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The States' New Role in Atomic Energy

JAMES N. NEEL, JR.*

On September 20, 1960, Kentucky became the first state to present to the Atomic Energy Commission a proposed radiation control program. The purpose of the program is to enable the Commonwealth to qualify for the assumption of certain of the Atomic Energy Commission's regulatory authority over byproduct, source and special nuclear materials in quantities less than a critical mass. The program becomes operative by an agreement to be executed by the Governor of the Commonwealth and federal officials pursuant to the September 23, 1959, amendment to the Atomic Energy Act of 1954, Public Law 86-373, now section 274 of that act.

As AEC Commissioner L. K. Olson stated as he accepted the Kentucky program:

This present radiation control proposal not only marks the beginning of another giant step in Kentucky's emergence into the atomic age, *more importantly, it symbolizes a landmark in the control of atomic energy.*¹ (Emphasis added)

To understand the significance of Commissioner Olson's statement and the impact of Public Law 86-373 as regards the role of the states in the control of atomic energy, a review of the development of atomic energy legislation and of events leading to the enactment of Public Law 86-373 is essential.

Background

The Atomic Energy Act of 1954² opened the era of private participation in the peaceful development of atomic energy in

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¹ Remarks made before a Joint Federal-State Conference on Atomic Energy, September 20, 1960, Frankfort, Kentucky.

² 68 Stat. 919 (1954), 42 U.S.C. 2011 (1958).

the United States. The Atomic Energy Act of 1946,³ now superseded by the 1954 act, failed to provide for private participation but sustained the federal monopoly which grew from military applications of nuclear energy.

The act provides for federal regulation of source material (uranium and thorium), byproduct material (radioisotopes), and special nuclear material (Uranium 233, U-235 and plutonium), and prohibits generally the possession or use of these materials except under license from the AEC. The act also provides that special nuclear material (a highly radioactive source and the heart of both the atomic bomb and the atomic reactor) shall be the property of the United States, regardless of whether it is produced in federally or privately owned facilities with the result that the user possesses the material only—title at all times remaining in the federal government.⁴

The Commission's licensing regulations prescribe the type of information that must be submitted by applicants for a license, the criteria to be employed in the evaluation of applications and other substantive and procedural requirements.⁵ Also, part 20 of the AEC regulations, "Standards for Protection Against Radiation," provides maximum permissible limits of radiation exposure, limitations on waste disposal, requirements for personnel monitoring, instruction of personnel, records and reports, and other provisions which apply to all AEC licensees in addition to regulations covering the specific material and any conditions placed in the license itself.

Under Section 110 of the act, radiation sources and activities of AEC contractors are excluded from licensing. These sources and activities, however, are controlled by special contract provisions.

In fulfilling their statutory responsibilities, other federal agencies have engaged in active programs of regulating radiation hazards. Having had a program for radiological health for many years, the Public Health Service established in 1958 a Division of Radiological Health within its Bureau of State Services. The Interstate Commerce Commission has issued comprehensive regu-

³ 60 Stat. 755 (1946), 42 U.S.C. 1801 (1958).

⁴ 42 U.S.C. 2072 (1958).

⁵ 10 C.F.R. §30 (1959) (Byproduct Material); 10 C.F.R. §40 (1959) (Source Material); 10 C.F.R. §70 (1959) (Special Nuclear Material).

lations governing the transportation of radioactive materials in interstate commerce,⁶ while the CAA,⁷ Coast Guard,⁸ Maritime Administration, Bureau of Mines, Food and Drug Administration,⁹ and the Departments of Labor,¹⁰ Agriculture, and Defense, all have programs or have issued regulations relating to the control, transportation or use of radiation sources.

Certain radiation sources, not covered by the act, have never been regulated by the AEC or any other federal agency. These sources include natural radiation emitting elements such as radium, X-ray and gamma ray machines, and radioisotopes produced in high energy machines such as particle accelerators. Regulation of these radiation sources has always been left to the states.

