

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

November 18, 2009

ORDER

(Addressing the NRC Staff's Motion for Leave to Amend Privilege Log Certification)

Before us is the NRC Staff's motion¹ to revise the language of the privilege log certification provisions of the Pre-License Application Presiding Officer (PAPO) Board's Revised Second Case Management Order² and Fifth Case Management Order.³ The provisions in question from those PAPO Board Orders were adopted by the Construction Authorization Boards in CAB Case Management Order #1.⁴ In a recent order denying the Staff's motion for leave to correct its July 30, 2009 deliberative process log, we quoted and explained a number of

¹ NRC Staff Motion for Leave to File an Amended LSN Privilege Log Certification and Motion to Extend November 1, 2009 Privilege Log Certification Deadline (Oct. 30, 2009).

² Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) (unpublished) at 7-8 (Part II.D), Appendices A, B, C, D, E, F and G.

³ Fifth Case Management Order (Supplementation, Correction, and Changing of Privilege Logs) (Nov. 1, 2007) (unpublished) at 4 (Part B), 6-7 (Part D) [hereinafter FICMO].

⁴ CAB Case Management Order #1 (Jan. 29, 2009) (unpublished) at 2-3 (Part A).

those applicable provisions.⁵ Because the PAPO Board Orders, as well as our recent October 7, 2009 Order, are clear and unambiguous, we will not repeat the applicable provisions.

The Staff asserts that, because it can no longer fix previous immaterial errors in its cumulative privilege log, it cannot certify that its latest supplement is correct. The ethical dilemma perceived by Staff counsel does not, in fact, exist. Properly read, the requirements of the case management orders, and the supplementation and certification scheme those provisions create, provide that counsel's certification accompanying any monthly supplementation of the privilege log certifies only that the information in the latest supplement to the privilege log is, inter alia, correct. Stated otherwise, although each month's supplementation adds information to the entire cumulative log, it also separately sets forth the newly added information. The certification accompanying the monthly supplementation covers only the newly supplemented material even though that information appears in two places, including the updated version of the cumulative privilege log.

Prior minor errors included in previously certified supplements to the privilege log are unfortunate and should have been eliminated by counsel in "exercis[ing] due diligence and care in preparing and filing their privilege logs."⁶ Such "mistakes are strongly disfavored and should be rare."⁷ Nonetheless, such minor errors, when subsequently discovered, are not deserving of correction and only "materially incorrect or misleading information" must be corrected by counsel.⁸ Therefore, the provisions of the case management orders, when properly read, do not pose the perceived ethical quandary conjured by Staff counsel. Accordingly, there is no need to amend the language of the required certification. That part of the Staff's motion is denied.

⁵ CAB Order (Denying Motion to Compel and Motion to Correct Logs) (Oct. 7, 2009) (unpublished) at 3-4.

⁶ FICMO at 4.

⁷ Id.

⁸ Id. at 6.

The Staff also asks that it be granted an extension of time to file its November privilege log supplementation until one day after the Board rules on its motion. Although the better practice would have been for the Staff to seek such relief before the eve of the due date, the Staff's request is granted.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 18, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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U.S. DEPARTMENT OF ENERGY)
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Docket No. 63-001-HLW

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Addressing the NRC Staff's Motion for Leave to Amend Privilege Log Certification), dated November 18, 2009, have been served upon the following persons by Electronic Information Exchange.

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