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Howard B. Sandler

Indiana University School of Law

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NON-REVIEWABILITY OF EMERGENCY SUSPENSION POWERS UNDER THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT: NOR-AM AGRICULTURAL PRODUCTS, INC. v. HARDIN

In the recent case of *Nor-Am Agricultural Products, Inc. v. Hardin*,¹ the Court of Appeals for the Seventh Circuit upheld the Secretary of Agriculture's exercise of emergency suspension power prior to an administrative hearing under the Federal Insecticide, Fungicide and Rodenticide Act.² The suspension was based upon a determination that a certain agricultural pesticide was an imminent hazard to the public. The Secretary's action was held unreviewable because the affected manufacturer had failed to exhaust available administrative remedies, despite the contention that the Secretary's determination was arbitrary and capricious and the manufacturer was suffering irreparable injury.

1. *Nor-Am Agricultural Products, Inc. v. Hardin*, No. 18478 (7th Cir., Nov. 9, 1970) [hereinafter referred to as *Nor-Am, rehearing* (Nov. 1970)].

2. 7 U.S.C. § 135b (1964) [hereinafter referred to as the FIFRA]:

(a) Every economic poison which is distributed, sold, or offered for sale . . . shall be registered with the Secretary. . . .

. . . .
(c) If it does not appear to the Secretary that the article is such as to warrant the proposed claims for it or if the article and its labeling and other material required to be submitted do not comply with the provisions of sections 135-135k of this title, he shall notify the applicant for registration of the manner in which the article, labeling or other material required to be submitted fail to comply with said sections so as to afford the applicant for registration an opportunity to make the corrections necessary As soon as practicable after completion of the hearing, but not later than ninety days, the Secretary shall evaluate the data and reports before him, act upon such objections and issue an order granting, denying, or canceling the registration or requiring modification of the claims or the labeling. Such order shall be based only on substantial evidence of record Notwithstanding any other provision of this section, 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. In such case, he shall give the registrant prompt notice of such action and afford the registrant the opportunity to have the matter submitted to an advisory committee and for an expedited hearing under this section. Final orders of the Secretary under this section shall be subject to judicial review, in accordance with the provisions of subsection (d) of this section

(d) In 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

3. The effect of suspending a registration is to prohibit all sale and distribution of the product in interstate commerce. 7 U.S.C. § 135a(a)(1) (1964). A person who sells, distributes or offers for sale an unregistered economic poison is subject to the penalties of § 135(f), which provides for a fine of not more than 1,000 dollars. Other provisions of the FIFRA provide for fines or imprisonment for not more than one year, upon conviction of continued violations.

The court's decision raises troublesome questions concerning the nature of the Secretary's power under the Act and the scope of judicial review when that power is allegedly abused.

I. FACTS

On February 18, 1970, the Division of Pesticide Regulation, United States Department of Agriculture, under the authority of the FIFRA, issued an emergency order³ suspending all registrations of Panogen products manufactured by Nor-Am Agricultural Products, Inc.⁴ Rather than await results of an advisory committee and expedited hearing, the normal procedure as provided by the Act,⁵ Nor-Am sought injunctive relief in the district court. A preliminary injunction was granted⁶ and thereafter affirmed by a three-judge panel in the Seventh Circuit,⁷ one judge dissenting. On rehearing en banc, the court of appeals reversed⁸ on the theory that plaintiff had failed to exhaust available administrative remedies.⁹ In a vigorous dissent, Judge Pell,¹⁰ who had written the majority opinion in the earlier decision, focused upon the unusual facts of this case to support his position.

Panogen is an "economic poison"¹¹ and as such is subject to regulation under the FIFRA.¹² It has been marketed by the plaintiff for over twenty years, during which time it has been estimated to have increased crop yield in excess of eight billion dollars, and is without an economically feasible substitute. Panogen products have always con-

4. The Secretary's order of suspension involved 17 cyano (methylmercury) guanidine products which are used for seed treatment. They are referred to throughout the decisions as "Panogen." Under the terms of the FIFRA, 7 U.S.C. § 135(d), Panogen products fall within the category of "fungicides."

5. 7 U.S.C. § 135b(c). In the *Nor-Am* cases § 135b(c) is referred to as § 4(c) of the 1964 amendments to the FIFRA. For partial text of § 135b(c) see note 2 *supra*.

6. *Nor-Am Agricultural Products, Inc. v. Hardin*, Civil No. 70 C 838, (N.D. Ill., Apr. 21, 1970).

7. *Nor-Am Agricultural Products, Inc. v. Hardin*, No. 18478 (7th Cir., July 15, 1970) [hereinafter referred to as *Nor-Am (Jul. 1970)*].