Federal-State Jurisdiction and Public Law 86-373

With respect to health and safety the 1954 act did not expressly state whether Congress intended to allow state regulation of sources of ionizing radiation licensed by the AEC. The constitutional question was posed by many as to whether Congress had preempted the field of health and safety regulations pertaining to byproduct, source and special nuclear material to the exclusion of the states or whether a state could adopt concurrent non-conflicting regulations applicable to AEC licensees.¹¹

Demands for Congressional clarification arose due to increasing interests,¹² activities, and the actual promulgation of regula-

⁶ 49 C.F.R. §§71-8 (1956).

⁷ 14 C.F.R. §49 (1956).

⁸ 46 C.F.R. §31 (1952).

⁹ 21 C.F.R. §121 (1953).

¹⁰ 29 C.F.R. §4.57 (1960).

¹¹ Law review articles in recent years have discussed quite ably the question of preemption. See generally Estep, "Federal Control of Health and Safety Standards in Peacetime Private Atomic Energy Activities," 52 Mich. L. Rev. 333 (1954); Krebs and Hamilton, "The Role of the States in Atomic Development," 21 Law & Contemp. Prob. 182 (1956); Frampton, "Radiation Exposure—The Need for a National Policy," 10 Stan. L. Rev. 7 (1957); Cavers, "Legislative Readjustments in Federal and State Regulatory Power Over Atomic Energy," 46 Calif. L. Rev. 22 (1958); see also Berman and Hydeman, A Study—Federal and State Responsibilities for Radiation Protection: The Need for Federal Legislation (1959).

¹² As early as 1957 a Federal-State Action Committee composed of state governors and presidential appointees recommended that the Atomic Energy Act of 1954 be amended "to clarify the roles of the federal and state governments to make possible the assumption of greater responsibilities by the states in the future promotion and regulation of the peacetime uses of nuclear energy." "Report of the Joint Federal-State Action Committee to the President of the United States and to the Chairman of the Governors Conference," Program Report #1, Dec. 1957.

tions by many state governments.¹³ These demands culminated hearings held in May 1959 on certain proposals to amend the act to delineate the respective areas of jurisdiction and to provide for the gradual assumption by the states of some of the AEC's responsibility. The result was the enactment of Public Law 86-373, "Cooperation with States."

The declared purpose of Public Law 86-373 is to provide for:

- 1) Recognition of the interests of the states in the peaceful uses of atomic energy and the need for clarification of responsibilities of the states and the Commission;
- 2) The need for cooperation and establishment of programs relating to control of radiation hazards;
- 3) The promotion of an "orderly regulatory pattern" between the AEC and the states;
- 4) Establishment of procedures and criteria for discontinuance of the Commission's regulatory responsibilities over byproduct, source, and special nuclear material in quantities less than a critical mass and assumption of those responsibilities by the states;
- 5) Coordination of the development of radiation standards for guidance of federal agencies and cooperation with the states; and
- 6) A recognition that as the states improve their capability to deal with byproduct, source, and special nuclear materials in quantities less than a critical mass, other areas of regulation may be transferred.

Discontinuance of the AEC's authority over these materials is accomplished in three basic steps: First, the governor of a state certifies that the state has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials covered by the agreement and that it is the desire of the state to assume regulatory responsibility. The Commission then evaluates the state program in order to make a finding as required by Public Law 86-373 that the state program is compatible with the Commission's program for the regulation of the materials and that the state program is adequate to protect the public health and safety. Negotiations terminate with the execution by the governor and Commission officials of an agree-

¹³ See Atomic Industrial Forum, "State Activities in Atomic Energy" (1958).

ment providing for the discontinuance of the regulatory authority of the Commission over the specified materials and the assumption of such regulatory authority by the state.¹⁴

Certain areas of jurisdiction are specifically reserved to the federal government. No agreement may be entered into with regard to discontinuance of the Commission's authority over: the construction and operation of a production or utilization facility; the export from or import into the United States of byproduct, source, or special nuclear material; the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission; the disposal of such other byproduct, source, or special nuclear materials which, because of the hazards or potential hazards thereof, the Commission determines by regulation or order should not be so disposed of without a license from the Commission; and special nuclear materials in quantities sufficient to form a critical mass.

