

Congress of the United States
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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

June 22, 2006

The Honorable Nils J. Diaz, Ph.D.
Chairman
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Dr. Diaz:

We are writing regarding the Commission's May 25, 2006 action on "Decision Item: Secy-06-0080 National Source Tracking Of Sealed Sources"¹. The Commission's actions changed the basis for the rulemaking from 'common defense and security' to 'public health and safety,' thereby allowing the Agreement States to implement the tracking system rather than ensuring that the implementation occurs at the federal level. We believe this could have adverse impacts on the security of materials that could be used to construct dirty bombs, and runs counter to the intent of Congress when it directed the Commission to establish a tracking system in the Energy Bill last year.

As you know, we are the authors of the "Dirty Bomb Prevention Act," portions of which were offered as amendments to the Energy Bill (H.R. 6) and enacted into law last summer. The enacted provisions of the "Dirty Bomb Prevention Act" – contained in Section 651 of the Act, added a new Section 170H to the Atomic Energy Act of 1954. Under this provision of the law, the Commission was directed to establish a tracking system for radiation sources (which were defined by law to include Category 1 and 2 sources as well as "any other material that poses a threat such that the material is subject to this section, as determined by the Commission, by regulation, other than spent nuclear fuel and special nuclear materials") which would:

- "(A) enable the identification of each radiation source by serial number or other unique identifier;
- '(B) require reporting within 7 days of any change of possession of a radiation source;
- '(C) require reporting within 24 hours of any loss of control of, or accountability for, a radiation source; and
- '(D) provide for reporting under subparagraphs (B) and (C) through a secure Internet connection.

While there is certainly a nexus between safety and security, the motivation for our legislation was the security of these materials. The Commission clearly understood this – for example, Commissioner Merrifield's views supporting the change in basis stated that "Additionally, if sources in the tracking system are covertly or accidentally identified to outside

¹ See Appendix A for the Commission voting record along with comments submitted by Commissioners in its 3-2 decision on this matter.

groups, they could become a preferred target for terrorists.² In its May 25 decision, however, the Commission inexplicably switched courses from the 'common defense and security' approach to 'public health and safety'.

The successful detonation of a dirty bomb could cause widespread fatalities and injuries, panic, environmental contamination and economic harm. We agree with Commissioner Jaczko's belief that the "NRC has a responsibility to impose security requirements under its common defense and security authority because of the real security threats that exist"³. We strongly urge the Commission to reconsider its decision to approve its regulation on the basis of 'public safety and security,' and return to the 'common defense and security' approach which we believe is necessary in order to faithfully implement Congressional intent. Moreover, given the importance of this matter, we also urge you to extend the 20 day timeframe in which the public may respond to the Commission's proposal. In addition, we also ask for your prompt attention in responding to the following questions:

- 1) According to Commissioner McGaffigan's views⁴ the Commission was told that "an informal poll of twenty-four States revealed that five States were not supportive of the basis switch. California (which alone regulates 20% of the total national inventory of radioactivity in Category 1 and 2 sources) and New York are among the five who do not support the switch, and neither of these States expressed an interest in an agreement under section 274i of the Atomic Energy Act to assist NRC in carrying out its responsibilities." Please provide complete documentation regarding this informal poll, as well as other interactions with the Agreement States on the creation of the tracking system, including copies of all correspondence, emails, faxes, meeting notes, memos, telephone logs and any other materials.
- 2) According to Commissioner McGaffigan's views,⁵ the NRC staff may have advocated for the switch in basis partly because of budgetary concerns, evidently assuming that in its first year of operation, the NRC would be "checking 100% of licensees in the first year, and expending 20 FTE and \$750,000."
 - a) Please provide copies of all staff analysis regarding the budgetary needs for NRC to implement a national tracking system.
 - b) Did staff attempt to identify the necessary resources with which to implement the national tracking system within NRC's existing funds? If so, what was the outcome?
 - c) If no resources were identified within existing NRC funds, did the NRC ever attempt to request that such funds be provided by Congress? If not, why not?
 - d) Where will the Agreement States obtain funds to implement their own tracking programs? Will the NRC provide such funding? How much will the establishment and implementation of such systems cost each State?

² These views are on pages 10-11 of Appendix A.

³ These views are on page 13 of Appendix A.

⁴ These views are on pages 6-7 of Appendix A.

⁵ These views are on pages 6-7 of Appendix A.

