RULEMAKING ISSUE
NOTATION VOTE

January 15, 2009 SECY-09-0011

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: DEFERRAL OF RULEMAKING: EXPANSION OF NATIONAL SOURCE TRACKING SYSTEM (RIN 3150-AI29)

PURPOSE:

To request the Commission's approval of the staff's recommendation to defer rulemaking on expanding the National Source Tracking System (NSTS) to include licensees who possess sealed sources whose radioactivity is greater than, or equal to, 1/10th of International Atomic Energy Agency (IAEA) Category 3 threshold levels.

SUMMARY:

On November 8, 2006, the U.S. Nuclear Regulatory Commission (NRC) issued a final rule to establish a national source tracking system requiring licensees who possess IAEA Category 1 and 2 sources to report certain inventory and transaction information. Implementation of the NSTS was scheduled for November 2007, but was delayed until December 30, 2008. On April 11, 2008, in response to a June 9, 2006, Staff Requirements Memorandum (SRM), NRC issued a proposed rule that would expand the NSTS to include sources greater than, or equal to, 1/10th of the IAEA Category 3 threshold levels. However, because the NSTS did not begin operation until December 2008, and based on a significant number of public comments received opposing the NRC's proposed rule to expand the current NSTS beyond Category 1 and 2 at this point of time, the staff is proposing to defer completion of the NSTS expansion rule (SECY-08-0031). This deferral would allow the staff to monitor operation of the NSTS for a year and apply

CONTACTS: Michael Williamson, FSME/DILR
(301) 415-6234

insights gained during that period to a decision on expansion of the system. It would also allow licensees and the States to gain experience and information related to the use of the current NSTS, and would allow the staff time to evaluate the information from upcoming source risk reports and the proposed General Licensing rule (SECY-08-0137) as they might relate to the NSTS expansion rule.

BACKGROUND:

As a result of the September 11, 2001, attacks in the U. S., the Commission undertook a review of licensee security programs. An outcome of this review was that licensees should implement additional measures to enhance the security and control of certain risk-significant radioactive materials to reduce the risk of malevolent use, such as a terrorist act. A licensee's loss of these materials, whether inadvertent or through a deliberate act, has a potential to result in significant adverse impacts that could reasonably constitute a threat to the public health and safety, the environment, or the common defense and security of the U. S. As a result, materials licensees were required to implement enhanced security requirements if they possessed radioactive material in quantities greater than, or equal to, IAEA Category 2.

One of the measures instituted as part of the review was the issuance on November 8, 2006, of the National Source Tracking of Sealed Sources final rule (71 FR 65686). Under this program, licensees who possess IAEA Category 1 and 2 sources are required to report information on the manufacture, transfer, receipt, disassembly, and disposal of these sources into a national database. The implementation date for the NSTS was originally scheduled for November 2007, but was delayed to allow additional time for system information technology (IT) development (72 FR 59162). The NSTS became operational on December 30, 2008, and licensees are required to report to the system by January 31, 2009.

In an SRM dated June 9, 2006, the Commission directed the staff to prepare a proposed rule which would consider expanding the NSTS to include Category 3 sources as well as certain high-end Category 4 sources, specifically those sources above 1/10th of IAEA Category 3 threshold levels. On April 11, 2008, in response to the SRM, a proposed rule was issued by the NRC in the *Federal Register* (73 FR 19749) which would expand the NSTS to include sources greater than, or equal to, 1/10th of the IAEA Category 3 threshold levels.

DISCUSSION:

Staff review of public comments and current activities

The staff has reviewed public comments received on the proposed rule to expand the NSTS to include sources greater than, or equal to, 1/10th of Category 3 threshold levels. In response to this proposed rule, the staff received 19 public comment letters. In 18 of these letters, the comments were generally opposed to expanding the NSTS as proposed. These commenters had three major concerns: 1) The rule is premature and should be delayed to allow more time to obtain operating information to refine the burden estimates in the regulatory analysis from an operational NSTS for Category 1 and 2 sources. A functioning NSTS can be used as a model to better estimate the burden on licensee operations and resources; 2) The NSTS should be

fully operational and successfully tracking Category 1 and 2 sources before the NRC adds a potentially significant number of Category 3 and high-end Category 4 sources (either specifically-licensed sources or certain currently generally-licensed sources) to the system; and 3) There needs to be additional detailed justification for the security risks posed by the lower activity sources before the additional burden of tracking them as part of an expanded NSTS is incurred, both to licensees and to the NRC in terms of monitoring data.

