

of a reviewable order. Thus, the section 25(a) elements of "aggrieved," "order," "proceeding," and "party" were generally ignored, but by necessity all four of the elements had to be satisfied. Portions of the statutory elements are to some extent found in each of the three general factors—finality, formality, and pragmatism—but the difficulty in determining the amount of each general factor requisite to finding one of the specific statutory elements is a prime source of criticism of the new test. Although the test may substantially liberalize reviewability, it offers no precise guidelines. Moreover, although the court's sense of public interest is commendable, its opinion warrants close scrutiny for the possibility that an absolute right of appeal upon meeting certain standards has been restructured into a discretionary right predicated upon the court of appeals' appraisal of the public interest involved.

Yet there is reason to commend the result in *Medical Committee*. It is altogether too likely that either individually or collectively management and the SEC can arbitrarily act "within the proxy rules" to stifle stockholder proposals and effectively chill individual participation in corporate democracy in derogation of the intent of the Act. Stockholders have apparently been relieved of the expense and burden of pursuing their investor rights in private actions against their corporation. Analysis of reviewability in terms of effect on the agency, the courts, and the party seeking a remedy is to be encouraged.<sup>86</sup> More liberal review under the general criteria employed in *Medical Committee* could promote effectuation of the stockholder proposal rules while conforming to section 25(a) review requirements and should not evoke fear of unwarranted judicial intrusion from an agency which objectively and fairly performs its statutory obligations. But liberal interpretations must still meet statutory requirements. It is imperative for future usage of the *Medical Committee* test that the relationship between finality, formality, and pragmatism and section 25(a)'s review requirements be clarified.

### *Reviewability of Emergency Suspension Orders Under the Federal Insecticide, Fungicide and Rodenticide Act*

#### The Court of Appeals for the Seventh Circuit and the Court of

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86. See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968). In a case involving review under the administrative procedure act, 5 U.S.C. §§ 702, 704 (Supp. V, 1970), the District of Columbia Circuit has likewise found the "practicalities of administrative involvement" sufficient to warrant judicial review of otherwise informal SEC action. *Independent Broker-Dealers Trade Ass'n v. SEC*, 39 U.S.L.W. 2506 (D.C. Cir. Mar. 4, 1971).

Appeals for the District of Columbia Circuit have recently taken conflicting views concerning the reviewability of determinations made by the Secretary of Agriculture pursuant to section 4(c) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).<sup>87</sup> The Act provides for emergency suspension of the registration of certain substances termed “economic poisons” when such suspension is determined by the Administrator of the Environmental Protection Agency to be necessary to prevent “an imminent hazard to the public.”<sup>88</sup>

In *Environmental Defense Fund, Inc. v. Hardin*<sup>89</sup> the Court of Appeals for the District of Columbia Circuit held that the failure of the Secretary of Agriculture to act within a reasonable time on a petition for suspension under the FIFRA was equivalent to a final order denying relief and was therefore reviewable in the court of appeals. The Environmental Defense Fund and other organizations involved in environmental protection activities jointly filed a petition with the Secretary<sup>90</sup> requesting the issuance of notices of registration cancellation for all economic poisons containing DDT, and the interim suspension of registration for such products pending the outcome of statutory administrative proceedings.<sup>91</sup> Notices of cancellation were issued by the Secretary with respect to some uses of DDT, but no action was taken as to other uses or on the request for interim registration suspension. Petitioners appealed, seeking to compel full compliance with their requests. The court denied the Secretary’s motion to dismiss and held that petitioners had standing as consumers of the regulated products to seek judicial review,<sup>92</sup> the disposition of a suspension request was not a matter committed by the FIFRA to unreviewable agency discretion,<sup>93</sup> and administrative inaction on the suspension request, owing to the urgency of the action requested and the allegation of “imminent hazard,” was equivalent to

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87. 7 U.S.C. § 135 (1964).