8. *Nor-Am, rehearing (Nov. 1970)*.

9. *Id.* at 6.

10. Note that the dissent in *Nor-Am, rehearing (Nov. 1970)*, at 16, incorporates by reference the majority opinion of *Nor-Am (Jul. 1970)*.

11. For the purposes of the FIFRA, the:

term "economic poison" means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insects, rodents, nematodes, fungi, weeds, and other forms of plant or animal life or viruses, except viruses on or in living man or other animals, which the Secretary shall declare to be a pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.

7 U.S.C. § 135(a).

12. *Id.* § 135b(a). For the text of § 135b(a) see note 2 *supra*.

formed to the requisite labeling regulations of the FIFRA.¹³

In August, 1969, a hog raiser in Alamogordo, New Mexico, obtained¹⁴ waste grain products which had been contaminated with a fungicide or fungicides containing mercury and fed them to his hogs as a supplement to their diet.¹⁵ After approximately a month of feeding on the supplement a hog was butchered and, although showing signs of illness, it was consumed by the family from September through December. The remainder of the hogs either died or became blind in October, but the family nevertheless continued to consume the previously butchered hog. In December, three family members suffered permanent damage to their central nervous systems resulting in nearly total blindness and paralysis.¹⁶

On the evening of February 17, 1970, there was a portrayal and discussion of the Alamogordo incident on a national broadcast of the Huntley-Brinkley news program. The next day, Dr. Harry Hays,¹⁷ Director of the Pesticide Regulation Division of the Department of Agriculture in charge of the area involved, sent a telegram to Nor-Am in accordance with procedures established by the FIFRA,¹⁸ which stated that in view of the recent accident, Nor-Am was thereby notified that registrations of Panogen products were suspended. Dr. Hays sent a

13. *Id.* § 135b(b).

14. Although the record is not clear on how the waste grain products were obtained, a report issued after the suspension indicated that the waste products were stored by a nearby granary awaiting burning and were taken by the farmer *without permission*. The manager of the granary told investigators that waste grain products were never allowed to be sold or given away. Department of Health, Education, and Welfare, Public Health Services and Mental Health Administration, *Mercurial Fungicide Used in the Recent Alamogordo Incident (Feb. 27, 1970)* cited in Appellant's Reply Brief, at A-1.

The procedure followed by the granary in destroying waste grain sweepings and screenings did conform to the directions, warnings, and cautions on the Panogen label.

The Health Services and Mental Health Administration Report, *supra*, also indicated that the only fungicide that had been used at the granary in over a year was Panogen and that it was very unlikely that the waste grain was stored for more than a year.

15. Nor-Am's original complaint pointed out that all labeling on Panogen products said, "Do not use this seed for food, feed or oil purposes." Appellees' Appendix, *Nor-Am (Jul. 1970)*, at 10-11.

16. The extent of the injuries to the three children is documented in a Mar. 27, 1970 report issued by the Viral Diseases Branch, Epidemiology Program, cited in Appellant's Brief, at A-1 to -3. As of the date of the report two of the children, ages eight and thirteen, were still in a coma, and the third child, age twenty, was still unable to care for herself.

17. The FIFRA authorizes the defendant—Secretary of Agriculture, Clifford M. Hardin, to act. 7 U.S.C. § 135b(c). This power was delegated to the defendant—Administrator of the Agricultural Research Service, G. W. Irving, Jr. 30 Fed. Reg. 5801 (1965). He, in turn, delegated it to the defendant—Director of the Pesticide Regulation Division, Harry W. Hays. 33 Fed. Reg. 15485, 15486 (1968).

18. 7 U.S.C. § 135b(c).

letter to Nor-Am on the same date justifying his action on the basis of other reported incidents in which mercury treated seed screenings and sweepings had been fed to livestock and disposed of in a manner resulting in wildlife feeding on them.¹⁹

At the district court hearing, Dr. Hays admitted that, as of the date of the suspension, he had assumed without evidence that the product involved in the Alamogordo incident was Panogen.²⁰ The hearing also revealed that Dr. Hays had no particular information or reason to associate Panogen with the incidents other than Alamogordo, and all reports of alleged incidents were completely undocumented and uninvestigated.²¹

II. MAJORITY AND DISSENTING OPINIONS

The approach of Judge Cummings, writing for the majority in the en banc rehearing, as to the dispositive issues presents a sharp contrast to that of Judge Pell. The majority concluded that the plaintiff was required to exhaust available administrative remedies before seeking

19. In elaborating the reasons for the emergency suspension, the letter further stated:

The action . . . was based on the fact that the directions for use and precautionary statements have failed to prevent treated seed from being used as feed

In view of the insidious nature of alkyl mercury poisoning and the irreversible injury to the central nervous system, we firmly believe that this class of compounds should be discontinued for seed treatment. To allow new stocks to enter channels of trade would increase the risk of injury to man and other vertebrate animals.