During the public comment period, the Conference of Radiation Control Program Directors, Inc. (CRCPD) and the Organization of Agreement States Inc. (OAS) submitted comment letters in response to the proposed rule to expand the NSTS. In its comment letter of June 24, 2008, the CRCPD stated that it was not in favor of expanding the requirement for tracking to Category 3 or 1/10th of Category 3 sources at this time. The CRCPD noted that the NSTS for radioactive material for sources in IAEA Categories 1 and 2 has not been implemented, and recommended that the expansion of national source tracking be postponed until there is significant information on the ease and ability of participation for licensees that possess Category 1 and 2 sources. In addition, the CRCPD stated that there has been no vulnerability assessment of Category 3 or 1/10th of Category 3 sources. Until such an assessment has been completed, CRCPD indicated that no efforts should be expended on the expansion of the NSTS. The OAS, in its comment letter dated June 25, 2008, indicated that it was in agreement with the comments provided by the CRCPD, and supported the postponement of the rulemaking to expand the NSTS.

The staff has also considered the current status of implementation of the NSTS for Category 1 and 2 sources. As previously noted, the NSTS for Category 1 and 2 sources was established in a final rule published on November 8, 2006. When the Commission directed the staff to expand the NSTS in the June 2006 SRM, the system was expected to be operational in November 2007. The NSTS became operational on December 30, 2008, and approximately 1,300 licensees with Category 1 and 2 sources will begin entering inventory data and source transaction (transfer, receipt, disposal, etc.) data in January 2009. The NSTS is a new system from the standpoint of IT, licensees' data entry, and NRC's ability to monitor any potential security concerns which the new NSTS may uncover. Thus, NRC will be able to analyze the implementation of the NSTS system after it becomes operational in January 2009.

<u>Staff recommendation on deferral of expansion of NSTS at this time</u>

Based on its review of the public comments and on consideration of the current status of the NSTS, the staff is proposing to defer the rulemaking on expanding the NSTS for the reasons listed below. The CRCPD, the OAS, and the U.S. Department of Energy, which were represented on the NRC staff's Working Group and Steering Committee, agree with the staff's recommended approach in this paper.

1) A deferral would allow NRC to observe the operation of the NSTS for IAEA Category 1 and 2 sources for a full year of operation and thereby:

    a. Ensure that the system is fully functional and working well before substantially increasing the size of the NSTS. While we fully expect the IT elements of the NSTS to be capable of being expanded to additional categories of sources, an expanded NSTS could result in as many as 4,900 additional Category 3 and 1/10th of Category 3 specific and general licensees. Specifically, the proposed NSTS expansion rule

would add approximately 3,500 specific licensees and the proposed General Licensing rule would add approximately 1,400 general licensees (the General Licensing rule, if it is finalized as currently proposed, would convert some generally-licensed sources into specifically-licensed sources);

b. Have operating information to refine the burden estimates from an operational NSTS for Category 1 and 2 sources and allow staff to better address comments from the States and the public on the regulatory analysis;

c. Determine how the NSTS is performing from the standpoint of IT, from the standpoint of issues that licensees have in data entry, and from the standpoint of how well NRC is able to monitor the NSTS for security issues; and

d. Better estimate specific problems that particular types of licensees (e.g., mobile brachytherapy units, etc.) may encounter in entering data and thus better consider appropriateness for expanding the NSTS to licensees having lower category sources.

