



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

May 28, 2009

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-09-0011

TITLE: DEFERRAL OF RULEMAKING: EXPANSION OF NATIONAL
SOURCE TRACKING SYSTEM (RIN 3150-A129)

The Commission (with Chairman Jaczko disapproving, Commissioner Lyons approving in part and disapproving in part, and Commissioners Klein and Svinicki approving) acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 28, 2009.

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 Jaczko
Commissioner Lyons
Commissioner Klein
Commissioner Svinicki
OGC
EDO
PDR

VOTING SUMMARY - SECY-09-0011

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO		X			X	2/2/09
COMR. LYONS	X	X			X	2/17/09
COMR. KLEIN	X				X	4/9/09
COMR. SVINICKI	X				X	4/8/09

COMMENT RESOLUTION

In their vote sheets, Chairman Jaczko disapproved, Commissioner Lyons approved in part and disapproved in part, and Commissioners Klein and Svinicki approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on May 28, 2009.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER JACZKO
SUBJECT: SECY-09-0011 – DEFERRAL OF RULEMAKING:
EXPANSION OF NATIONAL SOURCE TRACKING
SYSTEM (RIN 3150-AI29)

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached X None _____



SIGNATURE

02/21 2009

DATE

Entered on "STARS" Yes X No _____

**Commissioner Jaczko's Comments on SECY-09-0011
Deferral of Rulemaking: Expansion of National Source Tracking System**

I disapprove 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 Category 3 threshold levels. As noted in SECY-08-0137 regarding limiting the quantity of byproduct material in a generally licensed device, Category 3 sources could, if not under control, give rise to exposure sufficient to cause severe deterministic effects, and with regard to sources that are 1/10th of Category 3, only 10-12 of these sources need to be aggregated to create the equivalent of a Category 2 source. Improving the inventory of these sources should not be further delayed.

The Commission was quite clear in the SRM for SECY-06-0094, dated June 9, 2006, in which we directed the staff to complete the expansion of the NSTS within three years. The reasons given in SECY-09-0011 for delaying the expansion (to allow for observation of NSTS operation, to allow for consideration of additional reports on source risk, and to allow the General Licensing rule to be completed) do not outweigh the greater need to have these sources accounted for.

The staff indicates that since the implementation of the NSTS for Category 1 and 2 sources has been delayed, they would like to wait and observe NSTS operation for one year to gain information on its performance. However, the staff also says that "[W]e fully expect the IT elements of the NSTS to be capable of being expanded to additional categories". Although the implementation of the NSTS may involve a learning curve for data entry for both for licensees and staff, as would any new process or system, I am confident that that hurdle can be overcome relatively quickly. In addition, although I understand that the credentialing process can be time consuming, the rule does allow for other methods of entering data into NSTS (e.g., by faxing in information). Therefore, it does not appear to be necessary to wait and observe NSTS operation for an entire year.

The staff also indicates that a delay would give them time to evaluate the report by the Radiation Sources Subgroup of the Radiation Source Protection and Security Task Force, and the Sandia National Laboratories Study on the Material Attractiveness report on source risks in order to develop an improved risk basis. However, the Commission has already determined that there is adequate basis to expand the NSTS. In addition, the Government Accountability Office (GAO), in its June 2008 report titled "NRC and DHS Need to Take Additional Steps to Better Track and Detect Radioactive Materials," states that "...because some quantities of radioactive materials are potentially dangerous to human health if not properly handled, we recommend that the Nuclear Regulatory Commission complete the steps needed to include all potentially dangerous radioactive sources (category 3 and the larger category 4 sources, as well as categories 1 and 2) in the National Source Tracking System as quickly as reasonably possible." GAO also expresses concern about the significant delays that have already affected the implementation of NSTS. In the NRC's letter commenting on the draft GAO report, dated May 28, 2008, we stated that the final rule for possible expansion of the NSTS beyond Category 2 sources would be completed in early 2009. In addition, in a letter to Senator Joseph Lieberman dated September 18, 2008, Chairman Klein stated that the staff will provide a recommendation to the Commission in January 2009 as to whether the NSTS should be expanded. SECY-09-0011 does not even provide a recommendation on whether to expand the NSTS but instead only recommends a delay in developing any recommendation. A letter to Senator Carl Levin, dated June 6, 2008, from Chairman Klein states that the schedule calls for implementation of the expansion of NSTS by October 2009. I do not believe that sufficient

justification is provided for not upholding the schedules that we have been communicating to Congress and other stakeholders.

Lastly, the staff states that they would evaluate the impacts of any changes to the general licensing requirements, and they would then provide the Commission with: 1) a recommendation to either proceed directly to issue a final rule on NSTS expansion, or 2) a new proposed rule to expand the NSTS by September 2010. With respect to the possible impacts of possible changes to general licensing requirements, I would expect that possible impacts or interactions between general licensing and NSTS would have already been considered by FSME during the development of the respective Commission papers. Any further delay until 2010 is simply unwarranted.

