FINALITY OF ORDERS ISSUED PURSUANT TO THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

Dow Chemical Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973)

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[1] requires that all "economic poisons" marketed in interstate commerce be registered with the Environmental Protection Agency (EPA).[2] A pesticide must meet certain safety and efficacy standards[3] in order to be registered.[4] The Administrator of the EPA, in conducting continu-

1. 7 U.S.C. §§ 135-35k (1970) [hereinafter cited as FIFRA]. FIFRA was enacted in 1947, ch. 125, § 4b, 61 Stat. 167 (1947), to replace the Insecticides Act of 1910. Since the passage of the antiquated 1910 Act, many pesticides with highly complex chemical formulas had been developed and distributed without the knowledge of the appropriate agency. The primary purpose of FIFRA was to protect the health and safety of the public by excluding both ineffective and dangerous pesticides from the market by means of provisions for registration of "economic poisons." H.R. REP. No. 313, 80th Cong., 1st Sess. 2-3 (1947); S. REP. No. 199, 80th Cong., 1st Sess. 2 (1947).

2. FIFRA was first administered by the Secretary of Agriculture, whose functions pursuant to the Act were transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan 3 of 1970, § 2(a)(8)(i), 5 U.S.C. App. II (1970).

3. In the principal case the asserted violation of the standards was "misbranding." Misbranding occurs, *inter alia*, when a pesticide's labeling does not provide instructions and warnings that, when followed, make the product safe for use. 7 U.S.C. §§ 135 (z)(2)(c), (d), (g) (1970). *See generally* Save America's Vital Environment, Inc. v. Butz, 347 F. Supp. 521, 523-25 (N.D. Ga. 1972).

4. Prior to the 1964 amendment of FIFRA, the Secretary could, in order to protect the public, cancel the registration of any pesticide (termed "economic poison" by the Act) and notify the registrant of the manner in which the product failed to comply with the Act. The registrant could then make the necessary corrections or insist that the product be registered under protest, thereby continuing to market and distribute the pesticide under the risk of prosecution and criminal penalty. There was no provision for suspension. Federal Insecticide, Fungicide and Rodenticide Act, ch. 125, § 4b, 61 Stat. 167 (1947), *as amended*, 7 U.S.C. § 135b (1970).

Under the pre-1964 system, the Secretary was required to register a product even though he was convinced that the product was ineffective or dangerous to human life. Another effect of the registration under protest was to shift to the Secretary the burden of proving that the product did not meet the efficacy and safety standards required by the Act. H.R. REP. No. 1125, 88th Cong., 2d Sess. 2, 5, 7 (1964); S. REP. No. 573, 88th Cong., 1st Sess. 2, 3 (1963).

The 1964 amendments, following the principles and procedures of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (1970), were designed to give the Secretary greater power to eliminate dangers to the public, to shift the burden of proof

ing review of the registered products to assure compliance with the statutory standards, found that "it did not appear" that plaintiff's herbicide[5] complied with the terms of the Act. Pursuant to FIFRA, the Administrator cancelled[6] the registration of plaintiff's product. To avoid removal of its product from the market, plaintiff initiated the first stage of the FIFRA administrative review process[7] by filing a petition requesting referral of the matter to a scientific advisory committee.[8] The committee, in accordance with the Act, conducted an independent study of the data provided by the Administrator and all other pertinent information available and submitted a report recommending restoration of the registration.[9] After assessing the committee's re-

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to the registrant, and to give the registrant more options than withdrawing his product from the market or facing possible prosecution. 109 CONG. REC. 10,242 (1963) (remarks of Cong. Rosenthal); *id.* at 20,079-80 (remarks of Senators Ellender and Ribicoff).

5. The product in question was Veon 245, a herbicide containing 2,4,5-trichlorophenoxacetic acid, known commonly as 2,4,5-T. Veon 245 is used for the control of weeds in the production of rice intended for human consumption. 2,4,5-T and its contaminant, tetrachlorodibenzoparadioxin (TCDD), have been linked with carcinogenesis, mutagenesis, and teratogenesis. Suspension and cancellation of several of Dow's other products accompanied this order, but were not contested.

6. If the Administrator finds an "imminent hazard to the public" in the use of the pesticide, he may "suspend" registration, which results in the summary removal of the product from the market. If he determines that there is no imminent hazard, but "it does not appear that the article or its labeling or other material required to be submitted" complies with the terms of the Act, he may "cancel" the registration. Cancellation also removes the product from the market unless the registrant takes affirmative action within thirty days to initiate the administrative review process. If the registrant promptly contests the Administrator's decision, the cancelled product may be manufactured and sold pendente lite. 7 U.S.C. § 135b(c) (1970).

7. Where the Administrator cancels registration, the registrant may select one of two alternative methods of administrative review. He may either file a petition requesting referral of the matter to a scientific advisory committee, or he may file objections and request a public hearing. *Id.* The burden of proof in review of cancellation is on the registrant to show that the pesticide meets the statutory efficacy and safety standards. Continental Chemiste Corp. v. Ruckelshaus, 461 F.2d 331, 335 (7th Cir. 1972); Stearns Elec. Paste Co. v. Environmental Protection Agency, 461 F.2d 293, 304-05 (7th Cir. 1972).