Nor-Am, rehearing (Nov. 1970), at 3.

20. Although it was possible to identify the product which contained the grain, no such tests had been conducted prior to the suspension. *Nor-Am (Jul. 1970)*, at 9. It should also be noted that:

the Secretary's order of February 18 applied only to Panogen. Other alkyl mercury products used for seed treatment manufactured and sold by plaintiff's competitors were not suspended until more than a month later.

Id.

21. Judge Pell noted that:

A representative of the companies involved met with Dr. Hays in Washington shortly after the telegram was sent and interrogated the Director with regard to the alleged incidents of animal poisoning in Oregon, California and Texas. [These were the "other incidents" mentioned in the February 18 letter.] He [the company representative] stated that the companies had no information regarding these facts and asked what he could be told regarding them. Dr. Hays asked a member of his personnel to get the information and the assistant returned with a manila folder and said that Panogen was not involved in the Oregon incident. He further supplied the fact that the only information they had regarding the California incident was the newspaper clipping which mentioned mercury poisoning of birds, and there was no information on the Texas incident. . . .

Id. at 8.

review, and not having done so review was thereby precluded.²² Judicial review was not authorized by the Administrative Procedure Act²³ because the order of the Secretary was neither a final agency order made reviewable by the FIFRA, nor a final agency action for which there was no adequate remedy at law. Furthermore, since there was no irreparable harm, this case was not appropriate for disregarding the exhaustion requirement and granting equitable relief.²⁴

The dissent viewed the problem quite differently, focusing instead upon the functional impact of the order.²⁵ If Panogen subsequently was found to be hazardous in the expedited hearing, the emergency suspension would be finalized by permanent removal from the market; if not, the suspension would be rescinded but Nor-Am would not be compensated for interim losses²⁶ resulting from the Secretary's arbitrary and capricious determination of imminence. Consequently, the Secretary's determination of the *imminence* of the hazard would never be reviewed and was in effect a final order because the expedited hearing would consider only

22. Judge Cummings concluded: ". . . we are of the opinion that the district court lacked power to grant this relief because the plaintiffs have not exhausted their administrative remedy." *Nor-Am, rehearing* (Nov. 1970), at 6.

23. The Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (Supp. V, 1965-69), provides:

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. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

24. *Nor-Am, rehearing* (Nov. 1970), at 13.

25. The reasons supporting the dissent's position appear in *Nor-Am, rehearing* (Nov. 1970), at 22. An expanded version of these reasons, incorporated by reference, can be found in *Nor-Am* (Jul. 1970), at 14-15.

26. Judge Pell's argument is based upon the assumption that Nor-Am would not be able to initiate a damage action at a later date. Though the issue has not been fully settled, this assumption is probably correct. If the Secretary's determination is categorized as discretionary, as it was by both the majority and dissent in *Nor-Am*, then an abuse of discretion is not reviewable. In *United States v. Morrell*, 331 F.2d 498 (10th Cir. 1964), *cert. denied*, 379 U.S. 879 (1964), the court, after noting that the plaintiff had established a strong prima facie case proving that the Secretary of Interior had abused his discretion under the Taylor Grazing Act, 43 U.S.C. §§ 315 *et. seq.* (1954), and showing that the plaintiff was injured thereby, stated: "The point is that abuse of discretion does not impose liability on the United States." 331 F.2d at 502. The plaintiff in *Morrell* brought suit for trespass under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et. seq.* (1964). *See also* *Chournos v. United States*, 193 F.2d 321 (10th Cir. 1951), *cert. denied*, 343 U.S. 977 (1952). It is also noteworthy that the absence or presence of malice has been held irrelevant. *See* L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 248 n.52 (1965); 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.08 (1st ed. 1958).

the issue of hazardousness, and not that of imminence. The dissent reasoned that, without a finding of imminence by the Secretary, the suspension could not have preceded a hearing and a reviewable order. Based upon this reasoning Judge Pell asserted that the majority avoided the decisive issue, which he characterized as "whether judicial intervention is permissible in the event of arbitrary and capricious administrative action."²⁷

III. THE FIFRA

Although emergency suspension powers, enabling agencies to react more efficiently and quickly when the need arises, are not a new concept to administrative law,²⁸ those based upon imminent hazard determinations are recent innovations for federal agencies.²⁹ In creating these special powers, there has been recognition that special procedures are necessary in order to mitigate the potentially harsh impact of an emergency suspension upon a regulated party.³⁰ Consequently, Congress has provided for notification to the regulated party prior to suspension,³¹

27. *Nor-Am, rehearing* (Nov. 1970), at 17.