The basis for these reservations appear to relate to national security measures, traffic in interstate commerce, federal constitutional reservations, lack of expertise at the state level and high costs associated with the administration of programs in these areas.

The Commission is also given the authority to require, notwithstanding the agreement discontinuing control, that a manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of the product unless he has acquired a license from the Commission. The problem with which this section is concerned relates to devices or products which may be manufactured for distribution in interstate commerce. Before such distribution is made pursuant to a state license to manufacture, the AEC might desire to evaluate the design of the device or product to assure that no radiation hazard exists and that the public health and safety will be protected. However, this authority appears to be in direct conflict with the report of the Joint Committee on Atomic

¹⁴ It is important to note that the Commission may not relinquish certain categories of a material but must relinquish control of all materials in a category. However, a state may take control over one, two, or all three categories at its discretion. Also provision is made for publication of the terms of the agreement in the Federal Register and opportunity for comment by interested persons prior to execution.

Energy on the bill which expressly states the intention that the transfer of jurisdiction is to be complete, leaving no room for concurrent jurisdiction over licensees.¹⁵

Termination of the agreement could occur in two circumstances: First, at the request of the governor of the state and secondly, if the Commission, after reasonable notice and opportunity for hearing to the state finds that termination or suspension is required to protect the public health and safety.

Other sections provide for AEC-state agreements for the performance of inspections or other functions on a cooperative basis and for the Commission to provide such training to employees of, and other assistance to, state and local governments as the Commission deems appropriate.

Lastly, a Federal Radiation Council is created for the purpose of advising the President with respect to radiation matters including guidance for all federal agencies in the formulation of radiation standards and in establishment and execution of programs of cooperation with the states. The Secretary of Health, Education and Welfare, the Chairman of the AEC, the Secretary of Defense, the Secretary of Commerce, the Secretary of Labor and such other members as shall be appointed by the President¹⁶ are designated as members of the Council.

Federal Criteria for Transfer

The first step taken by the Commission to implement Public Law 86-373 was the development of a "Proposed Criteria for Guidance of States and the AEC in the Discontinuance of AEC Authority over Byproduct, Source, and Special Nuclear Materials in Less than a Critical Mass and the Assumption thereof by States through Agreements." The criteria were developed by a select Task Force on Federal-State Relations within the AEC and are based on an exhaustive analysis of AEC and other federal agencies' regulatory programs for the control of hazards associated with the possession and use of byproduct, source, and special nuclear materials.

Some twenty-nine items are listed which will be utilized by the AEC in evaluating a state regulatory program to determine its

¹⁵ Joint Comm. on Atomic Energy, Report on Public Law 86-373 (1959).

¹⁶ State representation on the Council would be possible by virtue of this broad appointment power.

compatibility with the federal regulatory program and its adequacy to protect the health and safety of the citizens as required by Public Law 86-373. The criteria by which each program is evaluated may be divided into nine basic categories: (1) Objectives; (2) Radiation protection standards; (3) Prior evaluation of uses of radioactive materials; (4) Inspection; (5) Enforcement; (6) Personnel; (7) Special nuclear material; (8) Administration; and (9) Arrangements for discontinuing AEC jurisdiction.

From an analysis of these criteria it is clear that while a state regulatory program does not have to be identical with the federal program, a degree of uniformity is intended to afford as little disruption as possible with the manner and scheme of the present federal program. This is, of course, essential so that by the ensuing transfer no harm will be done to the development of constructive uses of radiation and to the industry which has grown and lived with the federal pattern of control since its inception.