8. 7 U.S.C. § 135b(c) (1970) requires that the advisory committee be selected by the National Academy of Sciences. The committee must be composed of experts qualified in the subject matter and of adequately diversified backgrounds. The size of the committee is determined by the Administrator. The committee must issue a report within 120 days of request. For regulations governing the advisory committee procedure, see 40 C.F.R. §§ 164.10-.11 (1972).

9. Nine of the ten members of the advisory committee recommended that the registration be restored with certain limitations on the amount of the contaminant. TCDD, to be allowed in the 2,4,5-T. The committee found that teratogenetic effects were dose-

port,[10] the Administrator elected to continue the cancellation.[11] Plaintiff, rather than filing objections to the Administrator's order and findings and requesting a hearing,[12] which is the separate and distinct second-stage administrative review provided by FIFRA, sought[13] and

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related, that 2,4,5-T did not persist in water, plants, or other parts of the environment, and that no 2,4,5-T residues were detectable on rough rice fifty days after application of the herbicide. Brief for Appellee at 16, Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973). Both the dissenting committee member and the Administrator noted, however, that the committee had failed to weigh the risks of 2,4,5-T against its benefits. Brief for Appellant at 14.

10. If at this stage the Administrator's determination is favorable to the registrant, the cancellation will be lifted and no further proceedings will be necessary. If the decision is adverse, however, the statute provides for a separate and distinct second-stage administrative review. The registrant has sixty days in which to file objections to the Administrator's order and findings, and to request a public hearing. If the registrant chooses not to file objections within the allotted time, the order becomes final for purposes of judicial review. The registrant may be precluded from seeking this review, however, because of his failure to exhaust the available administrative remedies. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 591 n.16 (D.C. Cir. 1971). *See* note 29 *infra*; *cf.* FCC v. Schreiber, 381 U.S. 279 (1965); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Meekins v. Boire, 320 F.2d 445 (5th Cir. 1963); Neisloss v. Bush, 293 F.2d 873 (D.C. Cir. 1961); Union Oil Co. v. FPC, 236 F.2d 816 (5th Cir. 1956); Shank v. FPC, 236 F.2d 830 (5th Cir. 1956).

11. 7 U.S.C. § 135b(c) (1970) states, in part:

> After due consideration of the views of the committee and all other data before him, the Administrator shall, within ninety days after receipt of the report and recommendations of the advisory committee, make his determination and issue an order, with findings of fact, with respect to registration of the article and notify . . . registrant.

Throughout the administrative proceedings, the registrant has the continuing burden of proving to the satisfaction of the Administrator that his product is safe and effective. *See* notes 4 & 7 *supra*.

12. The purpose of the hearing is to receive evidence material and relevant to the issues raised by the registrant's objections. Following the second-stage review, the Administrator must issue a third order based upon substantial evidence adduced at the hearing. If this determination is also adverse, the registrant may seek judicial review in an appropriate court of appeals within sixty days. 7 U.S.C. § 135b (1970); 40 C.F.R. §§ 164.4(b)-(e), 164.20-.42 (1972).

13. Dow alleged that the Administrator had failed to perform his statutory duty pursuant to FIFRA, thereby subverting the statutory scheme and causing immediate and serious harm to Dow and the public. Dow stated in explanation that, in light of the recommendations of the advisory committee, the Administrator had only two lawful options. If he had sufficient data before him to indicate that 2,4,5-T did not meet statutory safety standards, he was obligated to issue an order cancelling Dow's registration, with specific findings of fact based on such data. If, on the other hand, he did not have information sufficient to warrant cancellation, he was obliged to lift the original cancellation, thereby affirming Dow's 2,4,5-T registration. Dow alleged that the Administrator followed neither of these courses, but issued a statement containing broad conclusions and an order to institute a public hearing, and that the statement

obtained[14] equitable relief in federal district court.[15] On appeal

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was, in fact, a refusal to make a final judgment on the merits of the cancellation. Dow sought both a writ of mandamus compelling the Administrator to issue a proper order containing findings of fact, and an injunction against further proceedings pending the issuance of the order.

In determining the focus of Dow's complaint, it is worthwhile to consider several alternatives. The first is that Dow was asserting that the Administrator was attempting to force Dow into a public hearing not required by statute. This cannot be a legitimate complaint, however, because if Dow had elected to forego the hearing, it would have been precluded from judicial review by the doctrine of exhaustion of administrative remedies. *See* note 10 *supra*.

A second possibility is that Dow, bearing the burden of proof, was alleging the Administrator's failure, through the issuance of broad conclusions rather than findings of fact, to narrow the scope of the public hearing. The validity of this complaint may also be questioned. Both the Administrator and the dissenting member of the advisory committee noted specifically that the majority of the committee had failed to explore the benefit coefficient of the cancellation. *See* note 9 *supra*.

A third alternative is that, because Dow had no legitimate substantive complaint, it was merely objecting to technical defects in the form of the Administrator's order. If this were true, it is likely that all Dow would have gained is a delay in the administrative proceedings. Pursuant to Dow's allegation of irreparable injury, such a delay would have only caused them further economic harm.