88. Section 4(c) provides that “the Secretary may, when he finds that such action is necessary to prevent an imminent hazard to the public, by order, suspend the registration of an economic poison immediately.” *Id.* § 135b(c). Regarding the substitution of the Administrator of the Environmental Protection Agency for the secretary, see note 90 *infra*.

89. 428 F.2d 1093 (D.C. Cir. 1970).

90. The functions of the Secretary of Agriculture under the FIFRA were recently transferred to the Administrator of the Environmental Protection Agency by section 2(8)(i) of Reorganization Plan No. 3, 1970 U.S. CODE CONG. & AD. NEWS 2998.

91. See notes 101-02 *infra*.

92. 428 F.2d at 1096.

93. *Id.* at 1098.

a denial of relief and hence a final order "ripe" for judicial review.<sup>94</sup>

In *Nor-Am Agricultural Products, Inc. v. Hardin*,<sup>95</sup> on the other hand, the Court of Appeals for the Seventh Circuit reversed a three-judge panel on en banc rehearing and held that an emergency suspension order under the FIFRA was *not* a final order subject to judicial review under the Administrative Procedure Act (APA)<sup>96</sup> and therefore a federal district court had no jurisdiction to enjoin enforcement of such an order. After a news broadcast concerning the contamination of grain with an agricultural fungicide containing a high percentage of mercury, Nor-Am, the largest seller of mercury-containing fungicide, was notified by the Department of Agriculture that, pursuant to section 4(c) of the FIFRA, its registration of products containing mercury compounds for use in seed treatment had been suspended, that such products were to be recalled from the market, and that further shipments would be unlawful.<sup>97</sup> Nor-Am and its distributor then obtained a district court preliminary injunction to stay enforcement of the suspension order pending the outcome of the formal administrative proceedings outlined in the FIFRA. Initially, a three-judge panel of the court of appeals upheld the district court's jurisdiction and affirmed the granting of the injunction.<sup>98</sup> However, on en banc rehearing, the full court reversed the three-judge panel and held the suspension order to be unreviewable.<sup>99</sup>

Agricultural poisons are regulated by the FIFRA, which was formerly administered by the Secretary of Agriculture but is now under the purview of the Administrator of the newly created Environmental Protection Agency.<sup>100</sup> The statute requires the

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94. *Id.* at 1099.

95. 435 F.2d 1151 (7th Cir. 1970), *rev'g on rehearing*, 435 F.2d 1133 (7th Cir. 1970), *cert. filed*, 39 U.S.L.W. 3347 (U.S. Feb. 5, 1971) (No. 1317).

96. Section 10(c) of the APA provides in part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. . . ." 5 U.S.C. § 704 (Supp. V, 1970).

97. Subsequently, the recall order was suspended "in view of the practical difficulty of safely disposing of the compound other than through ordinary use channels." 435 F.2d at 1136.

98. 435 F.2d 1133 (7th Cir. 1970).

99. *Nor-Am Agricultural Prod., Inc. v. Hardin*, 435 F.2d 1151 (7th Cir. 1970). Compare *Nor-Am and Environmental Defense Fund with Acquavella v. Richardson*, 39 U.S.L.W. 2446 (2d Cir. Jan. 25, 1971). In *Acquavella*, the court held that a summary order of the Secretary of HEW suspending Medicare payments to an "extended-care facility" constituted a reviewable final order under section 10 of the APA.

100. See note 90 *supra*.

registration of economic poisons and establishes procedures whereby the registration may be cancelled.<sup>101</sup> Because these procedures are likely to be time-consuming, the Administrator is empowered to suspend a registration immediately if he finds such action to be necessary to prevent an imminent public hazard. The legislative history of the 1964 amendments to the FIFRA, which included the clause concerning the emergency suspension power, does not contain a discussion of the term "imminent hazard," but it does mention that the procedure is modeled after a similar provision in the Federal Food, Drug and Cosmetic Act,<sup>102</sup> clearly implying that the language in both acts should be given the same meaning.<sup>103</sup>