2) A deferral would allow NRC to evaluate the report by the Radiation Sources Subgroup of the Radiation Source Protection and Security Task Force on the list of radioactive sources that warrant enhanced security and protection, and the Sandia National Laboratories Study on the Material Attractiveness report on source risks. Information from these reports would allow the staff to better address the comments from the States and the public on the proposed rule and to better articulate the risk basis for adding additional lower activity sources to the NSTS before placing additional costs and time burden on licensees with these lower activity sources and on the NRC for monitoring these sources. Although the staff has previously assessed numbers of licensees and types and quantities of Category 3 and certain Category 4 sources, that data does not by itself provide sufficient information to adequately define a risk basis. Review of the risk reports noted here will allow the staff to combine knowledge of sources possessed by licensees with the risks the sources present to sufficiently define the overall risk for these sources and to proceed with the rulemaking.

3) If the Commission determines that the general licensing requirements need to be revised, as proposed in the General Licensing rule, deferring the NSTS expansion rule would allow staff to consider the impact of adding additional licensees to the NSTS in one consolidated regulatory analysis. In addition, it would allow the staff to better consider the impact of potentially increasing the size of the NSTS.

<u>COMMITMENT:</u>

The staff plans to carry out actions with regard to the rulemaking on expansion of the NSTS as follows:

1) As stated above, the staff will implement the NSTS for Category 1 and 2 sources in January 2009, and observe how it operates for one year after its start-up date;

2) During and following the 1-year period, the staff will conduct a data and system operations and performance analysis of the NSTS for Category 1 and 2 sources based on one year's information;

3) The staff will evaluate the data received from the Radiation Sources Subgroup report and from the Sandia National Laboratories Study on Material Attractiveness report on source risks to better risk-inform this rulemaking and to better articulate the risk basis for adding additional lower activity sources to the NSTS; and

4) Based on the operations and performance analysis of the NSTS stated in (2) above, evaluation of data stated in (3) above, and the impact of changes to the general licensing requirements, the staff will recommend either proceeding directly to issue a final rule on expansion of the NSTS, or provide the Commission with a new proposed rule to expand the NSTS by September 2010.

COORDINATION WITH STATES:

The CRCPD and the OAS, were represented on the NRC staff's Working Group and Steering Committee, and the CRCPD and OAS agree with the staff's recommended approach to defer this rulemaking at this time.

RECOMMENDATIONS:

The staff recommends that the Commission approve the staff's approach for the rulemaking to expand the NSTS as indicated in the Commitment section of this paper.

RESOURCES:

Upon resumption of the rulemaking process, it is estimated that 0.8 full-time equivalent positions will be required to complete the rulemaking which has not been explicitly included in the Fiscal Year 2010 and 2011 budget. After Commission approval of the staff's approach, the staff will re-prioritize its resources in the Common Prioritization of Rulemaking Chart to support the rulemaking using existing available resources.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed approach outlined in this paper. Additionally, in accordance with the Inspector General Act, the Office of the Inspector General has provided its observations on this paper, which were considered by the staff in its recommendation.

/RA Martin Virgilio for/

R. W. Borchardt
Executive Director
for Operations

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed approach outlined in this paper. Additionally, in accordance with the Inspector General Act, the Office of the Inspector General has provided its observations on this paper, which were considered by the staff in its recommendation.

/RA Martin Virgilio for/

R. W. Borchardt
Executive Director
for Operations

ADAMS ACCESSION NO.: ML083540566 WITS200600275/EDATS: SECY-2008-0697

OFFICE	FSME	FSME	FSME	OGC
NAME	MWilliamson	KHsueh	MShaffer;MThaggard for	BJones
DATE	11/20/08	11/21/08	12/24/08	12/03/08
OFFICE	FSME	OIP	ADM	NSIR
NAME	RLewis	MDoane	MLesar	RCorreia
DATE	12/12/08	12/10/08	12/08/08	12/09/08
OFFICE	Tech Editor	FSME	EDO	
NAME	PTressler	CMiller (GPangburn for)	RWBorchardt (MVirgilio for)	
DATE	12/29/08	1/8/09	01/15/09	

OFFICIAL RECORD COPY