

August 1, 2006

The Honorable Hillary Rodham Clinton
United States Senate
Washington, D.C. 20510

Dear Senator Clinton:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am submitting this letter to respond to the concerns raised in your June 22, 2006 letter concerning the basis change for the National Source Tracking rule.

The Commission approved a proposed change in the basis of the National Source Tracking rule from common defense and security to public health and safety. The proposed rule on National Source Tracking was originally published for a 75-day comment period. Several of the Agreement States requested alignment of the rule's basis with the day-to-day radiation protection activities they conduct to maintain adequate protection of the public health and safety. The NRC staff considered the request, and the Commission directed that the rule's basis be changed. A 20-day comment period was initially proposed by the staff for the basis change and accepted by the Commission because 1) this rule addressed the majority of the comments received on the proposed rule; 2) the Agreement States were given advance notice of the proposed change; and 3) due to the broad support among the Agreement States for changing the rule's basis, the staff did not believe, at the time, that there would be significant adverse comments on the basis change. In response to the request in your June 22, 2006 letter, the comment period was extended until July 28, 2006. Comments have been received and are currently being evaluated for resolution.

Regardless of the National Source Tracking rule's basis, the NRC will develop and will maintain the tracking system. Agreement State licensees will report to the national system. Should the final rule be implemented under a public health and safety basis, the Agreement States would be responsible for issuing legally binding requirements to their licensees. The legally binding requirements would be identical to the rule requirements and would be issued such that they would become effective at the same time as the rule. These requirements would require Agreement State licensees to report transactions (manufacture, transfer, receipt, disposal, and disassembly) directly to the National Source Tracking System (NSTS), and not to the Agreement States. However, the States will have access to the information in the NSTS. Information in the database will be controlled and will not be publicly available. Consistent with their role in protecting public health and safety, the Agreement States would be responsible for inspection and enforcement of their licensees' compliance with the National Source Tracking reporting requirements. The NRC is planning to issue guidance for inspecting the reporting requirements related to the NSTS that both NRC and Agreement State inspectors will use. This is consistent with the regulatory process used by the NRC and Agreement States for the increased controls for risk-significant sources.

In conclusion, the National Source Tracking rule solely concerns collecting data, submitting it to a national data base developed and maintained by the NRC, and ensuring the data are appropriately updated in a timely manner. 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. In fact, the safety of the public is the main reason for implementing security measures for radioactive materials.

I would be pleased to discuss this matter with you in more depth. Your specific questions are addressed in the enclosure.

Sincerely,

/RA/

Dale E. Klein

Enclosure:
Response to Specific Questions

Identical letter sent to:

The Honorable Hillary Rodham Clinton
United States Senate
Washington, D.C. 20510

The Honorable Edward Markey
United States House of Representatives
Washington, D.C. 20510

RESPONSE TO SPECIFIC QUESTIONS

Question 1: According to Commissioner McGaffigan's views, 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 [U.S. Nuclear Regulatory Commission] 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.

Answer: The Agreement States have been involved in the development of the National Source Tracking System (NSTS) from the beginning. There are State representatives on the Working Group, Steering Committee, and the Interagency Coordinating Committee for the NSTS. The system has been discussed at the Organization of Agreement States and the Conference of Radiation Control Program Directors annual meetings, as well as the monthly conference calls with the States. Copies of correspondence related to the tracking system are attached.

During the comment period for the proposed rule, the Commission received several comments from individual Agreement States, which indicated that a change in basis (to public health and safety) was warranted and consistent with the implementation of other programs in this area. As an informal means to determine the level of support across all of the Agreement States, NRC staff contacted Agreement State management by telephone (since this was the most efficient and effective method to obtain such information in a short period of time) to understand each State's view on potentially recommending a change in basis. The results of this informal survey indicated that there was broad support from the Agreement States to implement the system under public health and safety authority. A copy of the survey's results, obtained via telephone in early-March 2006, is attached. As you stated, five Agreement States indicated a preference that NRC implement the system under its exclusive common defense and security authority. Of the remaining Agreement States, 19 supported the change in basis and 10 were neutral on the matter.

Agreement States may voluntarily enter into an agreement under section 274i of the Atomic Energy Act to assist in regulatory activities under direct NRC jurisdiction; however, most do not. The Commission has a strong working relationship with the Agreement States and is confident that all the Agreement States would implement the NSTS under their public health and safety authority in a timely and adequate manner.

Question 2: According to Commissioner McGaffigan's views, 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 percent of licensees in the first year, and expending 20 FTE [full time equivalent] 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?

