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**PR 20 and 32
(71FR34024)**

DOCKETED
USNRC

July 27, 2006

July 27, 2006 (2:01pm)

Secretary, U.S.
Nuclear Regulatory Commission,
Washington, DC 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: Comments on Basis Change for the NSTS (RIN 3150-AH48)

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To whom it may concern:

The New York State Department of Health (DOH) and the City of New York Department of Health and Mental Hygiene (DHMH), jointly submit the following comments regarding the proposed basis change for the National Source Tracking System (NSTS) rulemaking from "common defense and security" to "public health and safety." As the two agencies principally responsible for licensing the use of radioactive materials within this State, we oppose the proposed change in basis for the following reasons:

1. By enacting the NSTS provisions of the Energy Policy Act of 2005 (EPAct), Congress intended it as a measure to promote national security, not to protect public health. This fact was recently reiterated in a letter to the Chairman of the Commission by Senator Clinton and Representative Markey. For the Commission to turn the NSTS into a health and safety measure would therefore violate the express intent of Congress.
2. In justifying the change in basis, the NRC staff have stated that the initial decision to issue the rule under common defense and security was based on concerns over timeliness. The implication being that the source of the Commission's authority to issue the rule is unrelated to the rule's purpose. In fact, however, it is the purpose of a proposed rule which is determinative of whether the authority to issue such a rule exists. The mere fact that the Commission possesses both authorities does not make them interchangeable. The authority to issue rules to promote the common defense and security and the authority to issue rules to protect public health and safety are separate and distinct, and each was granted to the Commission by Congress with distinct applicability and limitations attached. The two are separate because they represent separate functions of government as delineated in the U.S. Constitution. They are not just pretexts for writing regulations.

That Congress understood the two to be irreducibly distinct can be clearly discerned in the language it employed in the Atomic Energy Act (AEA) to divide regulatory responsibilities between the States and the Commission. In chapters 6, 7 and 8 and in section 161, Congress grants general authority to the Commission to regulate for both the purpose of promoting common defense and security and for protecting the public health and safety. Subsection

274b. authorizes the Commission to enter into Agreements with the States under which the Commission relinquishes portions of this authority. While an Agreement is in effect, Congress declares that:

"...the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." (AEA § 274b., emphasis added.)

Note that this provision recognizes only an Agreement State's authority to regulate for the purpose of protecting public health and safety. At the same time, subsection 274m. expressly reserves to the Commission the authority, notwithstanding the Agreement, to:

"...issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material." (AEA § 274m., emphasis added.)

If the two functions are as intertwined as the Commission has argued, that is, if a regulation to protect public health and safety is perforce, also a regulation to promote the common defense and security (and vice versa), Congress could not assign the one responsibility to the Agreement States and the other to the Commission. Unless a clear distinction is maintained, subsection 274m. would enable the Commission to continue regulating for the purpose of protecting public health and safety within the Agreement States, and subsection 274b. would allow the Agreement States to regulate for the purpose of protecting common defense and security. Or put another way, if protecting the public health and safety can't be denied to the Commission within the Agreement States, then promoting the common defense and security cannot be denied to the Agreement States. Either way, any Agreement for the division of these responsibilities between the Commission and the States would be rendered meaningless.

It must be assumed that Congress did not intend to destroy the Agreements at the instant of their creation. In order to preserve the viability of the Agreement State program the Commission is obliged to reject any proffered justification for a rulemaking which bases its argument upon a blurring or melding of its common defense and security authority with its authority to protect the public health and safety. By approving the proposed basis change, the Commissioners have undermined the Agreement State program as originally established by Congress.

3. The last minute switch of the basis for adoption does irreparable harm to the States by denying them meaningful opportunity for input in a rulemaking that will place direct demands upon State resources. Although the States were afforded an opportunity to comment on the NSTS proposal previously, it was with the understanding that because it was a common defense and security matter, the States would have no role in the administration of the system. The fact that only six States submitted comments to the original draft Federal Register notice attests to the States' perception that the matter had little impact upon them. Had New York been aware that it was going to be called upon to implement and inspect against the source tracking rule, it would have commented. The change of basis and the Commission's expressed intent to make implementation by the States a matter of immediate, mandatory compatibility amounts to a substantive change in the rule and requires that the entire NSTS proposal be reopened for comment.
4. In 1992 the U.S. Supreme Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." (New York v. United States, 505

U.S. 144. Reaffirmed in *Printz v. United States* 521 U.S. 898). In enacting the NSTS provisions of the EPAct Congress has created a new federal regulatory program, and consistent with the Court's holding in *New York*, Congress made no attempt to compel the States to participate. There is nothing in the EPAct to suggest that the NSTS was intended to be incorporated into the Agreement State program. The relevant provisions make no reference to State involvement whatsoever. By shifting the burden of administering the NSTS to the Agreement States, the Commission not only violates the intent of Congress when it enacted the relevant provisions of the EPAct, but directly violates this express prohibition by the Supreme Court.

5. From the NRC staff's discussion of its rationale for changing the basis of the NSTS rule, it is apparent that the primary motivation for the change was budgetary. (See *Rulemaking Issue Affirmation*, April 6, 2006, SECY-06-0080, Enclosure no.1.) Under the heading Disadvantages of Common Defense and Security Basis, four of the five bulleted items refer to the required expenditure of NRC resources. While under Advantages of Public Health and Safety Basis, the staff includes the item "Anticipated resource savings for the NRC." The change in basis is a blatant attempt to shift the burden of implementing the program (or at least a portion of that burden) onto the backs of the States. In the specific case of New York, this is occurring on the heels of a withdrawal of 40% of its grant support from the Department of Homeland Security for the next fiscal year. In other words, the federal government is attempting to shift additional security responsibilities to the State simultaneously as it withdraws funding for that purpose. We would be surprised to learn that this was the intent of the authors of the NSTS provisions of the EPAct of 2005.

Thank you for this opportunity to comment.

Sincerely,

/S/

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NYS DOH

/S/

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/S/

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CC: Chairman Klein
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Date: Thu, Jul 27, 2006 2:01 PM
Subject: New York State Comments on NSTS basis change (RIN 3150-AH48)

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