28. The history and need for emergency and temporary administrative action are discussed by one commentator:

If the contagion is spreading, or the harmful medicinal preparation is being sold to the public, summary administrative action in advance of hearing is appropriate. In the judicial system, even when personal liberty is involved, tradition permits imprisonment of the accused pending trial. Temporary restraining orders against defendants who have had no opportunity to participate in an *ex parte* hearing of the plaintiff are commonplace. Drastic administrative action is sometimes essential to take care of problems that cannot be allowed to wait for the completion of formal proceedings.

K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.08, at 123 (1959). *C.f.* Civil Aeronautics Act of 1938, ch. 601, § 609, 52 Stat. 973, 1011; Natural Gas Act, 15 U.S.C. § 717 *et. seq.* (1964); Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23; Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128.

29. In federal legislation the language "imminent hazard to the public" first appeared in the Drug Amendments of 1962, 21 U.S.C. § 355(e) (1964), *amending* Act of June 25, 1938, ch. 675, § 505(e), 52 Stat. 1040, 1053.

30. Senator Eastland, Chairman of Judiciary Committee to which the FIFRA was referred, stated:

The bill includes a provision for immediate suspension of approval upon a finding of an imminent hazard to the public health; in this case, the applicant would have to be given prompt notice and an opportunity for an expedited hearing. The Committee believes that this authority, which could have grave effects upon a manufacturer and upon the confidence of the public in a drug which might later be found appropriate for continued availability to physicians, should only be exercised under the most extreme conditions and with the utmost care.

108 CONG. REC. 17366 (1962).

31. The House Report on the Drug Amendments of 1962 stated:

In the event the Secretary finds that there is an imminent hazard to public health, he may suspend the approval of an application immediately but shall give the applicant an opportunity for an expedited hearing. This authority

expedited hearings,³² and specific warnings that these powers should not be used indiscriminately.³³

While the FIFRA reflects this legislative concern for administrative restraint,³⁴ its provisions for judicial review in the event of an indiscriminate exercise of power by the Secretary are complicated by faulty draftsmanship. Section 135b(d), which authorizes judicial review, provides that "any order under this section" may be reviewed upon appeal.³⁵ Subsection (c), which authorizes emergency suspensions, 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) of this section."³⁶ The interpretation problem thus becomes two-fold: Whether the FIFRA permits appeals from "any order" or only from a "final order" and, if only the latter, whether an emergency suspension constitutes a final order for the purposes of judicial review.

The majority opinion reasoned that the specific provisions of subsection (c) limited the general provisions for review provided by subsection (d).³⁷ Furthermore, according to the majority, an emergency suspension could not be construed as a "final order by the secretary,"

may be exercised only by the Secretary or an Acting Secretary. It would be expected that in exercising this authority the Department would make every effort, within the limits of its public responsibility, to notify the applicant and allow him to advance arguments why summary suspension is not required, or after suspension has been invoked, why it might safely be withdrawn pending the hearing.

H.R. REP. No. 2464, 87th Cong., 2d Sess. 8-9 (1962).

In the FIFRA, notification requirements appear in 7 U.S.C. § 135b(c). Note that *Nor-Am* did not have a chance to contest the suspension before the proposed expedited hearing.

32. In the FIFRA, the provision for an expedited hearing appears in 7 U.S.C. § 135b(c).

33. The Senate Report on the Drug Amendments of 1962 stated:

An "imminent hazard to public health" would exist when the evidence before the Secretary shows that a drug is so unsafe as to create a public health situation which must be corrected immediately, and cannot be permitted to continue while a hearing is being held. The committee contemplates that this power would be exercised only in the exceptional case of an emergency, which does not permit the Secretary to correct it by other means.

S. REP. No. 1744 (pt. 2), 87th Cong., 2d Sess. 7 (1962).

34. See notes 30-31, 33 *supra*.

35. 7 U.S.C. § 135b(d) (emphasis added). In the *Nor-Am* cases § 135b(d) is referred to as § 4(d) of the 1964 amendments to the FIFRA. For partial text of § 135b(d) see note 2 *supra*.

36. 7 U.S.C. § 135b(c). (emphasis added). Compare the more complete text of §§ 135b(d) and 135b(c) as reproduced in note 2 *supra*.