Statutory review of suspension, cancellation, and other orders under the FIFRA is provided in section 4(d), which states in part that "[i]n a case of actual controversy as to the validity of any order under this section, any person who will be adversely affected by such order may obtain judicial review . . ." <sup>104</sup> thereof in the appropriate United States court of appeals. Section 4(c) also provides that "[f]inal orders . . . under this section shall be subject to judicial review, in accordance with the provisions of subsection (d) of this section."<sup>105</sup>

The Act determines the availability of judicial review for final orders but is not determinative when a party attempts to obtain review at some juncture other than that prescribed by the controlling statute. Two questions are posed which must be answered affirmatively if review is to be granted. Initially, the court must determine whether the administrative action involved is subject to judicial scrutiny at all;<sup>106</sup> if

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101. 7 U.S.C. § 135b(c) (1964), provides in relevant part: "The Secretary, in accordance with the procedures specified herein, may suspend or cancel the registration of an economic poison whenever it does not appear that the article or its labeling or other material required to be submitted complies with . . . this title."

It further provides that a cancellation is effective thirty days after service of appropriate notice "unless within such time the registrant (1) makes the necessary corrections; (2) files a petition requesting that the matter be referred to an advisory committee; or (3) files objections and requests a public hearing." *Id.*

102. H.R. REP. NO. 1125, 88th Cong., 2d Sess. 4 (1964).

103. See 435 F.2d at 1161 n.6. Under the FFDCA a finding of imminent hazard is a prerequisite to summary suspension of a license to market drugs if such suspension is to be effective prior to full administrative proceedings. The suspension power was intended to be used only in the event of serious danger to the public which could not be prevented by less summary methods. See S. REP. NO. 1744, 87th Cong., 2d Sess. pt. 2, at 7 (1962); H.R. REP. NO. 2464, 87th Cong., 2d Sess. 8-9 (1962).

104. 7 U.S.C. § 135b(d) (1964). The present section 4(d) was added in the 1964 amendments to the FIFRA.

105. *Id.* § 135b(c).

106. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 301 (1943).

this question is answered in the affirmative, the court must then determine whether irreparable injury will result if judicial review is withheld.<sup>107</sup> The complexity of a determination concerning reviewability is increased when the discretionary power of an agency or executive official is challenged as being arbitrary and capricious.<sup>108</sup>

Section 10(e) of the APA directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." <sup>109</sup> The proper interpretation of the above directive has been vigorously debated by the commentators.<sup>110</sup> The principal source of controversy concerns the effect to be given to the introductory proviso of section 10, which excepts "agency action . . . committed to agency discretion by law."<sup>111</sup> Professor Davis maintains that where action is by law "committed" to agency discretion, it is not reviewable even for arbitrariness or abuse of discretion; conversely, to the extent it is not "committed" to agency discretion it is reviewable. Under this approach, the courts can determine on practical grounds whether or not administrative action is "committed" to agency discretion and, therefore, whether it is reviewable.<sup>112</sup>

Professor Berger, on the other hand, equates the phrase "committed to agency discretion" with "committed to *lawful* agency discretion" which, by definition, excludes all action which is arbitrary or an abuse of discretion from the exception. He concludes that *all* administrative action is reviewable with respect to abuse of discretion except to the extent that judicial review is expressly precluded by statute.<sup>113</sup>

Judicial opinions have differed on the question of whether

107. *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

108. *See Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970).

109. APA § 10(e), 5 U.S.C. § 706 (Supp. V, 1970).

110. *See, e.g.,* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965) [hereinafter cited as DAVIS]; Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 U. PA. L. REV. 816 (1966); Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).

111. 5 U.S.C. § 701(a)(2) (Supp. V, 1970).

112. 4 DAVIS §§ 28.08 & 28.16.