In the atomic energy field where one can not talk of development without regulation, it is essential that regulation take into account the benefits that will accrue to society from the peaceful and constructive uses of radiation and the hazards to the health and safety of the public arising out of those uses. Without a consistent and compatible scheme of regulation prior and subsequent to transfer of control to the states over certain of these materials, discord and uncertainty would undoubtedly occur which could affect, to a considerable degree, the utilization of these new tools of advancement by industry, medicine, and agriculture. Thus, these criteria are designed to secure a course of control developed by the Commission from experience which should serve as an adequate and effective method of regulating the possession and use of these materials to foster development and protect the health and safety of the citizens of the states from harmful exposure.

State Radiation Control Act

In order to give substance to the criteria a Model State Enabling Act was developed based primarily on the criteria. In its early stage of drafting by the AEC, the Council of State Governments was contacted and through its offices the act was commented upon, amended, and clarified by various national and state groups including the National Association of Attorneys

General, the Advisory Committee of State Officials to the AEC, the Committee of State Officials on Suggested State Legislation, and other interested parties.

The act provides for the adoption of certain basic definitions, a licensing and registration program for sources of ionizing radiation, inspection of licensees, record keeping, authorization for the Governor to enter into the Federal-State Agreement, arrangements for discontinuance of AEC authority, inspection agreements and training programs, consistency of all laws relating to material covered by the agreement with local and municipal laws, administrative procedure and judicial review, injunction proceedings, prohibited uses of sources of ionizing radiation unless licensed or registered, and the impounding of materials and penalties.

The act also contains a number of alternative administrative arrangements to meet the needs, legal requirements and organizational patterns of any state,¹⁷ and covers not only those materials which are transferred by the agreement but all sources of ionizing in order to take into cognizance those radiation sources presently under state control.

Thus a state desiring to enter negotiation with the AEC may, as a first step, evaluate its position in line with a substantive act based on the criteria which have been subjected to exhaustive examination by various state groups.

The Kentucky Program

Kentucky's decision to assume regulatory responsibility over byproduct, source and special nuclear materials in quantities less than a critical mass pursuant to Public Law 86-373 was based on a variety of reasons. The first motivating consideration was the conviction that if the states do not move to assume the authority a strong possibility exists for a reassertion of the federal monopoly over these materials, and consequently the opportunity for the states to participate actively in the regulation and development

¹⁷ "Coordination of State Agencies," as proposed by the Council of State Governments; "State Radiation Control Agency," as proposed by the National Committee on Radiation Protection; and "Commission on Radiation Protection," as proposed by the American Public Health Association. The Model Act is entitled "State Radiation Control Act" and is contained in the Council of State Governments' Suggested State Legislative Program for 1961 Supplement "Development and Regulation of Sources of Ionizing Radiation."

of these important tools of industrial, medical and agricultural advancement would be relinquished.

Secondly, decentralization of the licensing and regulatory function from the federal to state level could create a more favorable climate for the development and use of these materials due to the state regulatory agency's closeness to the user, thereby facilitating a better understanding of the user's problems and rendering of better and swifter service in issuing licenses and granting amendments. The overall effect would be a stimulation of the development and utilization of these materials by science and industry.

Also, this same closeness to the user would render better health and safety protection to the citizens of the state from hazards associated with radiation. The assumption of this responsibility would place back in the state control over hazards to health within its environment which have traditionally been subject to state police powers.

The last factor was an economic one based on the belief that the atomic energy industry will continue to grow at a rapid rate and that the licensing power could be utilized as an attraction to nuclear and nuclear-related industries to locate within the state since industry would undoubtedly prefer the time and cost saving advantages of dealing with a decentralized agency in obtaining and amending licenses for the possession and use of these materials.