37. . . . Implicit in . . . [Subsection (d)] is the limitation on judicial review resulting from the specific extension on review in . . . [Subsection (c)] only to "final orders of the Secretary." . . . [Subsection (d)] merely details the procedural aspects of the judicial review permitted by . . . [Subsection (c)].
Nor-Am, rehearing (Nov. 1970), at 8.

since it is a "tentative, temporary measure" that contemplates further agency action.³⁸ The dissent, however, rejected the statutory construction technique, and instead suggested that the reference to "final orders" in subsection (c) is meaningless and simply an inadvertent carry-over from the Food and Drug Act, upon which the imminent hazard and emergency suspension provisions of the FIFRA were based.³⁹

Both attempts to resolve the confusion created by the draftsmanship leave several unresolved questions. If the words "any order" in subsection (d) mean "final order," as the majority asserts, it is unclear why Congress drafted subsection (d) in such broad terms. It is also arguable that "final" can define, rather than exclude, an emergency suspension. Moreover, the dissent's suggestion that "final order" was an inadvertent carry-over is equally unpersuasive, since a survey of the statutory history of the Food and Drug Act reveals no reference to "final action" in relation to any orders, much less emergency suspension orders.⁴⁰

A survey of the legislative history as to the reviewability of emergency suspension orders is also unenlightening. The language "imminent hazard to the public" first appeared in federal legislation in the 1962 amendments to the Federal Food, Drug, and Cosmetic Act,⁴¹ as a limitation on the exercise of the Secretary's newly-acquired emergency suspension power.⁴² The history of this amendment makes no reference to immediate judicial review of an abuse of emergency suspension powers for two possible reasons. First, there was a belief among the members

38. The majority noted that:

By its very nature and within the explicit purview of Section 4(c), the emergency suspension of registration represents a tentative, temporary measure. It is preliminary to more thorough administrative consideration of the hazardous condition of the "poisons." The statute expressly contemplates special proceedings to follow suspensions posthaste.

Nor-Am, rehearing (Nov. 1970), at 8-9.

39. *Nor-Am (Jul. 1970)*, at 19-20.

40. The Food, Drug, and Cosmetic Act, 21 U.S.C. § 355 (1964), provides:

(e) . . . if the Secretary . . . finds that there is an imminent hazard to the public health, he may suspend the approval of such application immediately, and give the applicant prompt notice of his action and afford the applicant the opportunity for an expedited hearing under this subsection; . . .

(h) An appeal may be taken by the applicant from an order of the Secretary refusing or withdrawing approval of an application under this section

This was the only time "imminent hazard" appeared in the Food, Drug, and Cosmetic Act and the word "final" has never appeared.

41. 21 U.S.C. § 355(e) (1964), *amending* Act of June 25, 1938, ch. 675, § 505(e), 52 Stat. 1040, 1053.

42. Based upon a finding of an "imminent hazard to the public health" the Secretary of Health, Education, and Welfare could summarily suspend a license to market a drug prior to a hearing. *Id.*

of Congress that these powers would not be used indiscriminately.⁴³ Second, an expedited agency hearing was established for quick and efficient resolution of disputes arising from the Secretary's determination.⁴⁴

When the FIFRA amendments were enacted two years later, they were based upon the Food and Drug Act.⁴⁵ Like that of its predecessor, the FIFRA's legislative history is silent with regard to review of an abuse of emergency suspension power prior to the completion of an expedited hearing. In addition, as of 1964, there had been no attempt to obtain pre-hearing judicial review under the Food and Drug Act.⁴⁶ Consequently, although both the majority and dissenting opinions draw inferences from statutory ambiguity and congressional silence, Congress, when enacting the FIFRA, never anticipated an appeal *prior* to an expedited hearing based upon the contention that the hazard was not imminent.

The dispute over whether an emergency suspension is a "final order" within the meaning of the FIFRA is further complicated by a recent decision of the Court of Appeals for the District of Columbia, *Environmental Defense Fund, Inc. v. Hardin*,⁴⁷ which considered reviewability

43. The similarity of the emergency provisions of the FIFRA and the Federal Food, Drug, and Cosmetic Act is discussed at note 45 *infra*. Though most of the FIFRA's legislative history is silent as to emergency suspensions, the legislative history of the Federal Food, Drug, and Cosmetic Act amendments indicate the congressional desire for administrative restraint when exercising these emergency powers. See notes 30-31 and 33 *supra*.

44. See note 30 *supra*. There is some indication that the expedited hearing is a lengthy process. See also *Nor-Am, rehearing* (Nov. 1970), at 8-9 and *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir. 1970). In *Nor-Am*, counsel for appellee argued that the expedited hearing was illusory and pointed out that, although Panogen was suspended on February 18, 1970, the Secretary's response to the company's objections was not mailed to counsel until May 22, 1970 (Brief for Appellee at 40, *Nor-Am* (Jul. 1970)), and the *prehearing conference* was not convened until the first week in July. (Letter from Holland C. Capper to Howard B. Sandler, November 18, 1970, on file in Indiana University Law Library at Bloomington). See generally Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968).