113. Berger, 51 MINN. L. REV., *supra* note 110, at 609-10.

discretionary agency action is reviewable for abuse of discretion. A few cases have held that the discretion exception of the APA unqualifiedly cuts off all review of administrative action for abuse of discretion,<sup>114</sup> and at least one case has expressly adopted the Davis approach.<sup>115</sup> Some cases have even gone so far as to hold that where the relevant statute is worded in permissive terms, agency action is never reviewable for abuse of discretion.<sup>116</sup>

The majority of recent opinions have, however, held arbitrary and capricious agency action to be reviewable even where such action is discretionary,<sup>117</sup> and two contemporary Supreme Court decisions appear to support this position. In *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>118</sup> the Court stated that “[t]here is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme.”<sup>119</sup> In *Barlow v. Collins*<sup>120</sup> the Court unequivocally stated that a legislative intent to preclude judicial review cannot be inferred from the mere fact that a statute is worded permissively to give an administrative official the power to “prescribe such regulations as he may deem proper.”<sup>121</sup> By virtue of these recent Supreme Court decisions, reviewability of discretionary action must be presumed unless there is a clear statutory command to the contrary. The trend in the lower federal courts appears to go even further and hold that arbitrary agency action is *always* reviewable.<sup>122</sup>

Once discretionary agency action is determined to be reviewable, the court must turn its attention to matters of finality, adequacy of remedy, and exhaustion of administrative remedies. Finality of action is generally a prerequisite to review of lower court rulings by a higher court, but the finality rule also includes judicial review of administra-

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114. See, e.g., *United States v. One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964); *Pullman Trust & Savings Bank v. United States*, 225 F. Supp. 860 (N.D. Ill. 1964).

115. *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

116. See, e.g., *United States v. District Director of Imm. & Nat.*, 175 F.2d 693 (2d Cir. 1949).

117. See *Velasco v. Immigration & Nat. Serv.*, 386 F.2d 283 (7th Cir. 1967); *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967); *Atewoofakewa v. Udall*, 277 F. Supp. 464 (W.D. Okla. 1967); *Kolstad v. United States*, 276 F. Supp. 757 (D. Mont. 1967); *Chamber of Commerce v. United States*, 276 F. Supp. 301 (D.N.D. 1967).

118. 397 U.S. 150 (1970).

119. *Id.* at 157.

120. 397 U.S. 159 (1970).

121. *Id.* at 166. The statutory language cited appears at 16 U.S.C. § 590d(3) (1964).

122. Cf. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 310-11 (1946).

tive action. In the latter context, the finality doctrine has been applied in a pragmatic way<sup>123</sup> with "final" action including any *effective* administrative action for which there is no other adequate remedy in any court.<sup>124</sup> This approach was utilized in *Isbrandtsen Co. v. United States*<sup>125</sup> where the court phrased the test in terms of the consequences of the action under review.<sup>126</sup> Since the order in *Isbrandtsen* would have visited severe consequences upon the petitioner, the court adopted the rule that review will be granted to protect a party from irreparable injury which would likely result from agency acts which directly and immediately affect the interests of the party.<sup>127</sup> Indeed, Professor Davis asserts that "[n]o court requires exhaustion [of administrative remedies] when exhaustion will involve irreparable injury. . . ."<sup>128</sup> The demonstration of irreparable injury, however, requires a strong showing of harm such as loss of reputation<sup>129</sup> or the loss of the monetary or moral value of an asserted right or defense.<sup>130</sup> The administrative process is allowed to continue if a party is adequately protected by the administrative or subsequent judicial process, but immediate relief should be granted if a court would be unable to provide an adequate remedy once the administrative process is complete.<sup>131</sup>

In *Nor-Am* the three-judge panel focused on the predicament in which the plaintiffs were placed by the Secretary's emergency suspension order. *Nor-Am* and Morton, the distributor, were faced with a difficult decision: should they comply with the Secretary's order and halt production and distribution, or should they ignore the order and face severe penalties, including possible fines and imprisonment?<sup>132</sup> The full court on rehearing, however, was not

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123. See, e.g., *Abbott Labs. v. Gardner*, 387 U.S. 167 (1967); *Gordon & Co. v. Board of Governors of the Fed. Reserve Sys.*, — F. Supp. — (D. Mass. 1970).