- 3) As you know, radiation sources are often transferred between entities within the U.S., or shipped to different geographical locations by their owners. How will the Agreement States be expected to coordinate the tracking of sources when such transfers occur? Who ultimately will be responsible for ensuring that when a radiation source is shipped out of one Agreement State, the Agreement State to which it is sent will be immediately informed?
- 4) If a radiation source located in one Agreement State is reported as missing, lost or stolen, will the Agreement State be responsible for informing a) the Commission, b) any or all of the other Agreement States, c) State or local law enforcement authorities in the Agreement State in which the source went missing, d) State or local law enforcement authorities in nearby Agreement States or e) federal law enforcement authorities? What are the required timeframes for such reporting?
- 5) Please provide a complete timeline for the process of adding Category 3 sources to the tracking system, listing the analysis that is required and deadlines for its completion.
- 6) As you know, earlier this year the Government Accountability office (GAO) successfully smuggled enough radioactive materials suitable for use in a small dirty bomb into the country across the Canadian border. In your May 2, 2006 response to a March 28, 2006 letter from Rep. Markey on this subject, you said that the Commission was "committed to working with CBP [Customs and Border Protection, part of the Department of Homeland Security, DHS] and other elements of DHS, as well as the Agreement States, to provide CBP easier access on a 24-hour-a-day basis to the information needed to confirm that shipments of risk-significant sources are legitimate."
 - a) There are 34 different Agreement States. Will every CBP official who might be confronted with shipments of radiation sources have 24-hour-a-day access to an official in each Agreement State in the event questions arise about a particular shipment? Will CBP officials basically be forced to decide which of 34 officials to contact, instead of contacting a single office at the NRC as they can currently do?
 - b) Does every Agreement State employ personnel whose job it will be to be on duty on a 24-hour-a-day basis in order to respond to such calls?
 - c) If not, then couldn't allowing the Agreement States to implement the tracking system result in a degradation of the security associated with these sources due to delays and/or inability to obtain rapid access to information regarding particular shipments? If not, why not?
 - d) As you know, in October, 2004 two radiation sources were imported from Russia by Halliburton and were supposed to be shipped to Texas upon their arrival in New York. Instead, they were mistakenly shipped to a warehouse in Chelsea, Massachusetts where they remained for several months until they were finally reported missing in February 2005. Under the new tracking system, under this scenario, when and to whom would the licensee be expected to report a newly imported source (assuming a future event such as this involved a Category 1 or 2 source) as missing – the appropriate official in New York, or Texas, or both? What would the official(s) then be expected to do?

- 7) It is our understanding that the Commission will be including Category 3 sources in the tracking system. We applaud this decision and encourage its prompt adoption. However, we are concerned that this could pose additional problems if it is left to the Agreement States to implement.
 - a) Isn't it true that currently, only some Agreement States regulate Category 3 materials? Please provide a list of Agreement States that do so.
 - b) Would the Agreement States that do not currently regulate Category 3 materials be expected to begin to do so? If so, what would that entail? Please provide an estimate of the costs associated with the assumption of such a responsibility for each State that does not currently regulate Category 3 sources.

- 8) A February 26, 2006 report by the NRC Inspector General (IG) entitled "Audit of the Development of the National Source Tracking System (NSTS)" found that the proposed tracking system "may not account for all byproduct material that represents a risk to the common defense and security and public health and safety. Such risks could result in economic, psychological, and physical harm to the United States and public." This report made 2 recommendations: 1) to conduct a comprehensive regulatory analysis for the NSTS that explores other viable options and 2) to validate the existing data in the Interim Database. Were these recommendations followed prior to the Commission vote? If so, what was the outcome? If not, why not?

- 9) Will the tracking system consider transactions involving the aggregation of sources whose activity levels, if taken together, exceed the Category 2 threshold? If not, why not, since the security and safety threats associated with such a transaction would be the same as that associated with a transaction involving a single Category 2 level source?

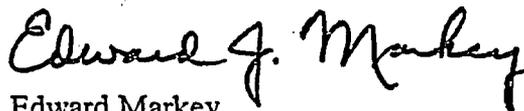
- 10) It is our understanding that the NRC's import/export rule for radiation sources *does* apply to aggregation of sources whose activity levels, if taken together, exceed the Category 2 threshold. Does this mean that if someone overseas wishes to send such an aggregation of sources to the U.S., that the importation will be tracked until the sources reach the U.S., after which they might be essentially ignored if such aggregated sources are not included in the tracking system? How can this be justified from a security and safety perspective?

Thank you for your attention to this important matter. Please provide your response no later than Friday June 30, 2006. If you have any questions or concerns please have your staff contact Dr. Michal Freedhoff (Rep. Markey) at 202-225-2836, and Dan Utech (Senator Clinton) at 202-224-8365.

Sincerely yours,



Hillary Rodham Clinton
United States Senate



Edward Markey
United States House of Representative