45. This similarity was noted in the House Report: "The new procedure [FIFRA's emergency suspension procedure] is modeled after that contained in § 408 of the Federal Food, Drug and Cosmetic Act." H.R. REP. No. 1125, 88th Cong., 2d Sess. 4 (1964).

It should be noted that § 408 of the Food, Drug, and Cosmetic Act does not deal with the concept of "imminent hazard"; however, § 505(e), 21 U.S.C. § 355(e) does. Compare the statutory language of the Food, Drug, and Cosmetic Act, *supra* note 40, with the statutory language of the FIFRA, *supra* note 2.

46. Nor has there been an appeal from an emergency suspension order prior to an expedited hearing since 1964. However, subsequent to the enactment of the FIFRA amendments, there have been several cases allowing review of an order notifying a registrant of a non-emergency suspension of certification prior to an agency hearing. See *Upjohn Co. v. Finch*, 303 F. Supp. 241 (W.D. Mich. 1969) and *American Home Products Corp. v. Finch*, 303 F. Supp. 448 (D. Del. 1969).

47. 428 F.2d 1093 (D.C. Cir. 1970).

issues analogous to those in *Nor-Am*. In *Environmental Defense Fund*, plaintiffs⁴⁸ filed a petition with the Secretary of Agriculture requesting,

(1) the issuance of [non-emergency] notices of cancellation of all economic poisons containing DDT [on the basis of hazardousness] (2) the [emergency] suspension [on the basis of *imminent* hazardousness] for all such products pending the conclusion of cancellation proceedings.⁴⁹

In response the Secretary issued notices of cancellation of several uses of DDT, solicited comments concerning the remaining uses, "and took no action on the request for interim suspension."⁵⁰

Dissatisfied with the Secretary's response, plaintiffs sought immediate judicial review of his alleged abuse of administrative power. Judge Bazelon remanded the case, holding that failure to issue non-emergency notices of cancellation was not judicially reviewable prior to an administrative investigation and hearing.⁵¹ With regard to the failure to issue emergency interim suspensions of DDT prior to a hearing, the court held that, if plaintiffs' claim of irreparable harm were valid, the Secretary's inaction would be tantamount to a "final order" within the meaning of the FIFRA and therefore reviewable, although there was no formal "final order."⁵² The court's differing treatment of plaintiffs' request for a regular suspension and its request for an emergency suspension highlights the distinction between "hazardousness," the basis for permanent cancellation of a registration, and "imminent hazardousness," the basis for temporary emergency suspension. In this case the Secretary's determination of "imminence" was held to be a final order, but the determination of "hazardousness" would become a final order only upon completion of a hearing. This distinction is the foundation upon which Judge Pell based his dissent in *Nor-Am*.⁵³

48. *Id.* at 1095. The petitioners were five non-profit organizations engaged in activities relating to environmental protection.

49. *Id.* at 1096.

50. *Id.*

51. The court stated that "[w]ith regard to the request for interim suspension of the registration of DDT, we agree that inaction is tantamount to an order denying suspension." *Id.* at 1099.

52. The court stated:

With respect to the request for notices of cancellation, we are more reluctant to equate a tentative and equivocal delay with an outright denial of the request. . . . But the statutory scheme of the FIFRA itself contemplates a lengthy inquiry into the conditions for the safe use of an economic poison before its registration may finally be cancelled. . . .

Id. at 1100.

53. See *Nor-Am, rehearing (Nov. 1970)*, at 22:

Further administrative proceedings in the present case will be for a deter-

IV. THE APA

Implicitly recognizing that the FIFRA itself is silent as to judicial review, both the majority and dissent in *Nor-Am* turned to the question of whether the Secretary's determination was a "final agency action" for which section 704 of the Administrative Procedure Act⁵⁴ provides review, and for which there would be no adequate remedy other than an alternative form of judicial response as provided by section 703.⁵⁵ The majority, using a similar analysis as in interpreting "final order," characterized the Secretary's action as a temporary measure, thus concluding that an emergency suspension was not a "final action."⁵⁶ Judge Cummings supported his conclusion by reliance upon *Ewing v. Mytinger & Casselberry, Inc.*,⁵⁷ which presented a fact situation analogous to that of *Nor-Am*. In *Ewing*, the plaintiff, exclusive national distributor of a food supplement product, brought suit to enjoin enforcement of a multiple seizure of misbranded articles under the authority of section 304(a) of the Federal Food, Drug, and Cosmetic Act⁵⁸ prior to court proceedings to condemn the product. The plaintiff contended that the Secretary's determination of "probable cause" was arbitrary and capricious and, because of the drastic impact of the multiple seizures upon the plaintiff's business, the determination was "final agency action" within the meaning of the Administrative Procedure Act.⁵⁹ The Supreme Court, however, held that the Secretary's probable cause finding was not reviewable because the Secretary's action was preliminary in nature, although the

mination of whether there is a hazard to the public which would require preclusion from the market place. On the other hand, the issue which precipitated this litigation, determined without hearing and indeed without proper consideration, was not the hazard question per se but the imminent hazard question.