Answer: The change in basis from common defense and security to public health and safety was for the rule only, not the National Source Tracking System (NSTS) itself. The NRC has budgeted for system development, operations, and maintenance. The costs associated with the development and implementation of the NSTS is discussed in SECY-06-0080, "Final Rule: National Source Tracking of Sealed Sources (RIN 3150-A448)," which is attached. Agreement States will not be establishing nor implementing a tracking system. Should the final rule be issued under public health and safety authority, the Agreement States would be issuing legally binding requirements to their licensees that address reporting to the system.

The distinction in the basis change becomes more significant as the issue relates to the oversight (e.g., inspection and enforcement) efforts that would ensue to make certain that licensees across the country are increasing controls over their sources. When the Commission determined that the system could be implemented under public health and safety, rather than common defense and security, that meant that Agreement States had the authority for oversight, including inspection and enforcement, that would be required in their States, rather than NRC. When this determination was made, the associated savings to the NRC were estimated to be about 7 FTE per year based on the number of Agreement States at that time.

If the decision on the basis were to be reversed, a similar ongoing cost (7 FTE per year) would be incurred. However, assuming that all licensees are inspected within the first year, the costs in the first year would be much higher. To inspect approximately 1,350 licensees across the country to ensure that they report their initial inventories into the NSTS could require about 20 FTE and \$750K that first year.

Question 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?

Answer: The Agreement States would not be expected to coordinate the tracking of sources when transfers to different states occur. The licensee is responsible for reporting transactions to the NSTS. There is no notification of an Agreement State (via the NSTS) of when a source enters an Agreement State. The Agreement States will have access to the data in the NSTS so they can check to see what sources their licensees possess.

Question 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 nearby Agreement States or e) federal law enforcement authorities? What are the required timeframes for such reporting?

Answer: The NSTS does not change the requirements for reporting of lost or stolen sources. Licensees are responsible for reporting missing, lost, or stolen Category 1 and 2 sources immediately upon discovery of the occurrence. If the material is a Category 1 or 2 source, the licensee's immediate response to any actual or attempted theft, sabotage, or diversion of the radioactive material is to call to the local law enforcement agency and then call its regulatory agency (NRC or Agreement State). The Agreement States provide information on lost, stolen or missing sources to the NRC within 24 hours.

Question 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.

Answer: In a June 9, 2006, Staff Requirements Memorandum, the Commission directed the staff to perform a one-time data collection and analysis of Category 3.5 sources (0.1 of Category 3) and develop a rule to include Category 3 data in the NSTS. The staff was directed to complete the expansion within 3 years. The staff will need to analyze the survey data to determine the types and numbers of licensees that possess Category 3 sources and the total number of sources possessed. The staff will then use the data in conducting a regulatory analysis (cost-benefit) to support the rule. The goal is to have the final rule published and implemented by June 2009. A detailed schedule is being developed.

Question 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 Defense, 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 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?

Answer: As was stated in the NRC's May 2, 2006, letter to Rep. Markey, while the material obtained by GAO could be used as part of a bomb, it would only contain an insignificant amount of radioactive material. Additionally, this letter provided information clarifying why the NRC does not consider it credible that a sufficient number of exempt quantities of radioactive sources could be purchased to accumulate a risk-significant quantity of material. This information, coupled with NRC and Agreement State measures in place, minimize the potential that a dirty bomb could be created through the methods described in the GAO report.

The NRC has worked cooperatively with Customs and Border Protection (CBP) to verify the legitimacy of shipments of radioactive material entering the United States through established ports of entry. As part of implementing the International Atomic Energy Agency (IAEA) Code of Conduct for the Safety and Security of Radioactive Sources, NRC's regulations were amended in December of 2005 to require prior notifications of import and exports of IAEA Category 1 and 2 shipments. These notifications are provided to CBP daily. In addition, the import/export rule requires an NRC-issued specific license to import or export Category 1 and 2 quantities of radioactive materials. NRC periodically provides copies of all active Import/Export licenses to CBP. The NRC issues all commercial import/export licenses. These notifications will eventually be recorded in the NSTS.

The legitimacy of shipments below Category 2 is performed by verifying that the recipient has a valid NRC or Agreement State license. To check this information, CBP Border agents can contact CBP's Laboratory and Scientific Services Technical Data Assessment & Teleforensic Center personnel, who are able to verify the legitimacy of licenses using the information discussed below. This process will not change once the NSTS is deployed. NRC will continue to work with CBP staff to improve on existing procedures and to meet future needs.

For NRC licensees, the NRC periodically provides CBP with copies of its License Tracking System database, which contains information on all NRC materials licensees. NRC further provided a single point-of-contact for questions concerning NRC licensees. NRC staff conducted hands-on training for CBP staff on the licensing information provided. In addition, an NRC Source Data Team in the Office of Nuclear Material Safety and Safeguards, Division of Industrial and Medical Nuclear Safety was created to respond on a 24/7 basis to issues that CBP does not resolve.

