 7935408; 4/23/2001
	:	
	:	Docket No. WEST 2001-427-RM
	:	Citation No. 7935409; 4/23/2001
	:	
	:	Docket No. WEST 2001-428-RM
	:	Citation No. 7942519; 4/23/2001
	:	
	:	Mine ID 05-00037 L35
	:	Portland Plant/Quarry
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-461-M
Petitioner	:	A.C. No. 05-00037-05506 L35
	:	Docket No. WEST 2002-464-M
v.	:	A.C. No. 05-00037-05509 L35

	:	
	:	Docket No. WEST 2003-5-M
CDK CONTRACTING COMPANY,	:	A.C. No. 05-00037-05511 L35
Respondent	:	
	:	Portland Plant & Quarry

**ORDER GRANTING, IN PART, MOTION TO COMPEL**

CDK Contracting Company filed a motion to compel the Secretary to produce (1) any Special Assessment Review Forms that were prepared with respect to the citations and orders contested in these cases; and (2) the Special Investigation file relating to Citation No. 7935401 and Order No. 7935402.

**I. Special Assessment Review Forms.**

CDK Contracting states that these forms may contain factual information that is relevant to the penalty criteria and that it is entitled to these forms in preparation of its defense. The Secretary contends that these forms are irrelevant to these proceedings because Commission judges assess penalties *de novo*. She also contends that the forms are protected by the deliberative process privilege. She maintains that they are subject to the deliberative process privilege because they contain predecisional, deliberative recommendations made by the MSHA inspector to his supervisors about whether a special assessment should be initiated.

The Secretary’s special assessment process in 30 C.F.R. § 100.5 is totally irrelevant in these proceedings. Commission administrative law judges assess penalties taking into consideration the six penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), without regard to the Secretary’s special assessment provisions. If I find that the Secretary has established violations in these cases, I will assess each penalty based only on the penalty criteria without taking into consideration how the Secretary assessed the violation.

The Special Assessment Review Forms contain facts that the MSHA inspector presents to his supervisor to support a special assessment. Thus, these forms may contain factual information that relates to the penalty criteria. The deliberative process privilege protects communications between subordinates and supervisors within the government that are “antecedent to the adoption of an agency policy.” *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) (citation omitted). The deliberative process privilege “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents that are protected by the privilege “are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Id.* Nevertheless, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position

on an issue or is used by the agency in its dealing with the public.”<sup>1</sup> *Id.*

I find that the Special Assessment Review Forms are not protected by the deliberative process privilege in this instance. The Secretary did not provide these forms for my *in camera* review, but such forms always set forth the inspector’s factual basis for recommending that a special assessment be considered by the Secretary. The Secretary accepted the inspector’s recommendations as the agency’s position when the subject citations and orders were specially assessed. Thus, even if the forms had once been protected by the privilege, they lost their protected status when the Secretary adopted his recommendations.

In addition, the Secretary’s position with respect to Special Assessment Review Forms is inconsistent at best. I take official notice of the fact that I have been assigned several cases in the past few years in which Special Assessment Review Forms have been attached to the Secretary’s petition for assessment of penalty as a part of Exhibit A. A good example is *Plateau Mining Corp.*, WEST 2002-207, which is currently pending before me. The special assessment review form for each citation in that fatality case was attached by the Secretary to the petition for assessment of penalty. In addition, the Secretary has introduced these forms into evidence at hearings to support her case. *See, e.g., Basin Resources, Inc.*, 19 FMSHRC 1565, 1570-71 (Sept. 1997) (ALJ); *S & M Construction, Inc.*, 18 FMSHRC 1018, 1051-52 (June 1996) (ALJ). The Secretary cannot make her Special Assessment Review Forms public in some cases and claim that it is privileged in others.

I find that the requested Special Assessment Review Forms may have some relevance to the Secretary’s negligence and unwarrantable failure determinations. For the reasons set forth above, CDK Contracting’s motion to compel production of the Special Assessment Review forms is **GRANTED** and Secretary is hereby **ORDERED** to provide counsel for CDK Contracting a copy of the requested Special Assessment Review Forms as soon as possible.

## II. Special Investigation File

CDK states that it believes that the Special Investigation file for Citation No. 7935401 and Order No. 7935402 contains factual information relevant to the citations and orders at issue in these proceedings. The Secretary objects to producing this file on the grounds that it is not relevant. She also objects to providing portions of the file that are protected by the deliberative process privilege, the informant’s privilege, or the attorney-client privilege. The Secretary states that, “[s]ubject to and without waiving these objections, the file is attached with the exception of redacted or withheld privileged information as detailed in a privilege log.” (S. Objection 2).

Because counsel for the Secretary represents that he has provided the requested Special Investigation file to counsel for CDK Contracting with privileged sections redacted, CDK

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<sup>1</sup> A more detailed discussion of the deliberative process privilege is contained in my order in *Newmont Gold Co.*, 18 FMSHRC 1532 (August 1996).

Contracting's motion relating to the special investigation file is **DENIED**.

Richard W. Manning  
Administrative Law Judge

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