The staff also states that the proposal for delay is partially based on the review of the 19 public comments that it received, most of which were generally opposed to expanding the NSTS. However, upon reading the comments, it appears that these commenters would be against the expansion of the NSTS regardless of the timeline for its implementation. Therefore, I do not think that these comments provide a compelling basis for further delay.

Staff should proceed with the rulemaking to expand the NSTS to include licensees who possess sealed sources whose radioactivity is greater than, or equal to, $1/10^{\text{th}}$ of Category 3 threshold levels.



Gregory B. Jaczko 02/ 2 /2009
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER LYONS
SUBJECT: SECY-09-0011 – DEFERRAL OF RULEMAKING:
EXPANSION OF NATIONAL SOURCE TRACKING
SYSTEM (RIN 3150-AI29)

Approved X (in part) Disapproved X (in part) Abstain

Not Participating _____

COMMENTS: Below _____ Attached X None _____



Peter B. Lyons

SIGNATURE

2/17/09

DATE

Entered on "STARS" Yes X No _____

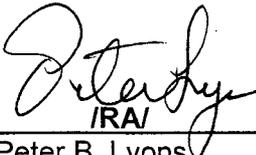
Commissioner Lyons' Comments on SECY-09-0011

I approve in part and disapprove in part 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 IAEA Category 3 threshold levels. During the deferral period, the staff committed to 1) implement NSTS for category 1 and 2 sources and observe how it operates for one year; 2) conduct a data and system operations and performance analysis of the NSTS based on one year's information; 3) evaluate the data received from the Radiation Sources Subgroup report and from the Sandia National Laboratory Study on Material Attractiveness on source risks to better risk inform the rulemaking; and 4) based on the results of (2), (3) and impact of changes to the general license requirements, recommend either proceeding directly to issue a new rule on the expansion of NSTS or provide the Commission with a new proposed rule. I would like to thank the staff for its thorough evaluation and for working closely with the Agreement States during development of this Commission Paper.

I disapprove staff's recommendation to evaluate the data received from the Radiation Sources Subgroup report and from the Sandia National Laboratory Study on Material Attractiveness on source risks to better risk inform the rulemaking. In previous SRMs, the Commission determined that there is adequate basis to expand NSTS. In the SRM for SECY-08-0031, the Commission directed the staff to publish the draft rule that would require licensees to report sealed sources down to 1/10th of IAEA Category 3 threshold levels to NSTS. After further consideration, I believe that NSTS should only be expanded to IAEA Category 3 or greater sources. The license verification system (LVS), which will broker information stored in NSTS and the web-based licensing system to ensure radioactive sources are obtained in authorized amounts only by legitimate users, should provide confidence regarding any aggregation towards Category 2 levels. I am concerned that further expansion of NSTS to include sources down to 1/10th of Category 3 levels will divert staff effort and not fully focus our safety and security efforts on higher activity sources which pose the greatest risks.

I approve the staff's recommendation to defer rulemaking on expanding the NSTS for one year and to conduct a data and system operations and performance analysis of the NSTS based on one year's information. I believe it is important that NSTS be used as designed, as a near real-time system with electronic input and confirmation by licensees and government agencies. Since NSTS is the Agency's first system with level 4 authentication requirements, staff continues to work through very challenging credentialing issues for system users. At the time of my meeting with staff in late January to discuss the status of credentialing, less than 10% of approximately 1300 Category 1 and 2 licensees and 36 Agreement State agencies had received their smart cards. Expanding the NSTS reporting requirements to include those licensees with sealed sources down to IAEA Category 3 threshold levels will significantly expand the number of individuals requiring access to NSTS. Consequently, staff should start the credentialing process for licensees with Category 3 sources well in advance of the final rule. I believe that it is important to gain valuable operating experience with Category 1 and 2 users in NSTS before adding significantly more users to the system. I also believe that it is important that staff completes the data and system operations and performance analysis since NSTS will become part of LVS. The results of the staff's evaluation will help inform the development of LVS and its components. These results should be reported to the Commission for information.

After the one year deferral and without further evaluation, staff should proceed directly to issue the final rule on expanding NSTS to include sealed sources containing IAEA Category 3 or greater threshold levels.