54. The APA provides: "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review. . . ." 5 U.S.C. § 704. For the full text of this section see note 23 *supra*.

55. The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action 5 U.S.C. § 703.

56. *Nor-Am, rehearing (Nov. 1970)*, at 10-11.

57. 339 U.S. 594 (1950).

58. The Federal Food, Drug, and Cosmetic Act § 304(a), 21 U.S.C. § 334(a) (1964) provided:

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce . . . shall be liable to be proceeded against . . . on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however*, that . . . [multiple libel proceedings cannot be instituted except] (2) when the Secretary has probable cause to believe from facts found, without hearing . . . that the misbranded article is dangerous to health

59. Act of June 11, 1946, ch. 324, § 10 (c), 60 Stat. 243, *as amended* 5 U.S.C. § 704.

impact upon the regulated party was onerous.⁶⁰

Judge Pell, however, was not persuaded by the majority's analogy to *Ewing*:

It is significant in *Ewing* that the challenge was not to the seizure itself but to the determination, without hearing, of probable cause for the initiation of the suits. The company, however, by virtue of the initiation of the suits was in court and could raise questions for judicial determination. Actually, while the administrative agency made the probable cause determination, the exercise of the discretion as to whether suit should be filed was made by the Attorney General.⁶¹

The dissent also pointed out that the concept of "final agency action" has been interpreted by the Supreme Court in *Abbott Laboratories v. Gardner*⁶² to be flexible, requiring the courts to examine the impact of the agency action upon the affected party.⁶³ Justice Harlan, writing for

60. Judge Cummings cited other cases in addition to *Ewing* holding a determination by an administrative agency was not final, although the impact upon the regulated party was drastic. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589 (1931); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Fahey v. Mallonee*, 332 U.S. 245 (1947). But note the differing statutory schemes of these cases. In *Phillips, supra*, the Commissioner of Internal Revenue, under the summary procedure permitted by § 280(a) (1) of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 61, determined that certain stockholders who received the assets of a dissolved corporation were liable to pay income and profits taxes of the corporation. *Held*, the liability of the taxpayers was not reviewable until after the tax due was paid, but if, upon review later, the petitioners prevailed, they would receive a refund. In *Bowles, supra*, the Price Administrator, pursuant to the rent control provision of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, established a maximum rental on certain property before a hearing, which petitioner sought to enjoin in a state court proceeding. *Held*, review was not appropriate until the pending administrative hearing was concluded. Section 204(c) of the Act, 56 Stat. at 32, specifically provided that the reviewing court would *not* have power to "issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part" the Price Administrator's determination. In *Fahey*, the Federal Home Loan Bank Board, under the authority of Section 5(d) of the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128, appointed a conservator to take possession of a federal savings and loan association prior to a hearing. *Held*, stockholders could not seek review of the action because the statute vested the Board with complete discretionary power.

61. *Nor-Am (Jul. 1970)*, at 13.

62. 387 U.S. 136 (1967). *Abbott* involved a drug manufacturer's request for a declaratory judgment and injunctive relief from pre-enforcement of a general agency regulation promulgated and issued by the Commissioner of Food and Drugs. The regulation would have required extensive changes in drug labeling requirements, and non-compliance would have subjected the manufacturer to criminal penalties. The manufacturer claimed that the new regulation exceeded the statutory authority of the Commissioner given him by the Food, Drug, and Cosmetic Act. *Held*, manufacturer's suit was within the Administrative Procedure Act and the Declaratory Judgment Act, and since the regulation was "final agency action" within the meaning of the APA the issue was ripe for review.

