



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 25, 2006

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-06-0205

TITLE: FINAL RULE: NATIONAL SOURCE TRACKING OF SEALED
SOURCES (RIN 3150-AH48)

The Commission (with Chairman Klein and Commissioners Merrifield and Lyons agreeing) approved the final rule as noted in an Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) of October 25, 2006. Commissioners McGaffigan and Jaczko disapproved the final rule.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Klein
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons
OGC
EDO
PDR

VOTING SUMMARY - SECY-06-0205

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE ⁶
CHRM. KLEIN	X				X	10/11/06
COMR. McGAFFIGAN		X			X	10/5/06
COMR. MERRIFIELD	X				X	10/11/06
COMR. JACZKO		X			X	10/13/06
COMR. LYONS	X				X	10/11/06

COMMENT RESOLUTION

In their vote sheets, Chairman Klein and Commissioners Merrifield and Lyons approved the final rule and provided some additional comments. Commissioners McGaffigan and Jaczko disapproved the final rule. Subsequently, the Commission affirmed the final rule in Affirmation Session as reflected in the SRM issued on October 25, 2006.

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN KLEIN
SUBJECT: **SECY-06-0205 - FINAL RULE: NATIONAL SOURCE
TRACKING OF SEALED SOURCES (RIN 3150-AH48)**

Approved xx Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached xx None _____



SIGNATURE

10/11 /2006

DATE

Entered on "STARS" Yes No _____

**Chairman Klein's Comments on SECY-06-0205, Final Rule:
National Source Tracking of Sealed Sources**

I approve the staff's recommendation to issue the final rule for the National Source Tracking System (NSTS) under the NRC's authority to protect public health and safety. As the staff notes in SECY-06-0205, issuing the rule under this basis would be consistent with the framework for the increased controls for radiation sources established by the Commission, and it would enable Agreement States to oversee their licensees' data reporting to the NSTS. Furthermore, this position is in line with the consensus of the Agreement States on this matter.

I agree with the view that the American people are better served when the NRC works in partnership with the current 34 Agreement States. For the NSTS rule, engaging the capabilities of the Agreement States will allow for more prompt verification that the rule's reporting requirements are being implemented, and for more effective and efficient inspections as a result of the States' familiarity with their licensees. This approach will translate into a reduction of unnecessary burden on material licensees.

The NRC is responsible to develop and maintain the NSTS, and Agreement States will not develop or maintain their own databases. The NSTS will be a truly national system. Far from abdicating its responsibilities, as some have asserted, I believe that, in fully engaging the Agreement States in this effort, the Commission will better leverage the Nation's capabilities to ensure that radioactive sources of concern are controlled. The Agreement States have demonstrated that they can issue legally binding requirements in both a timely and consistent manner, and that they can provide effective inspection and enforcement oversight of their licensees' implementation of increased controls on radioactive sources. To provide a further layer of assurance that sources of concern are being effectively tracked and controlled, the NRC will monitor Agreement State oversight of their licensees' implementation of the NSTS reporting requirements through the periodic reviews of Agreement State programs conducted under the Integrated Materials Performance Evaluation Program.

The staff estimates that no more than 1 hour of inspection effort per licensee will be necessary to inspect the roughly 1000 Agreement State licensees possessing Category 1 and 2 sources during the first year of implementation of the NSTS, resulting in a total estimated cost of \$87,000 among all the Agreement States. Subsequently, these licensees would be inspected every three years, and the annual implementation costs to the Agreement States would fall to a total of \$29,000. These inspections will be conducted during routine safety and/or security inspections. This is a non-discretionary burden, and the Federal and State governments should work together to bear this burden in an efficient and practical manner to the benefit of the American people.

As Commissioner McGaffigan noted in his vote, the future addition of Category 3 sources to the NSTS will increase the oversight demands on regulators. To address this concern, the staff should work with the NRC's external stakeholders to develop less burdensome reporting and verification guidelines for Category 3 sources, commensurate with the reduced risk they present. Additionally, the staff should work with those States that have expressed reservations about overseeing their licensees' implementation of the NSTS reporting requirements to identify ways in which the NRC can ameliorate their underlying concerns and possibly withdraw their objections to the public health and safety basis for the NSTS rule. Finally, and more broadly related to the evolution of the relationship between the NRC and the Agreement States, the staff should propose a strategy for the NRC to approach the Congress and secure a reasonable appropriation from the general fund to support the development and maintenance of the national structure for regulating nuclear materials. To this end, I would be willing to support annual funding on the order of \$2 million in support of technical training, regulatory guidance development, and other applicable activities.