The last alternative is that Dow felt that the Administrator's discretionary decision to continue the cancellation was a wrongful disregard of the findings of the advisory committee. Because the substantive decision was within the discretion of the Administrator, however, it was necessary to focus on the form prescribed by statute. If Dow had been able to persuade the court that the Administrator's decision was based on conclusions rather than facts, the findings of the advisory committee might have been the only facts available to the Administrator for reaching his decision. Under those circumstances it would have been difficult for the Administrator to justify any action other than lifting the cancellation.

14. The United States District Court for the Eastern District of Arkansas first suggested that the Administrator enter an additional order explicitly containing findings of fact as required by statute. The second order was issued and the court, in an unreported opinion, entered its memorandum and order, concluding that the Administrator had failed to enter an order and findings of fact on the basis of the advisory committee's report and that the order was thus contrary to the plain language of the statute. The court directed the Administrator to enter an additional order showing relevant portions of the data being relied on, the manner in which the Administrator's findings were based on the data, and the manner in which the conclusions were derived from the findings. Pending issuance of the order, the court directed all proceedings relating to 2,4,5-T to be held in status quo. Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317, 1321-22 (8th Cir. 1973).

The district court interpreted the review sections of the Act to permit equitable relief in these circumstances. Provisions for review are set forth in FIFRA §§ 4(c)-(d), 7 U.S.C. §§ 135b(c)-(d) (1970). Section (c) provides:

> Final orders of the Administrator under this section shall be subject to judicial review, in accordance with the provisions of subsection (d) of this section.

Section (d) states, in part:

> In case of actual controversy as to the validity of any order under this section

by the Administrator, the Eighth Circuit Court of Appeals reversed and *held*:[16] FIFRA precludes judicial review of cancellation orders[17] until those orders have become "final."[18]

Statutes delineating regulatory functions of administrative agencies frequently provide for review of agency action.[19] One of the primary

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any person who will be adversely affected by such order may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has his principle place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part . . . . Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part.

Section (d) further provides that the findings of the Administrator must be sustained "if supported by substantial evidence when considered on the record as a whole, including any report and recommendation of an advisory committee."

In issuing a writ of mandamus, the court based its jurisdiction on 28 U.S.C. § 1361 (1970), which provides:

The district courts shall have jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The district court, apparently following the ministerial-discretionary distinction in deciding when mandamus may lie, *see* Wilbur v. United States *ex rel.* Kadric, 281 U.S. 206, 218-19 (1930), declared that the congressional doctrine that the Administrator reach a decision on the basis of the advisory committee report and other data before him was not discretionary and, hence, mandamus was proper. Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317, 1322 (8th Cir. 1973).

The district court did not specify the basis for injunctive jurisdiction but the general utility of the injunction as a means of reviewing administrative action when no other form of review proceeding is indicated is widely recognized. *See* Elmo Div. v. Dixon, 348 F.2d 342, 347 (D.C. Cir. 1965); Zirin v. McGinnes, 282 F.2d 113, 115 (3d Cir.), *cert. denied*, 364 U.S. 921 (1960); Board of Supervisors v. Fleming, 265 F.2d 736, 737 (5th Cir. 1959) (per curiam); Frost v. Garrison, 201 F. Supp. 389, 391 (D. Wyo. 1962); Burack v. State Liquor Author., 160 F. Supp. 161, 165 (E.D.N.Y. 1958).

Even when statutory review is made exclusive, an injunctive proceeding may be the proper mode of review when the statutory means of review is unavailable. *See* Oestereich v. Selective Serv. Sys. Local Bd., 393 U.S. 233, 235-39 (1968); Leedom v. Kyne, 358 U.S. 184, 184-91 (1958). For a discussion of the limitations on this line of reasoning, see Clark v. Gabriel, 393 U.S. 256 (1968) (per curiam); Boire v. Greyhound Corp., 376 U.S. 473, 477-82 (1964). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT 445 (3d ed. 1972).

15. The district court interpreted the review sections of the Act to permit equitable relief in these circumstances. Provisions for review are set forth in FIFRA §§ 4(c)-(d), 7 U.S.C. §§ 135(c)-(d) (1970).

16. Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973).

17. *See* note 6 *supra.*

18. *See* note 15 *supra* (FIFRA review provisions).

19. *See, e.g.*, Federal Environmental Pesticide Control Act § 16, 7 U.S.C. § 136n (Supp. II, 1972); Natural Gas Act § 19, 15 U.S.C. § 717r (1970); Federal Power Act

requirements of reviewability is that the action be "ripe."[20] When an agency action takes the form of an order,[21] it is necessary that the order be "final" to be "ripe" for review.[22] For an order to be "final,"

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§ 313, 16 U.S.C. § 8251 (1970); Federal Food, Drug and Cosmetic Act § 701(f), 21 U.S.C. § 371(f) (1970). *See also* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 429 n.12 (1973); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 655 nn.33-34 (1973). *But see* Veteran's Benefits Act § 8(a), 38 U.S.C. § 211(a) (1970); Renegotiation Act § 403(c)(1), 50 U.S.C. App. § 1191(c)(1) (1970) (barring de novo judicial review of administrative action).