Legislative Preparation

Kentucky adopted in 1958 a modified version of the Council of State Government's Model State Act for the Coordination of Atomic Development which appeared in the Council's Suggested State Legislation Program for 1957.¹⁸ A thorough perusal of the act revealed that two amendments were immediately necessary to facilitate the preparation of a regulatory program acceptable to the AEC, one giving the Governor the authority to negotiate the Federal-State Agreement and a second amendment giving state agencies the power to license the possession and use of sources of ionizing radiation. After the amendments were adopted and the legislature had recessed, not to meet again until 1962, it

¹⁸ Ky. Rev. Stat. ch. 152 (1960).

was determined that in order to meet the federal criteria other measures were essential in setting up the machinery for transfer. Therefore, the Governor issued certain executive orders based in substance on the Council of State Government's State Radiation Control Act which augmented, as an interim measure, the legal and administrative deficiencies of Kentucky's Nuclear Energy Act.

Briefly, the executive orders:

- (1) Created a state task force on atomic energy composed of the heads of all departments and agencies of the state for the purpose of alerting all state agencies of their responsibilities and to prepare regulations operable within their respective areas of jurisdiction;
- (2) Placed the licensing power over the possession and use of byproduct, source, and special nuclear material in the Division of Radiological Health in the Kentucky State Department of Health, spelling out basic administrative procedures the Division would follow;
- (3) Created the position of Coordinator of Atomic Activities in order to facilitate the formulation of uniform, non-conflicting and non-overlapping regulatory and development programs pertaining to all state agencies relating to sources of ionizing radiation.

Regulatory Preparation

Since Public Law 86-373 specifies that a state's regulatory program must be compatible with the federal program, a thorough analysis of the AEC licensing and regulatory system was undertaken to ascertain its application and feasibility at the state level. It was soon perceived that with certain modification, amendment, and deletion, made to conform with those areas of jurisdiction reserved to the federal government and to adhere to the traditional format of regulations within the Department of Health, a compatible and uniform system based on the federal regulations would be possible. Also, it was concluded that if another regulatory system of control was devised, even if deemed compatible, AEC licensees who had grown accustomed to the AEC procedure would be burdened with ascertaining the compatibility of the new system. Thus the period of transition from federal to state control would become a confused and difficult task which could

have crippling effects on the development of constructive uses of these materials in the state.

In addition, labor and industry were basically satisfied with the protection offered under the federal scheme and deviations from federal regulations relating to posting requirements, personnel monitoring and records could have caused serious disapproval of the regulations by these segments, if not by the AEC. Finally, and most important, the health and safety of the public would tend to be better secured by the fostering and adoption of a uniform and compatible system based on the federal program.

As submitted to the AEC, the Kentucky proposal is comprised of: (1) Kentucky's amended Nuclear Energy Act authorizing the Governor to execute the Federal-State Agreement, and conferring the licensing power over sources of ionizing radiation on state agencies; (2) Executive orders creating a state task force on atomic energy, the position of Coordinator of Atomic Activities and designating the Division of Radiological Health of the Kentucky State Department of Health as the agency primarily responsible for licensing and regulating the possession and use of byproduct, source, and special nuclear material; (3) Thirteen regulations based on the AEC's parts 2, 20, 30, 31, 40 and 70; and (4) other data relating to personnel, administration and equipment.

Conclusion

By virtue of the prospective execution of numerous agreements between the federal government and the states in ensuing months and years relating to relinquishment of the AEC's control over byproduct, source and special nuclear materials, fifty possible laboratories to spur the development of the peaceful uses of atomic energy may come into being. For the first time the states will be given a real and constructive role to play in the regulation and development of nuclear energy. Many important state programs and interests will be affected, to mention a few, the protection of the health and safety of workers and the general public, the regulation of insurance and transportation, the conservation and use of natural resources and the promotion of industrial and agricultural expansion.

In considering the responsibility that will pass to the states two major goals are readily apparent. The states must first do as

much as possible to encourage the peacetime development of nuclear energy and specifically use of these materials for the benefit of the public; and secondly, they must do everything essential to guard against potential hazards.

The responsibility for which the states have long been clamoring in atomic energy is at hand. It is hoped that all states will respond so that the nation will profit from a speed-up in the development of peaceful uses of atomic energy and from better protection for the health and safety of the public which will surely follow this move toward decentralization in such an important area of human endeavor.