The NRC provided CBP 24/7 personnel contact information for each Agreement State radiation control program. This allows CBP to get information about Agreement State licensees when questions arise about a particular shipment. Of the 34 Agreement States, 24 Agreement States have 24/7 capability to access license database information. The remaining 10 Agreement States, some of whom are working to establish 24/7 database access, have this capability, but only during business hours.

The requirements for reporting a missing Category 1 or 2 source are contained in the Orders and legally binding requirements imposed on licensees. The licensee is still responsible for reporting to the appropriate officials that a radioactive source is missing. The National Source Tracking rule does not change any of these reporting requirements and would not be directly involved in the suggested scenario. The system will send an alert to the NRC that a licensee has not reported receiving the Category 1 or 2 source within the expected timeframe.

- Question 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.

Answer: The Agreement States will not be implementing the tracking system. The Agreement States would be responsible for issuing legally binding requirements that impose the reporting requirements on their licensees that possess Category 3 sources. All of the Agreement States currently regulate Category 3 materials.

Question 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?

Answer: The rule on National Source Tracking was originally developed for Category 1 and 2 sources. Data were not available to conduct a cost-benefit analysis of including additional sources in the tracking systems. As for validating data in the Interim Database, the staff did take some measures for improvement in the 2005 survey of licensees. The analysis of the 2005 data was available before the Commission vote. The Commission has directed the staff to conduct a one-time survey of licensees to obtain information on Category 3.5 sources.

Question 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?

Answer: The NSTS will not consider transactions involving the aggregation of sources. The System will be an item-level tracking system for individual sources. If aggregation were considered, the smaller sources would be entering and exiting the system. The system data would become unreliable as the source moved in and out of the system. Some licensees would be required to report information on Category 3 sources and some would not. As discussed in the response to Question 5, NRC plans to include Category 3 source data in the NSTS in the future. Lowering the threshold of the NSTS helps to address the security concerns related to the aggregation of Category 3 sources.

It is important to note that the NSTS by itself does not impose any additional security on the sources. The security and control measures are imposed by Order or other legally binding requirements. Those security and control requirements do consider aggregation of sources.

Question 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 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?

Answer: The import/export rule requires the notification of any import of Category 1 or 2 quantities of radioactive material. Aggregation is considered. The import notifications will be recorded in the NSTS. Once on U.S. soil, the security and control measures issued by Order or legally binding requirement apply.

Attachments:

1. STP-05-007, Opportunity to Comment on
Proposed Rule: National Source
Tracking, ML050140429
2. Merri Horn Email re: Comments regarding
the Draft of the Final Rule on National Source
Tracking (RIN: 3150-AH48), ML061930425
3. Merri Horn E-mail re: Iowa Comments on Draft
Federal Register Notice on National Source
Tracking, ML061930441
4. Merri Horn Email re: Kansas Comments
on Source Tracking Rule, ML061930442
5. Merri Horn Email re: Comment on STP-06-002,
ML061930444
6. RCPD-05-012, Proposed Rule: National Source
Tracking of Sealed Sources, ML052030595
7. STP-05-063, Request Sent to Licensees
Regarding Public Meetings and Proposed Rule
on National Source Tracking, ML052230557
8. Comment (20) submitted by State of NJ, Dept. Of
Environmental Protection, Jill Lipoti, on Proposed
Rule PR-20, 32 & 150 re: National Source
Tracking of Sealed Sources, ML052850026
9. Comment (21) submitted by State of Wisconsin
Dept. Of Health and Family Services, Michael
Welling, on Proposed Rule PR-20, 32 & 150
re: National Source Tracking of Sealed Sources,
ML052850219
10. Comment (27) Submitted by Oklahoma Dept. Of
Environmental Quality, Patricia Chawla, on
Proposed Rule PR-20, 32 & 150 re: National
Source Tracking of Sealed Sources, ML052850236
11. Comment (28) Submitted by Kansas Department of
Health and Environment, Thomas A. Conley,
on Proposed Rule, ML052850237
12. STP-06-002, Opportunity to Comment on Final Rule:
National Source Tracking, ML060030488
13. Merri Horn Ltr re: Comments regarding the *Federal
Register* Notice and Final Rule Package related
to the establishment of the National Source
Tracking System, ML061930424
14. Merri Horn Ltr re: Comments Regarding the
Proposed Final Rule: National Source Tracking
System, ML061930423
15. Radiation Control Program Directors email re:
May 25, 2006 Commission Affirmation Session,
ML061930420
16. STP-06-051, Opportunity to Comment on the Change
in Basis for the National Source Tracking System to

- Public Health and Safety, ML061640436
17. Agreement State Telephone Survey for Support of the NSTS Basis Change to Public Health and Safety, ML061940092
 18. SECY-06-0080 - Final Rule: National Source Tracking of Sealed Sources (RIN 3150-AH48) ML060690228