20. "In its most general sense ripeness is not a requirement of the administrative action to be reviewed but of the judicial controversy between the plaintiff and the agency." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395 (1965).

In Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 149 (1967), the Court, to establish ripeness, made a twofold inquiry: first, whether the issues tendered were appropriate for judicial resolution, and second, whether serious hardship would befall the parties if judicial relief was denied at that point in the process. *Accord*, Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 170 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162 (1967); Citizens Communications Center v. FCC, 447 F.2d 1201, 1205 (D.C. Cir. 1971); Upjohn Co. v. Finch, 303 F. Supp. 241, 255 (W.D. Mich. 1969), *aff'd on other grounds*, 422 F.2d 944 (6th Cir. 1970).

For a further elaboration of the concept of ripeness in administrative law, see Flemming v. Florida Citrus Exch., 358 U.S. 153, 168 (1958); Frozen Food Express v. United States, 351 U.S. 40, 43-44 (1956); Textile & Apparel Group v. FTC, 410 F.2d 1052, 1052-54 (D.C. Cir.), *cert. denied*, 396 U.S. 910 (1969); American Home Prods. Corp. v. Finch, 303 F. Supp. 448 (D. Del. 1969).

21. Administrative actions may take essentially two forms, the "rule" and the "order."

> A rule is the product of rule making, and rule making is the part of the administrative process that resembles a legislature's enactment of a statute. An order is the product of adjudication and adjudication is the part of the administrative process that resembles a court's decision of a case.

K. DAVIS, *supra* note 14, at 123. Administrative Procedure Act § 2, 5 U.S.C. § 551 (1970) states:

> (4) "rule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, process, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
> (5) "rule making" means agency process for formulating, amending or repealing a rule;
> (6) "order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing . . . .

22. The requirement of a "final" order may be imposed explicitly by statute. *See, e.g.*, Federal Environmental Pesticide Control Act § 16, 7 U.S.C. § 136n (Supp. II, 1972); Immigration and Nationality Act § 106a, 8 U.S.C. § 1105a (1970); National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1970).

however, it need not be the last possible administrative order in a proceeding.[23] Rather, the definition is flexible,[24] and, in designating an

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The Administrative Procedure Act also requires that an order be "final" for purposes of review. Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (1970). *See* Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 149-50 (1967); Klein v. Commissioner of Patents, 474 F.2d 821, 824 (4th Cir. 1973); Samuel B. Franklin & Co. v. SEC, 290 F.2d 719, 723-24 (9th Cir.), *cert. denied*, 368 U.S. 889 (1961); State *ex rel.* Blankenship v. Smith, 312 F. Supp. 770, 771 (W.D. Okla. 1970); Bucks County Cable T.V., Inc. v. United States, 299 F. Supp. 1325 (E.D. Pa. 1969), *rev'd on other grounds*, 427 F.2d 438 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

The controlling statute may provide for review of an agency "action" or "order" and the court will construe such language as requiring a "final" "action" or "order." *See* FPC v. Metropolitan Edison Co., 304 U.S. 375, 383-85 (1938); United Gas Pipe Line Co. v. FPC, 206 F.2d 842, 844-45 (3d Cir. 1953); Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334, 337-38 (1st Cir. 1953); Aluminum Co. of America v. FPC, 130 F.2d 445, 447-48 (D.C. Cir. 1942); Indiana & Mich. Elec. Co. v. FPC, 224 F. Supp. 166, 169 (N.D. Ind. 1963).

23. *See, e.g.*, Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 416-18 (1942); Goodman v. Public Serv. Comm'n, 467 F.2d 375 (D.C. Cir. 1972); Northeast Airlines, Inc. v. CAB, 345 F.2d 662, 664-66 (1st Cir. 1965); Lam Man Chi v. Bouchard, 314 F.2d 664, 670 (3d Cir. 1963); Trans-Pacific Freight Conf. of Japan v. Federal Maritime Bd., 302 F.2d 875, 877-78 (1962); Cities Serv. Gas Co. v. FPC, 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958).

In Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 589-90 (D.C. Cir. 1971), the court held that the Administrator's refusal to act on a request for suspension of a product's registration pursuant to FIFRA was reviewable. It was further stated that the test for "finality" for purposes of review was not whether the order was the last possible administrative order contemplated by the statutory scheme, but rather whether the order imposed an obligation or denied a legal right with consequences sufficient to warrant review. *See* Environmental Defense Fund, Inc. v. Environmental Protection Agency, 465 F.2d 528, 533 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

Pax Co. v. United States, 454 F.2d 93, 97-98 (10th Cir. 1972), provides a specific example of an "early" final order issued in a FIFRA proceeding. The section of FIFRA requiring the registrant to prepay the costs of an advisory committee was held invalid. The court reasoned that the requirement of prepayment of such costs affected the registrant immediately upon its request for an advisory committee, and was thus effective long before the final determination of the Administrator.

