

Office Memorandum • UNITED STATES GOVERNMENT

TO : O. S. Hiestand, Attorney

DATE: September 6, 1951

FROM : W. E. Guilian, Attorney

SUBJECT: LICENSING FUNCTION OF ISOTOPES DIVISION SUBJECT TO JUDICIAL REVIEW

SYMBOL: GC:WEG

REPOSITORY *Old Ridge Dr.*
 COLLECTION *Records of the Isotopes Area*
 BOX No. *H-122-2 B149, 2714-H*
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Pursuant to our recent conversation on the subject, I have completed a study of the Administrative Procedure Act (5 USCA § 1001 et seq.) and the Atomic Energy Act of 1946 and its legislative history in an effort to determine whether or not the function of the Isotopes Division in authorizing the possession, use and transfer of radionuclides is subject to judicial review. It is my opinion, based upon the results of this study, that this function is subject to judicial review.

Section 14 (a) of the Atomic Energy Act expressly provides that section 10 of the Administrative Procedure Act "shall be applicable, upon the enactment of this act, to any agency action under the authority of this act"

Section 10 of the Administrative Procedure Act provides that:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion - (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action shall be entitled to judicial review thereof."

Since, therefore, Commission action is expressly made subject to the terms of the Procedure Act and the Atomic Energy Act does not preclude judicial review, the answer to the problem would seem to lie in a determination of the question whether or not the "licensing" function of the Isotopes Division is "agency action" by law committed to agency discretion within the contemplation of the Procedure Act. To arrive at an answer to this question, it was necessary to look into the background of section 5 of the Atomic Energy Act and to attempt to analyze the provisions of that section. It is there provided that the Atomic Energy Commission "is authorized to distribute, with or without charge, by-product materials to applicants seeking such materials for research or development activity, medical therapy, industrial uses, or such other useful application as may be developed....." That same section then expressly prohibits the Commission from distributing such by-product materials to any applicant who cannot or will not observe Commission-formulated health and safety standards, who uses such materials in a manner or for a purpose other than as disclosed in the application and/or who uses them in violation of Commission regulations or of law.

Use of the word "authorized" in the first sentence of section 5 (quoted above) could possibly be construed as committing this particular action to agency discretion were it not for the fact that the legislative history of the section discloses that the legislature did not so intend it. Senate Report Number 1211 on the Atomic Energy Act, in speaking of this provision, states ~~as follows~~, that:

"..... the radioactive materials yielded in the production of fissionable materials are of enormous scientific and industrial value and their distribution involves no danger to the national security. The Commission is required to distribute these materials with or without charge for research and development activities, medical therapy, and industrial and other uses, giving priority to medical uses and research." (Emphasis added.)

To a general program being not necessarily in specific cases

It would appear from this, therefore, that, once it is established that the materials are to be used for one of the enumerated purposes and that the particular applicant is equipped to comply with the health and safety regulations of the Commission, ~~the license must be issued and that the Commission has no discretion in the matter.~~ ^{as he has previously stated} If this be true then it follows that the licensing function of the Isotope Division is subject to judicial review.

subject to judicial review

On July 18, 1946, the House of Representatives amended the proposed draft of Senate Bill Number 1717 (Atomic Energy Act) by deleting from it section 5 (d) which provided that:

"The Commission shall establish by regulation a procedure by which any person who is dissatisfied with the distribution or refusal to distribute to him, or the recall from him, of any fissionable or by-product material, or with the issuance, refusal, or revocation of a license to him for the transfer or receipt of source materials, may obtain a review of such determination by a board of appeal consisting of three members appointed by the Commission. The Commission may in its discretion review and revise any decision of such board of appeal." (Section 5 (d), as revised) (Senate Draft Number 5)

regulation or license

I am of the opinion that, had this provision remained in the Act, the agency action here discussed would not be subject to judicial review, but that it would have been "agency action committed by law to agency discretion." This idea seems to be borne out by the comments of the legislators made at the time section 5 (d) was deleted. In proposing the amendment deleting this section, the proponent thereof stated:

"..... I submit that it (Section 5 (d) 2) should be eliminated from the bill and the general provisions of the Administrative

Code of Procedure, which we adopted some time ago in this House, should apply." (Cong. Rec. July 18, 1946, page 938.)