DK
10/11/66

AFFIRMATION ITEM

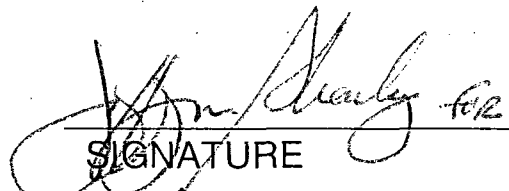
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-06-0205 - FINAL RULE: NATIONAL SOURCE
TRACKING OF SEALED SOURCES (RIN 3150-AH48)**

Approved _____ Disapproved x Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached x None _____



SIGNATURE

10/5/06

DATE

Entered on "STARS" Yes x No _____

Commissioner McGaffigan's Comments on SECY-06-0205

I disapprove the final rule on National Source Tracking of Sealed Sources. Consistent with my vote on SECY-06-0080, I continue to believe that the facts before us weigh strongly in favor of keeping this rule under our common defense and security authority. However, this does not mean that I think we need to "go it alone." To the contrary, I believe that there continues to be a role for Agreement States that either have signed or will sign agreements pursuant to Section 274.i of the Atomic Energy Act of 1954, as amended, and that are willing and able to join us in overseeing National Source Tracking. In fact, as I indicated in my vote on COMSECY-05-0015, I continue to believe that there may be other mechanisms beyond 274.i that we can explore to enhance State participation.

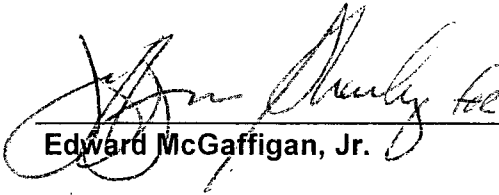
What concerns me is the five States who stated that they are neither willing nor able to join us under the rubric of "public health and safety." California, Florida, Massachusetts, New York, and Illinois have more licensees with risk significant radioactive sources than the NRC. National Source Tracking is just too important and too critical a program for us, our Federal partners, and the Agreement States to risk placing the burden of its oversight on the backs of a significant number of States that are already struggling for resources. Moreover, these States see no operational nexus between their established regulatory programs, which provide for the public health and safety of their citizens, and the nationwide, interstate functions of the National Source Tracking program. National Source Tracking was clearly meant to be a Federal program with strong, central, and Federal resources and accountability. This was clearly the intent of the Congress in adopting the provisions of the Dirty Bomb Prevention Act in Section 651(e) of the Energy Policy Act of 2005.

As an unfunded Federal mandate, the "public health and safety" version of this rule will place considerable strain on State resources. In keeping with the current scope of the rule, the staff presented just the near-term State impacts of tracking Category 1 and 2 sources. But the future addition of Category 3 sources to the National Source Tracking will multiply this strain well beyond "1 hour per licensee times 1,000 licensees." For example, Florida estimates that its resources are already insufficient to implement the rule for 60-70 licensees with risk significant Category 1 and 2 sources, and that the addition of Category 3 to the NSTS would only triple the strain.

I'm sure that other States would also be stretched beyond their ability to provide effective oversight of the National Source Tracking requirements. For example, in its 2006 IMPEP review, staff noted that Massachusetts suffered a 30% reduction of Radiation Control Program staff assigned to Agreement State program functions since the 2002 IMPEP review and that staff shortages contributed to a backlog of licensing actions. If this is the case, how can we add more burden on Agreement States through the public health and safety implementation of the NSTS?

I recognize that for reasons related to timeliness, fiscal restraint, and a sustained interest in Agreement State participation in the tracking of risk-significant radioactive material, my colleagues may be reluctant to restore the original basis for this rule. However, we have recently learned that deployment of version 1 of the NSTS software will be delayed until November 2007 (FY'08). Like it or not, we have time to reconsider this rule, and to seek OMB

review of the original version. Congress will certainly support whatever reasonable budget increment we need to oversee the NSTS in FY'08. So, I urge my colleagues to join Commissioner Jaczko and me in putting this rule back on a firm Federal footing.

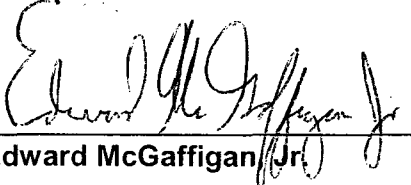
 10/5/06
Edward McGaffigan, Jr. (Date)

Commissioner McGaffigan's Additional Comments on SECY-06-0205

I am supplementing my vote because the issue of treating Category 3 sources differently from Category 1 and 2 sources in the National Source Tracking System (NSTS) has come up in other Commissioners' votes.

I support Commissioner Jaczko's position that it is premature to make any such judgment. We have heard from only one stakeholder on the matter at the OAS/CRCPD Commission meeting. Other stakeholders, particularly our Federal partners, may have very different views on this matter. EPA, DHS, and DOE all have expressed strong support for including Category 3 sources in the NSTS. The Chairman's August 2006 Task Force Report to the President and the Congress endorsed expansion of NSTS to Category 3 sources. NSTS is supposed to meet the needs not only of NRC, but also of our Federal partners. That is why there is an interagency steering committee for the NSTS.