24. It has been held that an order, otherwise "final" but subject to presidential nullification, is not "final" for purposes of review. *See* Trans World Airlines v. CAB, 184 F.2d 66, 70-71 (2d Cir. 1950), *cert. denied*, 340 U.S. 941 (1951); Employers Group v. National War Labor Bd., 143 F.2d 145, 151 (D.C. Cir.), *cert. denied*, 323 U.S. 735 (1944); Pan Am. Co. v. CAB, 121 F.2d 810, 814 (2d Cir. 1941); Grace Line, Inc. v. Panama Canal Co., 143 F. Supp. 539, 547 (S.D.N.Y. 1956), *rev'd on other grounds*, 243 F.2d 844 (2d Cir. 1957), *rev'd*, 356 U.S. 309 (1958).

"Final" administrative orders have been defined as those orders which impose an obligation, deny a right, or fix some legal relationship as a consummation of the legal process. Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948); Rochester Tel. Corp. v. United States, 307 U.S. 125, 131 (1939); United States v. Los

order "final," courts take account of such factors as the imminence of irreparable injury if review is denied[25] and the appropriateness of the issues for judicial resolution.[26] In the case of preliminary orders such as cancellation,[27] which pose only a threat to the plaintiff, courts, in weighing the aforementioned factors, rarely allow review.[28]

Angeles & S.L.R.R., 273 U.S. 299, 309-10 (1927); National Van Lines, Inc. v. United States, 326 F.2d 362 (7th Cir. 1964); Lam Man Chi v. Bouchard, 314 F.2d 664, 670 (3d Cir. 1963); Cities Serv. Gas Co. v. FPC, 255 F.2d 860, 863 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958).

It has also been stated that an order is final if issued at a time when judicial review will not disrupt the process of administrative decision-making and legal rights or obligations have been determined by agency action. Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget, 400 U.S. 62, 71 (1970); ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 602 (1966).

25. Courts have stated that the test for finality is whether judicial review is needed to protect the plaintiff from irreparable injury threatened by the "administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow." Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 425 (1942) (disruption and serious damage to plaintiff's business held sufficient injury to warrant review); Trans-Pacific Freight Conf. of Japan v. Federal Maritime Bd., 302 F.2d 875, 877 (D.C. Cir. 1962) (obstruction of plaintiff's function as private regulatory agency held sufficient injury to warrant review); Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954) (virtual removal of plaintiff from shipping market resulting in serious injury to his business held sufficient injury to warrant review); *see* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 698-703 (D.C. Cir. 1971) (choice between criminal penalties or extensive costs to plaintiff's business held sufficient injury to warrant review); B.F. Goodrich Co. v. FTC, 208 F.2d 829, 834 (D.C. Cir. 1953) (choice between treble damage suits and serious disruption of plaintiff's business held sufficient injury to warrant review).

26. The court may refuse to review orders relating to an agency's case-handling procedures. *See* Coca-Cola Co. v. FTC, 475 F.2d 299, 304 (5th Cir. 1973); Bristol-Myers Co. v. FTC, 469 F.2d 1116, 1118 (2d Cir. 1972); Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524, 526 (D.C. Cir. 1970); Bokat v. Tidewater Equip. Co., 363 F.2d 667, 671-72 (5th Cir. 1966); Chicago Auto. Trade Ass'n v. Madden, 328 F.2d 766, 769 (7th Cir.), *cert. denied*, 377 U.S. 979 (1964); United Airlines v. CAB, 228 F.2d 13, 16 (D.C. Cir. 1955).

Courts may view issues concerning the setting of rates or charges as inappropriate for review. *See* Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970); Rural Elec. Adm'n v. Northern States Power Co., 373 F.2d 686, 700 (8th Cir.), *cert. denied*, 387 U.S. 945 (1967).

Courts may also consider certain issues inappropriate for review due to inadequacy of the record. *See* Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Bd., 380 U.S. 513, 514 (1965); American Comm. for Protection of Foreign Born v. Subversive Activities Control Bd., 380 U.S. 503, 503-05 (1965).

27. *See* note 6 *supra*.

28. *See* Ewing v. Mytinger & Casselberry, 339 U.S. 594, 599 (1950) (Court found no violation of due process and held injury to reputation of plaintiff's business insufficient to warrant review); Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103

Certain difficulties have arisen in interpreting the final order requirement.[29] The first stems from the fact that a court, in applying the requirement, may review what is in form an interlocutory order, if the order is in substance a final determination of individual rights.[30] Thus, what one court might term a "final order" another may term "interlocutory but reviewable," while both courts will consider essen-

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(1948) (Court found no serious injury to plaintiff's business where order had not yet received presidential approval necessary for enforcement); Phillips Petroleum Co. v. Brenner, 383 F.2d 514, 517-18 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968) (court found no violation of plaintiff's right to participate in patent interference proceeding); Pharmaceutical Mfrs. Ass'n v. Gardner, 381 F.2d 271, 276 (D.C. Cir. 1967) (costs to plaintiff of additional administrative evidentiary hearing held insufficient injury to warrant review); Turkel v. FDA, 334 F.2d 844, 846 (6th Cir. 1964) (cost of application procedure and hearing held insufficient injury to warrant review); Pepsico, Inc. v. FTC, 343 F. Supp. 396, 398 (S.D.N.Y. 1972) (failure of Commission to join certain parties in agency proceeding held insufficient injury to warrant review where parties still had right to intervene); Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136, 139-40 (S.D.N.Y. 1966) (court found neither violation of due process nor contravention of the Administrative Procedure Act where further administrative alternatives were still open to plaintiffs).