Later, in commenting upon this amendment, another congressman said:

"I think there is merit to the amendment offered by the gentleman from Ohio. I do think there ought to be some appeal from the acts of the Commission, but since I am led to believe that it would be covered by the Administrative Appeals Act, it seems to me it is more or less unnecessary."

This action and the legislative comments upon it would seem to show rather conclusively that Congress did not intend for Commission action, in the field of licensing the possession, use and transfer of by-product and source materials, to be "committed to agency discretion," but that Congress did intend for such action to be subject to judicial review. In this connection it is interesting to note the language of section 7 of the Atomic Energy Act which does, in my opinion, commit at least one phase of agency action to agency discretion. That section provides that:

Whenever in its opinion any industrial, commercial, or other nonmilitary use of fissionable material or atomic energy has been sufficiently developed to be of practical value, the Commission shall prepare a report to the President stating all the facts with respect to such use, the Commission's estimate of the social, political, economic, and international effects of such use and the Commission's recommendations for necessary or desirable supplemental legislation."

This section then goes on to provide that the President shall submit his report and recommendation to Congress and that Congress shall act upon it. In the event such report remains in Congress' hands for a period of ninety days without Congressional action, it is provided that the Commission must then make the final decision also as to whether or not a license will be issued for such purpose.

This section, placing so much stress upon the opinion of the Commission as it does, seems clearly to me to leave to the discretion of the Commission the initial decision, at least, as to whether a proposed use of fissionable material is practical and far enough developed to be worthy of a license. Under the terms of the section, I do not believe that judicial review could be obtained of the Commission's refusal to make the initial decision in any particular instance that a proposed use is practical or feasible.

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It might possibly be argued that the licensing and control of radioisotopes or by-product materials is included within the restriction of section 7, since the term "atomic energy" is used in the first sentence in defining the materials and uses to be subject to that section. ("Whenever in its opinion any industrial, commercial, or other nonmilitary use of fissionable material or atomic energy"). This possible interpretation finds support in the broad definition of "atomic energy" provided by section 18 (a) of the Act:

"The term 'atomic energy' shall be construed to mean all forms of energy released in the course of or as a result of nuclear fission or nuclear transformation."

While it is admitted that this broad definition of "atomic energy" and the use of the phrase in section 7 would seem to support the above theory, I am of the opinion that the term was not used by Congress in section 7 with exactly the same connotation that it used the term in section 1 (a) of the Act or with the broad meaning assigned in the "definitions" section of the Act. At least I do not believe section 7 was intended to cover licensing and control of by-product materials. I arrived at this conclusion because of the fact that section 5 (c) 2 specifically authorizes the Commission to distribute by-product materials to applicants for certain purposes. If Congress meant for distribution and licensing of by-product materials to be controlled by the terms of section 7, there would have been no necessity for 5 (c) 2, and that section would, in fact, serve no useful function.

While this licensing function of the Isotopes Division is, I believe, subject to judicial review, it is not circumscribed by the procedural requirements of sections 5, 7 and 8 of the Administrative Procedure Act, since the "adjudication" in this field is not "required by statute to be determined on the record after opportunity for an agency hearing." The fact that these provisions are not applicable, however, does not mean that the Isotopes Division is free to dispose of individual rights or claims in the field without restraint; there is always the requirement to be met that "due process of law" has been followed.

For the foregoing reasons, therefore, I am of the opinion that while the Commission is authorized by section 5 (c) 2 to license the distribution of radioisotopes, this function is "agency action" within the contemplation of the Administrative Procedure Act and since, in my opinion, this action has not been "by law committed to agency discretion," Commission decisions in this area are subject to judicial review. Although this function is not bound by the procedural requirements of the Administrative Procedure Act, there is still the requirement of "due process" to be met.

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