124. See *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961).

125. 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

126. Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. . . . Under this test a final order need not necessarily be the very last order. *Id.* at 55.

127. *Id.* at 55-56.

128. 3 DAVIS § 20.01. Professor Davis also holds the view that: "The statement the courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings." *Id.*

129. *Pierne v. Valentine*, 291 N.Y. 333, 52 N.E.2d 890 (1943).

130. *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939).

131. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 432 (abridged student ed. 1965).

132. See 7 U.S.C. § 135f (1964).

persuaded that the possible harm to plaintiffs was irreparable or that the suspension order was “final” under either the FIFRA or the APA<sup>133</sup> and hence found the district court without jurisdiction to enjoin enforcement of the order.

Addressing itself to the FIFRA, the court reasoned that the language in subsection 4(d) providing for judicial review of “any order under this section”<sup>134</sup> must be construed as referring only to *final* orders, since subsection 4(c) provides that “[f]inal orders of the Secretary under this section shall be subject to judicial review, in accordance with the provisions of subsection (d). . . .”<sup>135</sup> The court found that section 4(d) provides details of the procedural aspects of review already authorized by section 4(c). The court then characterized the emergency suspension order as “a tentative, temporary measure . . . preliminary to more thorough administrative consideration”<sup>136</sup> and not a final order within the meaning of the FIFRA.

The claim that the suspension order possessed sufficient finality to qualify for review under the “final agency action” provision of the APA<sup>137</sup> was also rejected. Conceding that the concept of finality is a flexible one under the APA, the court nevertheless found that the concept was not flexible enough to allow disregard of the concept of congressional delegation of power. Relying heavily upon the purpose of the emergency suspension power, the court suggested that the power was within the APA’s exception for action committed to agency discretion by stating that a suspension order “involves highly discretionary administrative action with deeply rooted antecedents in the realm of public health and safety.”<sup>138</sup>

In contrast to *Nor-Am*, the court in *Environmental Defense Fund* determined that the Secretary of Agriculture’s failure to act on a petition for emergency suspension of DDT products was equivalent to a final agency order ripe for judicial review under the FIFRA. In reaching this result, the court proceeded in three steps. First, merely because the statutory language regarding emergency suspension orders is written in permissive terms, a congressional intent to preclude judicial review was not inferred; second, in view of the

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133. 435 F.2d at 1156-57.

134. See text accompanying note 104 *supra*.

135. Section 4(c), 7 U.S.C. § 135b(c) (1964) (emphasis added).

136. 435 F.2d at 1157.

137. APA § 10(c), 5 U.S.C. § 704 (Supp. V, 1970).

138. 435 F.2d at 1158.

urgency of a petition for suspension and the allegation that delay would result in irreparable injury, the issue was "ripe" for review; and third, failure to order suspension of the registration of DDT amounts to a final order denying such a request because such inaction has an identical effect on the rights of the parties. Review is not to be frustrated, noted the court, merely because the agency chooses inaction rather than action.<sup>139</sup> Since the administrative inaction made meaningful judicial review impossible, however, the court remanded the case to the Secretary<sup>140</sup> for either an affirmative disposition of the proceedings or a statement of reasons for continued inaction.<sup>141</sup> With respect to the request for issuance of notices of cancellation, however, the court determined that the delay had not taken on the character of a denial of relief since the Secretary had made "a few feeble gestures" toward compliance, having issued some notices while presumably contemplating the request for others.

A fundamental question presented by the *Nor-Am* and *Environmental Defense Fund* cases is whether the same standard of judicial review should be applied both to orders *granting* and orders *denying* emergency registration suspension. The two decisions may possibly be read together as a statement that, because of the congressional purpose to prevent "imminent hazard to the public," a suspension order will not be reviewable but the denial of a suspension order will be. The potential consequences to the public of an erroneous administrative judgment with respect to a suspension request are obviously greater where subsequent events prove a denial to have been ill-advised than where a suspension order proves to have been unnecessary. Furthermore, a suspension order triggers expedited administrative proceedings,<sup>142</sup> whereas arguably a denial of suspension is the end of the road for a petitioner. Notwithstanding these arguments, however, the distinction between orders granting and

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139. The court warned that "an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." 428 F.2d at 1099.