29. Some confusion may result because the problem of finality often appears simultaneously with that of exhaustion of administrative remedies, but the two can be distinguished. The doctrine of finality requires that for an interlocutory agency order to be judicially reviewable, it must be definitive, deal with the merits of the administrative proceeding, and have such an effect on the plaintiff's rights as to cause irreparable injury if not subject to judicial review. The doctrine of exhaustion requires that the plaintiff utilize all available administrative remedies prior to seeking review by the courts. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 *et seq.* 1958 ed., 1965 Supp.); L. JAFFE, *supra* note 20, at 424-58; Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1963). The doctrine of exhaustion, then, requires specific action on the part of the plaintiff, while the doctrine of finality requires specific action on the part of the administrative agency.

There may be exhaustion of administrative remedies without finality where, for example, there is a refusal on the part of the administrative agency to take any action whatsoever. There may be finality without exhaustion when, upon issuance of an agency order, the plaintiff fails to exercise his option for administrative review within the statutory time limit and the order becomes final. Often the situation arises, however, in which the plaintiff seeks judicial review with administrative review still available. There are concurrent problems of exhaustion and finality when the administrative review not exercised will provide a remedy for the plaintiff.

The supporting rationale of both doctrines is essentially the same: to develop a complete record prior to judicial review; to avoid costly duplication of effort by the courts and administrative agencies; and to prevent impediment of the carefully designed administrative process.

30. Citizens Communication Center v. FCC, 477 F.2d 1201, 1205 (D.C. Cir. 1971); Phillips Petroleum Co. v. Brenner, 383 F.2d 514, 518 (D.C. Cir. 1967); *see* Leedom v. Kyne, 358 U.S. 184 (1958); Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919).

tially the same factors in deciding whether to review.[31] A second problem arises in determining what constitutes the irreparable injury which is requisite to finality when a plaintiff seeks review of an interlocutory order.[32] Courts now seem to regard an order which immediately causes the plaintiff to face the choice of either taking action which is significantly disadvantageous to him (*e.g.*, withdrawing a product from the market) or incurring the risk of criminal penalties, as having sufficient impact to warrant review.[33] However, courts will balance other factors against the plaintiff's injury in determining whether review should be granted; therefore, the requisite injury may differ from case to case.[34]

In *Pax Co. of Utah v. United States*[35] the Tenth Circuit held that, pursuant to FIFRA, judicial review of a cancellation order was unavailable because the order presented only a threat of injury, and

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31. An order has been held interlocutory but reviewable when it had an impact on the rights of the party and was of such a nature as would cause irreparable injury if not challenged. Green County Planning Bd. v. FPC, 455 F.2d 412, 425-26 (2d Cir. 1972); Amerada Petroleum Corp. v. FPC, 285 F.2d 737, 739 (10th Cir. 1960). *See also* Atlanta Gas & Light Co. v. Southern Natural Gas Co., 338 F. Supp. 1039, 1049 (N.D. Ga. 1972), in which the court held that the power to review FPC action did not apply only to final actions, but to any order that was definitive, dealt with the merits of the proceeding before the Commission, and had such an impact on plaintiff's rights as to cause irreparable injury if not challenged. Compare the cases above with those cited at notes 24-25 *supra*.

32. *See* notes 25 & 28 *supra* and accompanying text.

33. *See* Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Abbott Labs., Inc. v. Gardner, 387 U.S. 136 (1967); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 698-703 (D.C. Cir. 1971); Independent Broker-Dealer's Trade Ass'n v. SEC, 442 F.2d 132, 141-42 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). *But see* International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954); Public Utilities Comm'n v. United Airlines, 346 U.S. 402 (1953).

34. For a listing of additional factors that a court may consider, see Nor-Am Agricultural Prods., Inc. v. Hardin, 435 F.2d 1133, 1144 (7th Cir. 1970), *citing* Saferstein, *Non-reviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

35. 454 F.2d 93 (10th Cir.), *rev'g* 324 F. Supp. 1335 (D. Utah 1972). The Secretary of Agriculture cancelled registration of the company's herbicide and Pax requested advisory committee review. Before the committee could meet, however, Pax filed suit in federal district court alleging arbitrary and capricious conduct on the part of the Secretary. The district court assumed jurisdiction and granted injunctive relief based upon findings that there was no adequate administrative remedy, that there was imminent irreparable injury to the plaintiff, and that preliminary notices of cancellation are "final" orders.

the last possible agency order had not been issued.[36] The considerations influencing the court's holding were lack of injury to the registrant[37] and the congressional purpose in delegating power to the administrative agency.[38]

The Seventh Circuit in *Nor-Am Agricultural Products v. Hardin*[39] held that the administrative process established by FIFRA is subject to judicial review exclusively by the appropriate appellate court after a "final" order has been entered.[40] The court further held that a suspension order is not "final" because the statutory scheme of FIFRA indicates a congressional intent to compel the registrant to follow the detailed procedures for administrative review.[41] The policy supporting the Act[42] and the relative insignificance of the injury to the registrant when weighed against the possible injury to the public,[43] were primary factors in the court's reasoning.