I believe that the existing mandate to the staff in the SRM on SECY-06-0094 will ensure that all stakeholders, including the Agreement States, will have input into the Category 3 proposed rule. There is no need to prejudge the staff's analysis based on the input of a single stakeholder.


Edward McGaffigan (Jr.) 10/13/06
(Date)

AFFIRMATION ITEM


RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-06-0205 - FINAL RULE: NATIONAL SOURCE TRACKING OF SEALED SOURCES (RIN 3150-AH48)**

Approved Disapproved Abstain

Not Participating

COMMENTS: Below Attached None



SIGNATURE

10/11/06

DATE

Entered on "STARS" Yes No

Comments from Commissioner Merrifield on SECY-06-0205:

I approve the staff's recommendation to issue the final rule for the National Source Tracking System (NSTS) under the NRC's authority to protect the public health and safety as outlined in SECY-06-0205, Final Rule: National Source Tracking of Sealed Sources. Issuing the rule under our public health and safety authority is consistent with the framework for the increased controls for radiation sources and authorizes the Agreement States to oversee their licensee's reporting of data to the NSTS. This position is also in line with the consensus of the Agreement States on this matter.

In previous votes I documented my reasoning for approving this rulemaking under NRC's authority to protect public health and safety. Public comments on this rulemaking have not been sufficient to change my decision. Basically, the Agreement States already regulate the sources of concern in this rulemaking under a public health and safety basis. The NRC, under the direction from Congress, is establishing a national source tracking system. The NRC will develop and maintain the national tracking system. All the Agreement States are being tasked to do is to ensure that the licensees they are already regulating submit appropriate reports to maintain the national source tracking system accurate and current. To initiate the program, NRC will provide both the licensees and the Agreement State access to the data in our interim data base and the initial review can focus on any necessary revisions. It is neither unreasonable nor a significant burden for Agreement States to ensure their existing licensees are reporting data appropriately to the NRC.

I recognize that there are some Agreement States currently under financial strain. This situation happens every year as various States go through their budget cycles. I do not believe the new limited State responsibilities under the national source tracking system are the sole cause of this financial strain. These States must solve their own financial problems. This action should happen regardless of this new responsibility. If the NRC were to retain sole responsibility for all reporting to the national source tracking system, then, under our existing funding requirements, the NRC would need to charge fees to the licensees in the Agreement States for our inspections. Therefore, I conclude that it would be more efficient overall for the authority to ensure the data is submitted in a timely manner be vested in the Agreement States.

However, I do believe the NRC and Agreement States should work together to ensure this increased reporting requirement is implemented in an efficient and practical manner. Staff should work with those States that have expressed reservations about assuming this new responsibility to identify potential methods to address their underlying concerns.

In addition, the future addition of Category 3 sources will increase the demands on the licensees and the regulators. Staff should work with the appropriate stakeholders to develop less burdensome reporting and verification requirements for category 3 sources, commensurate with the reduced risk they present.



10/11/06

AFFIRMATION ITEM

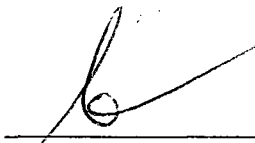
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER JACZKO
SUBJECT: **SECY-06-0205 - FINAL RULE: NATIONAL SOURCE
TRACKING OF SEALED SOURCES (RIN 3150-AH48)**

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached X None _____



SIGNATURE

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10/17/06

DATE

Entered on "STARS" Yes X No _____

Commissioner Jaczko's Comments on SECY-06-0205
Final Rule: National Source Tracking of Sealed Sources (RIN 3150-AH48)

I disapprove of the staff recommendation to issue the final rule for the National Source Tracking System (NSTS) under the Commission's public health and safety authority. Because of the events of September 11, 2001, the Commission determined that it needed to develop and implement such a system to protect the American public from the potential malevolent use of radioactive sources. As I stated in my vote on SECY-06-0080 "the NRC has a responsibility to impose security requirements under its common defense and security authority because of the real security threats that exist." Thus, issuing the final rule under public health and safety is antithetical to the original basis for developing the NSTS.

Protecting the common defense and security under the Atomic Energy Act is reserved to the Nuclear Regulatory Commission. States, however, are not excluded from assisting the Commission in matters of national security. Section 274i of the AEA gives the Commission the authority to enter into agreements with States to perform inspections and other functions cooperatively with the Commission in matters of national security.

The Commission has been successful in implementing Section 274i agreements with States, and States are currently helping the Commission secure high-risk sources in the possession of manufacturers and distributors and irradiator licensees. I believe that Congress intended the Commission to act to protect the common defense and security as evidenced by the enactment of Section 651(e) of the Energy Policy Act of 2005.