140. The court of appeals again remanded for further proceedings in *Environmental Defense Fund, Inc. v. Ruckelshaus*, \_\_\_ F.2d \_\_\_ (D.C. Cir. 1971). On the first remand, the Secretary had formally denied suspension, stating that while a substantial question existed as to the safety of DDT, the evidence did not warrant summary suspension. In its second opinion, the court found that the Secretary had set the standard of proof too high in light of the statutory purpose of protecting the public from "imminent hazard." *Id.*

141. The court made it clear that if suspension were refused, the basis for the refusal "should appear clearly on the record." 428 F.2d at 1100.

142. 7 U.S.C. § 135b(c) (1964).

denying suspension, suggested in *Nor-Am*,<sup>143</sup> was found to be unpersuasive by the District of Columbia Circuit in its second *Environmental Defense Fund* decision.<sup>144</sup> Although it is true that a denial of suspension would not trigger *expedited* administrative proceedings, normal proceedings would follow later if notices of cancellation have been issued. The preference expressed in *Nor-Am* for protecting the public health and safety rather than business profits and good will represents a commendable value judgment. However, this judgment should have a bearing not on the question of *reviewability* but rather on the question of the relative *weight* to be accorded the administrative decision on review.<sup>145</sup>

Another possible distinction between the two cases is that the remedy pursued by plaintiffs in *Nor-Am* was a suit for injunction in the district court, rather than a petition for review in a court of appeals as was the case in *Environmental Defense Fund*. The sole statutory review provided by the FIFRA is indeed review in the appropriate court of appeals.<sup>146</sup> The Act also provides, however, that “[u]pon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of. . . .”<sup>147</sup> Clearly, as a matter of statutory construction the courts of appeals cannot claim exclusive jurisdiction to review suspension or other orders *until* the petition for review has been filed.<sup>148</sup> Furthermore,

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143. 435 F.2d at 1159.

144. The court stated in relevant part:

Nor can we find in the statutory scheme any support for the *Nor-Am* distinction between orders granting and denying suspension. For the administrative proceedings that follow suspension are equally available after a refusal to suspend. If the Secretary orders suspension, the proceedings are expedited; otherwise they may follow in due course after he issues cancellation notices. In either event, there is a prospect of further administrative action, but that prospect does not resolve for us the question of reviewability. — F.2d at

145. It should be noted that the *Nor-Am* court's attempt to distinguish *Environmental Defense Fund* on this point is marred by factual error. The *Nor-Am* court originally confused the facts of *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), with those of *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083 (D.C. Cir. 1970). See 27 AD. L. 2D 928, 936 (7th Cir. 1970). This was later corrected in the official report of the case. 435 F.2d at 1159.

146. The FIFRA provides that a person adversely affected by an administrative order may obtain review in the court of appeals by filing therein a petition to have the order set aside. 7 U.S.C. § 135b(d) (1964). The provisions relating to judicial review were added by the 1964 amendments to the FIFRA. See § 4, Pub. L. No. 88-305, 78 Stat. 190 (1964).

147. 7 U.S.C. § 135b(d) (1964) (emphasis added).

148. The legislative history tends to confirm this inference. The House Report on the 1964 FIFRA amendments notes that “[s]ection 4 adds a new section d to section 4 of the act to provide for judicial review . . . by petition to an appropriate U.S. court of appeals. . . . The

*Leedom v. Kyne*<sup>149</sup> would seem dispositive of the issue of the jurisdiction of a district court to entertain an original suit to set aside administrative action where statutory review is limited to the courts of appeal. In *Leedom*, a district court was held to have jurisdiction over a suit to set aside an NLRB representation order notwithstanding the provisions of the National Labor Relations Act which appeared to limit review to the courts of appeal.<sup>150</sup>

The original decision of the three-judge panel in *Nor-Am* is therefore correct in its determination that the statutory review provisions of the FIFRA do not deprive the district courts of jurisdiction to entertain initial review of administrative action asserted to have been arbitrary and capricious. Indeed, the government did not argue against this position,<sup>151</sup> and the issue was apparently not raised during the en banc rehearing.