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36. The court did hold invalid the one section of FIFRA requiring the registrant to prepay the cost of an advisory committee. *Id.* at 97-98. *See* note 23 *supra.*

37. The court found that, since Pax still had a right to both a hearing and judicial review as provided by statute, there was no assurance that Pax would lose or, in fact, suffer any harm whatsoever. 454 F.2d at 96-97.

38. The court indicated that the merits of the controversy should be tried on the basis of the expertise prescribed by Congress and that Congress was careful and deliberate in constructing the statute to afford complete due process. *Id.* at 96.

39. 435 F.2d 1151 (7th Cir.), *rev'g* 435 F.2d 1133 (7th Cir. 1970), *cert. dismissed,* 402 U.S. 935 (1971). The Secretary of Agriculture suspended the registration of plaintiff's fungicide. Plaintiff sought immediate injunctive relief in the United States District Court for the Northern District of Illinois. The court issued an injunction restraining suspension and a three-judge panel of the appellate court affirmed with one judge dissenting. The panel found that the order, placing plaintiff in the position of either immediately suspending activities which had theretofore been lawful or risking criminal penalties, was sufficiently final to warrant review. The Secretary appealed for a rehearing en banc and obtained a reversal.

40. *Id.* at 1155-58.

41. Of primary importance to the court were respect for the will of Congress, desire to prevent delay of the administrative proceedings, and the fact that judicial review would nullify the need for the further agency action clearly prescribed by statute. *Id.* at 1155-60.

42. In reaching its conclusion, the court stressed the expertise of the administrative agency, the highly discretionary nature of an order that concerns public health and safety, and the need for administrative autonomy. *Id.*

43. The court recognized the injury to Nor-Am in a situation in which the company had to choose between withdrawing its product from the market or facing severe statutory penalties. But the court reasoned that where public health and safety demand the emergency removal of a commodity from the market, even unrecoverable financial losses incurred during litigation must be considered an expense of the litigation itself. *Id.* at 1160. Litigation expenses do not constitute the type of economic injury requisite to judicial review of an interlocutory agency order. *See, e.g.,* Myers v. Bethlehem Ship-

The *Nor-Am* holding was strongly criticized in *Environmental Defense Fund, Inc. v. Ruckelshaus*[44] *(EDF)*. The District of Columbia Circuit Court of Appeals held that an order denying suspension of registration on the ground that there was no threat of "imminent hazard" is sufficiently final in its impact to warrant judicial review.[45] The court based its decision on the determination that FIFRA contains no conclusive indication that Congress intended to limit review to orders made after advisory committee proceedings and a public hearing.[46] Having reached this result, the court found no reason to distinguish a decision to suspend from a refusal to suspend and concluded that both were reviewable.[47] The court did, however, distinguish decisions to issue cancellation orders as nonreviewable, because they "merely set in motion the administrative process that terminates in a reviewable final order."[48]

In *Dow*, the court considered two elements in determining that the challenged cancellation order was not "final." The court looked first to the congressional intent as evidenced by the carefully designed, pro-

building Corp., 303 U.S. 41, 51-52 (1938); Pharmaceutical Mfrs. Ass'n v. Gardner, 381 F.2d 271, 276 (D.C. Cir. 1967); Turkel v. FDA, 334 F.2d 844, 846 (6th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965); Clark v. Lindemann & Hoverson Co., 88 F.2d 59, 60 (7th Cir. 1937); Pittsburgh & W.V. Ry. v. ICC, 280 F. 1014, 1015-16 (D.C. Cir. 1922).

44. 439 F.2d 584 (D.C. Cir. 1971). Plaintiffs requested the Secretary of Agriculture to suspend registration of all pesticides containing DDT. No action was taken on the request and the plaintiffs sought review in the District of Columbia Circuit Court of Appeals. In Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), the court held that the Secretary's silence on the request for suspension was tantamount to a denial of that request and that the denial was reviewable as a final order. The court remanded the case to the Secretary who then issued an order refusing to suspend. The plaintiffs again sought review.

45. 439 F.2d at 592.

46. *Id.* at 591. Two facts supported the court's determination. First, judicial review pursuant to FIFRA is available to those who have no right to advisory committee review or a public hearing, specifically, "any person who will be adversely affected by such order may obtain judicial review." 7 U.S.C. § 135b(d) (1970). Secondly, a manufacturer himself may in some situations have a right to judicial review of an administrative decision that will not be considered in subsequent administrative proceedings. The court gave as an example the case of the manufacturer who concedes to a cancellation order, but contests a determination that his product warrants suspension as an imminent hazard.

47. 439 F.2d at 591. The court reasoned that the administrative review proceedings available subsequent to suspension are equally available after a refusal to suspend.