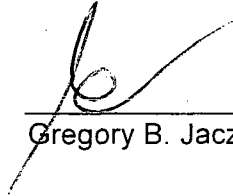
Given the current financial strain of the States, issuing this rule under public health and safety further increases their financial challenges, as Commissioner McGaffigan has repeatedly stated. I agree with his remarks that the NSTS is too important and too critical a program for the Commission, other federal agencies, and States to place the burden of its oversight on States that are resource challenged. The challenge the States face in "going it alone," as proposed by changing the basis to public health and safety, may create gaps in the national framework aimed at securing and accounting for these sources.

For the reasons stated above, I am unconvinced by the staff's argument that the Commission should support a public health and safety basis for the NSTS rule. Therefore, I join Commissioner McGaffigan in urging my colleagues to put this rule back on a firm footing by issuing the rule under the Commission's common defense and security authority.

It has been suggested by some of my colleagues that the staff work with stakeholders to develop less burdensome reporting and verification requirements for Category 3 sources on the basis that they may be less of a risk to the public. To the contrary, a Category 3 sealed source could cause permanent injury to a person who comes in contact with the source for a few hours, as compared to the minutes to hours cited for a Category 2 source. So, from a risk perspective, there appears to be little justification for reducing the reporting and verification requirements for Category 3 sources.

In the Staff Requirements Memorandum for SECY-06-0094, the Commission directed the staff to collect and analyze data on Category 3 sources, and to propose a rule to include them in the NSTS. In developing the rule, the staff will engage stakeholders and conduct the necessary analyses for expansion of the NSTS to include Category 3 sources. Thus, I would ask my colleagues to allow the process to run its course, providing the staff with the opportunity to

engage all stakeholders, particularly our federal partners, who have urged us to track Category 3 sources. I look forward to seeing the staff's analysis in the proposed rule on including Category 3 sources in the NSTS.



Gregory B. Jaczko

10/13/06

Date

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER LYONS
SUBJECT: **SECY-06-0205 - FINAL RULE: NATIONAL SOURCE TRACKING OF SEALED SOURCES (RIN 3150-AH48)**

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

10/11/06

DATE

Entered on "STARS" Yes xx No _____

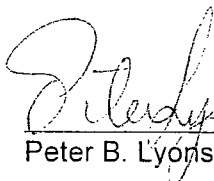
Commissioner Lyons' Comments on SECY-06-0205

I approve the staff's recommendation to publish the final rule for the National Source Tracking System with the public health and safety basis subject to the following:

- 1) The requirement to report a licensee's initial inventory in June 2007 is optimistic, given a recent staff prediction that the database will be completed in November 2007. Staff should modify the rule text to reflect reporting compliance dates that more accurately align with completion of the NSTS. I'm also concerned that the timing for completion of the NSTS may also impact staff conducting workshops and training sessions on the new system before June 2007.
- 2) Delete (NRC Form 748) from 20.2207 and in the subsections a through e. As constructed, this could be read that only the Form 748 can be used to report inventory data and appears inconsistent with 20.2207 (f) which allows for 5 reporting options.
- 3) Page 21, first full paragraph. Making reference to well logging sources ruptured downhole may not be an appropriate example. 10 CFR 39.77 requires immediate reporting of such accidental destructions/ruptures to the NRC Regional Office and not to the NRC Operations Center as noted in the first sentence. Suggest the well logging example be deleted.

During the Agreement State review period, several Agreement States opined that the basis for the rulemaking should be under protection of the public health and safety for consistency with the framework established for issuance of the increased controls, which was developed after the approval of the NSTS proposed rule. I view this change from common defense and security to be directly responsive to the Agreement States and to the Organization of Agreement States (OAS) position expressed, for example, in OAS letter of August 31, 2004, to Senator Inhofe, Chairman of the Senate Committee on Environment and Public Works, that the Agreement States participate more fully in increased controls over sources. Further, I believe that, in general, the American people are better served when the NRC works in partnership with the Agreement States, rather than when the NRC "goes it alone." The public health and safety basis will allow for more prompt verification of implementation of the rule and for more effective and efficient inspections as a result of the Agreement States' familiarity with their licensees. Issuing this rule under the NRC's authority to protect the public health and safety in no way diminishes NRC authority to take appropriate action, nor lowers the significance of NRC actions.

I support the Chairman's comments and strongly support more proactive NRC actions related to the evolution of the relationship between the NRC and the Agreement States, including seeking and providing funding to support the national structure for regulating nuclear materials. To this end, I believe that the staff should propose a strategy for the NRC to provide annual funding to States for training, regulatory guidance development, and other activities that support the development and initiation of State NSTS programs, to the extent permitted under NRC's current legal authority to do so. In addition, NRC should approach Congress for legislation and appropriations for the funding of the States' ongoing maintenance of their source tracking programs.


Peter B. Lyons
10/11/06
Date