A third possible distinction between *Nor-Am* and *Environmental Defense Fund* is that the suspension order in *Nor-Am* had an adverse effect upon the *private* economic interests of *Nor-Am* and its distributor, while the denial of suspension in *Environmental Defense Fund* had a potentially adverse effect upon the *public* interest in health and safety. The *Nor-Am* decision rests in part upon this distinction<sup>152</sup> but improperly so with respect to the question of reviewability. Whether an administrative order affects private or public interests may be highly relevant when considering the *merits* of a controversy but should not affect a court's determination on the question of reviewability.<sup>153</sup>

The agency orders in both *Nor-Am* and *Environmental Defense Fund* seemingly carried with them sufficiently direct and immediate effects upon the interests of the petitioners to merit judicial review. Certainly the *Environmental Defense Fund* holding that excessive administrative delay on a suspension request is equivalent to a final order denying suspension was a proper one. In its subsequent opinion

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court would *then* have exclusive jurisdiction to affirm or set aside the order." H.R. REP. NO. 1125, 88th Cong., 2d Sess. 4 (1964) (emphasis added).

149. 358 U.S. 184 (1958).

150. The Court observed: "This suit is not one to 'review,' in the sense of that term as used in the [NLRA], a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers. . . ." *Id.* at 188.

151. 435 F.2d at 1134.

152. *Id.* at 1160.

153. Where an administrative order affects private economic interests, a sufficient basis is ordinarily present to hold the order "final" and reviewable. *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir. 1954). The statement in the text is the view adopted in dictum by the District of Columbia Circuit in the second *Environmental Defense Fund* opinion. \_\_\_ F.2d at \_\_\_

the court reflected an evolving temperament of increased judicial scrutiny of discretionary administrative standards:

We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years courts have treated administrative policy decisions with great deference. . . . Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, the power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.<sup>154</sup>

Failure to appreciate this principle certainly contributed to the second *Nor-Am* decision. The facts were undisputed in *Nor-Am* that there was no evidence indicating that the products whose registration had been suspended were involved in any incidents or that the products had caused adverse effects in more than twenty years of use. Furthermore, a fair inference could be drawn that the one incident had been the sole motivating factor behind the suspension order and had been the result of negligence on the part of the injured persons.<sup>155</sup> Nothing in the FIFRA compels the conclusion that a suspension order issued without factual justification should be immune from threshold judicial review. For this reason, the second *Nor-Am* decision holding that the emergency suspension order was not a final order and therefore not reviewable appears erroneous.

### *Exhaustion of Administrative Remedies*

In *Jewel Companies, Inc. v. FTC*<sup>156</sup> the Court of Appeals for the Seventh Circuit held that a district court has jurisdiction, prior to the completion of FTC proceedings and notwithstanding the doctrine of exhaustion of administrative remedies, to determine whether a commissioner in voting for the issuance of a complaint had improperly interpreted his statutory obligation. The FTC brought

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154. \_\_\_ F.2d at \_\_\_ Compare *FTC v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970), discussed at DECISIONS section *supra*. For further indication from the same court of the increasing emphasis on collaboration between court and agency, see *Greater Boston Television Corp. v. FCC*, \_\_\_ F.2d \_\_\_, \_\_\_ (D.C. Cir. 1970).

155. The precise holding of the three-judge panel, reversed on rehearing, was stated as follows: “[W]e do not here purport to balance the conflicting interests of the public. Rather we hold that, at the present juncture, the finding of the district court that the suspension of the registration was arbitrary and capricious is adequately supported on the record.” 435 F.2d at 1145.

156. 432 F.2d 1155 (7th Cir. 1970).