48. *Id.* at 592. Because suspension orders also set in motion the administrative review process, this may seem a facile distinction. *But see* note 58 *infra* and accompanying text for a discussion of the rationale underlying the differentiation.

tracted administrative process and reasoned that the proceedings provided ample remedy[49] and were based on the necessity to develop a complete record when dealing with recondite issues.[50] Secondly, the court stressed the lack of irreparable injury to Dow. Dow had alleged that it had been injured through deprivation of a proper statutory decision and appeal[51] and that it had suffered economic harm.[52] The court found no merit in the first contention[53] and deemed the second claim insufficient to warrant review.[54] While recognizing the economic pressures on Dow, the court stated that only a threat of economic injury existed and that there was no assurance that the company would ultimately fail in the administrative proceeding.[55]

Dow, together with *Pax* and *Nor-Am*, supports the proposition that when the purpose of FIFRA—protection of the public and environment—is frustrated by judicial review sought on the ground of economic pressures placed on the registrant by the requirements of the statutory scheme, such pressures are insufficient to warrant review of the agency order. The court in *EDF* could have adopted the principles underlying this position by distinguishing *Nor-Am* on the ground that a suspension order results in injury to a private economic interest, while refusal to suspend, as in *EDF*, threatens public health and safety.[56] The court refused to do so, however, reasoning that once the Secretary has made a decision with respect to suspension, whether he decides to grant or deny suspension, the determination of the "immi-

49. 477 F.2d at 1323, *citing* Pax Co. v. Hardin, 454 F.2d 93, 96 (10th Cir. 1972).

50. 477 F.2d at 1325-26.

51. *See* note 13 *supra*.

52. Dow contended that the cancellation order had caused adverse economic consequences to the company. The agricultural extension services in Texas, Arkansas, and Louisiana removed 2,4,5-T from their official 1971 lists of recommended chemicals for weed control, resulting in decreased use of the product in the heart of the nation's rice-growing area. Furthermore, public utilities in at least thirteen states stopped or curtailed use of 2,4,5-T for non-agricultural purposes. As a result of the cancellation and the state and private action in reliance on it, a 36% drop in Dow's 2,4,5-T sales occurred between 1970 and 1971. Appellee's Brief at 41-42, Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973).

53. 477 F.2d at 1326.

54. *Id.*

55. *Id.* Other cases have denied review on the ground that there was no assurance that the plaintiff would ultimately fail in the administrative proceedings. Coca-Cola Co. v. FTC, 475 F.2d 299, 303-04 (5th Cir. 1973); Bristol-Myers Co. v. FTC, 469 F.2d 1116, 1118 (2d Cir. 1972); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 711 (D.C. Cir. 1971); Pepsico, Inc. v. FTC, 343 F. Supp. 396 (S.D.N.Y. 1972).

56. 439 F.2d at 591.

nence'" of the hazard to the public is "final."[57] Because subsequent administrative proceedings will not address the question of imminent hazard,[58] the focus of the court in deciding whether to review should not be on the availability of further administrative review, but on the impact of the imminent hazard determination.[59] The court concluded by stating that a "threat of economy injury has always been regarded as sufficient . . . for the purpose of finding an order final and reviewable."[60]

The District of Columbia Circuit, then, advocates judicial review of determinations as to "imminent hazard" where the requisite economic injury to the plaintiff is present. This position is consistent with recent decisions concerning the character of irreparable harm required for review.[61] Such a stand, however, would commit to the courts an issue which would be better left to the expertise of the administrative agency, particularly at this preliminary stage where there would be no record to aid the court in its decision.[62]

The court in *EDF*, while differing generally in its interpretation of the review provisions of FIFRA,[63] adopted a view consonant with that of the *Pax*, *Nor-Am*, and *Dow* courts as to the nonreviewability of cancellation orders. Although the practical effect on the registrant of a cancellation order may be severe,[64] it is merely the incunabulum of the administrative process. To consider such a preliminary order "final" for purposes of judicial review could result in the inefficacy

57. *Id.*

58. The court reasoned that the administrative proceedings initiated subsequent to a suspension order no longer deal with the issue of whether the plaintiff's product presents an imminent hazard to the public, but whether it complies with the Act and, if not, whether it should be removed from the market. The second of these two distinct issues, compliance with the Act, is also the subject of the administrative proceedings which follow a cancellation order. However, because the initial determination made by the Administrator in a decision with respect to cancellation is whether the product complies with the Act, *see* note 6 *supra*, the initial determination will be the subject of subsequent administrative proceedings. Hence, while there is no need to provide for judicial review in the case of cancellation, it is necessary in the case of suspension.

59. 439 F.2d at 591.

60. *Id.* at 592.

61. *See* note 33 *supra* and accompanying text.

62. The court recognized the problem of the absence of an advisory committee report and hearing record, but stated that this would not preclude judicial review, but merely limit its scope. 439 F.2d at 591.

63. *See* note 46 *supra* and accompanying text.

64. *See* note 52 *supra*.

of the administration of FIFRA as well as serious injury to the public and environment.

While there is clear agreement among the circuits as to the non-reviewability of cancellation orders, the difficult question still remains: What position will the Eighth Circuit take as to the reviewability of suspension orders? The *Dow* court, in examining the reviewability only of cancellation orders, considered the extent of the injury to the plaintiff and the need for a complete administrative record in reviewing complex issues which affect the public health and safety. While both factors may assume increased significance in suspension cases, the court, by distinguishing suspension cases such as *Nor-Am* and *EDF*, gave no indication of which factor may take precedence.