 2/17/09
IRA/ 2/13/2009
Peter B. Lyons Date

NOTATION VOTE

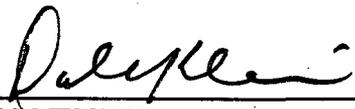
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN KLEIN
SUBJECT: SECY-09-0011 – DEFERRAL OF RULEMAKING:
EXPANSION OF NATIONAL SOURCE TRACKING
SYSTEM (RIN 3150-AI29)

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___



SIGNATURE

4/9/09

DATE

Entered on "STARS" Yes No

Chairman Klein's Comments on SECY-09-0011, Deferral of Rulemaking: Expansion of National Source Tracking System

I approve the staff's recommendation to defer rulemaking on expanding the National Source Tracking System (NSTS) to include sources whose radioactivity is greater than, or equal to, $1/10^{\text{th}}$ of the International Atomic Energy Agency (IAEA) Code of Conduct Category 3 threshold (the upper end of Category 4 sources). This recommendation is prudent in view of the implementation difficulties that are being experienced with the recent deployment of the NSTS, as well as the significant comments submitted by external stakeholders on the proposed rule.

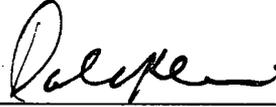
The stakeholder comments received for this rulemaking appear to be well-founded. Our rulemaking process, which requires a thorough analysis and response to each substantive comment, necessitates continued rigor in considering these comments and the relevant reports in order to arrive at the best result. The staff's proposed deferral, a natural outgrowth of this process, will help to achieve this purpose. It is necessary to take the time needed to ensure that the NSTS is fully operational and is able to track successfully Category 1 and 2 sources before adding a significant number of Category 3 and high-end Category 4 sources to the system. Otherwise, the unintended negative consequence could be a much more protracted timeline and cost for making the NSTS functional as intended. Additionally, having a final rule in place before the infrastructure and the agency are ready to support reporting for an expanded population could result in a situation in which compliance with regulatory requirements would be impracticable.

I also approve the staff's recommendation to evaluate, during this deferral period, 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 including additional lower activity sources to the NSTS. In addition to ensuring the functionality of the NSTS, operating information obtained during the deferral period is needed to confirm whether the advantages of including lower radioactivity sources indeed outweigh the burden.

Although I initially supported the $1/10^{\text{th}}$ less than Category 3 threshold, the preponderance of comments from credible stakeholders in response to the proposed rule leads me to conclude that a confirmatory review is merited. To this end, the staff's proposal to evaluate the noted reports to better risk-inform this rulemaking is sound. The staff should be open-minded on this point, i.e., if the risk and burden information does not show a net benefit against the cost, the staff should not feel compelled to "better articulate the risk basis" to justify the currently proposed $1/10^{\text{th}}$ less than Category 3 threshold. For such an outcome, the staff should not hesitate to develop and recommend an alternate threshold criterion, or perhaps a graded approach for tracking or reporting. For example, it may be possible to implement reporting requirements for the sources being added by this rulemaking that are commensurate with their risks. Specifically, it may be preferable to have an annual inventory update for these sources in lieu of recording every transaction. Additionally, the staff may want to consider requiring tracking for only some, not all, of the sources below the Category 2 threshold.

Other options could be considered that are commensurate with the risk posed by these sources. In working out its recommendation for the final rule, the staff should continue to coordinate and interact with the Agreement States to reduce any unnecessary burden of this decision on Agreement State resources to the maximum extent practical.

If the Commission approves the staff's recommendation, the staff should inform the public, NRC's Congressional oversight representatives, and other stakeholders of the deferral of this rulemaking, the basis for this decision, and the staff's planned actions during the deferral period to help make the NSTS a viable and useful tool. Finally, the staff should provide a paper to the Commission shortly after the deferral period to obtain Commission's policy direction on how to proceed at that time.



Dale E. Klein

4/ 7/09

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-09-0011 – DEFERRAL OF RULEMAKING:
EXPANSION OF NATIONAL SOURCE TRACKING
SYSTEM (RIN 3150-AI29)

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

04/8 /09

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on SECY-09-0011
Deferral of Rulemaking: Expansion of National Source Tracking System (RIN 3150-AI29)

I approve 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 until the staff has monitored the operation of the current NSTS and assesses that NSTS is fully functional and working well with the universe of Category 1 and Category 2 source tracking information.

The staff proposes in the paper that one year of observational data on the NSTS be gathered. I have no basis to assess whether one year is sufficient or excessive. I would suggest, therefore, that the staff report back to the Commission with a recommendation on rulemaking related to possible expansion of the NSTS when the staff has gathered sufficient operating experience and data, not only from the NSTS, but also from Agreement States and licensee-users of the system, but in any case, no later than one year from the date users began reporting to the NSTS. If the staff finds it is confident in making its assessment in less than one year, so much the better.

Finally, as noted in my vote on SECY-08-0137, I caution the staff against binding too closely together the issues of 1) the appropriate demarcation between generally and specifically licensed devices for the purposes of establishing the needed public health and safety regime over such devices and 2) the threshold for tracking of sources in the NSTS for purposes of greater security. In my view, these are separate matters and the staff must assess each, on its merits, in a risk-informed manner.



Kristine L. Svinicki

04/8/09