63. *Id.* The *Abbott* Court emphasized the strong presumption of judicial review, and then, noting that the real issue in determining "finality" is not the form of the order,

the majority in *Abbott*, responded to the contention of the Commissioner of Food and Drugs that *Ewing* precluded review of a regulation prior to its enforcement regardless of its harsh consequences by stating:

To equate a finding of probable cause for proceeding against a particular drug manufacturer [in *Ewing*] with the promulgation of a self-operating industry-wide regulation [in *Abbott*] would immunize nearly all agency rulemaking activities from the coverage of the Administrative Procedure Act.⁶⁴

Judge Cummings, while recognizing that *Abbott* required the court to examine the impact of the agency action, concluded that the procedural scheme of the FIFRA nevertheless precluded review.⁶⁵

The rule requiring the exhaustion of administrative remedies is well-established.⁶⁶ Judge Cummings set forth the traditional policies for not permitting premature review as follows:

Even the limited review here contemplated nullifies the need or utility of the further agency action desired by Congress. The administrative process is interrupted before issues have been crystalized and narrowed and without affording opportunity for application of technical expertise and informed judgment. . . . Judicial scrutiny of the accuracy and correctness of the Secretary's emergency suspension largely abrogates need of expedition of further agency proceedings. At the very least, however, the agency must postpone its further proceedings (even if it plans ultimately to expedite them) pending the outcome of judicial review. Not only may this aggravate the harm suffered by the innocent registrant by prolonging litigation, but it unnecessarily encumbers governmental efforts and may have the adverse effect of coloring further agency actions.⁶⁷

but the impact, stated: "The cases dealing with judicial review of administrative actions have interpreted the "finality" element in a pragmatic way." *Id.* at 149. See generally Note, *Administrative Law: Pre-Enforcement Review of FDA Regulations*, 52 MINN. L. REV. 872 (1968); Note, *Administrative Law—Judicial Review Pre-Enforcement Review Under Inexplicit Statute and the Problem of Ripeness—Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), 17 AM. U.L. REV. 323 (1968).

64. 387 U.S. at 147.

65. *Nor-Am, rehearing* (Nov. 1970), at 10 states:

The flexibility of the finality concept does not, however, permit facile disregard of the purposes of congressional delegation of power and of the clear procedural scheme delineated in this particular statute.

66. See L. JAFFE, *supra* note 26, at 424-26 (1965); 3 K. DAVIS, *supra* note 26, at §20.01 (1st ed. 1958); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Catlin v. United States*, 324 U.S. 229 (1945).

67. *Nor-Am, rehearing* (Nov. 1970), at 11-12.

Query: Since the district court's injunction had nothing to do with preventing a

Professor Jaffe suggests certain assumptions upon which the rule is based: The requirement of exhaustion "implies that the remedy is (a) available to [the affected party] on his initiative (b) more or less immediately and (c) will substantially protect his claim of right."⁶⁸ However, if one or more of these assumptions is not valid when applied to a fact situation, review has been held appropriate prior to the exhaustion of the administrative process,⁶⁹ although the courts generally couch this result in terms of the "irreparable injury" the aggrieved party would suffer.⁷⁰

In *Isbrandtsen Co. v. United States*,⁷¹ for example, the Federal Maritime Board granted pre-hearing approval to an agreement by a conference of companies which had the effect of giving lower rates to shippers who dealt exclusively with the conference. The Circuit Court of Appeals for the District of Columbia held that the Board's approval was reviewable because the plaintiff, who was not a conference member, would suffer irreparable injury through loss of revenues while waiting for the hearing to be completed. The court equated the pre-hearing approval with a final order when it stated, ". . . a final order need not necessarily be the very last order [of the agency]."⁷²

hearing, but only dealt with enjoining the emergency suspension prior to the hearing, why would the hearing process have to be postponed? Are the two proceedings mutually exclusive?

68. L. JAFFE, *supra* note 26, at 424.

69. *See, e.g.*, *Greene v. United States*, 376 U.S. 149 (1964); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947); *Order of Railroad Conductors of America v. Swan*, 329 U.S. 520 (1947); *Public Util. Comm'n. v. United Fuel Gas Co.*, 317 U.S. 456 (1943); *Illinois Commerce Comm'n. v. Thompson*, 318 U.S. 675 (1943); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Gonzales v. Williams*, 192 U.S. 1 (1904).

70. *See, e.g.*, *National Air Carriers Ass'n. v. C.A.B.*, 27 Ad. L.2d 1, (D.C. Cir. May 28, 1970); *Isbrandtsen v. United States*, 211 F.2d 51 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 989 (1954); *C.B.S. v. United States*, 316 U.S. 407 (1942); *A.B.C. v. FCC*, 191 F.2d 492 (D.C. Cir. 1951); *Merchants Delivery Co. v. U.S.*, 265 F. Supp. 669 (W.D. Mo. 1967); *Upjohn Co. v. Finch*, 303 F. Supp. 241 (W.D. Mich. 1969), *aff'd*, 422 F.2d 944 (6th Cir. 1970); *American Home Products Corp. v. Finch*, 303 F. Supp. 448 (D. Del. 1969).

Two major treatises on administrative law take the position that the APA, 21 U.S.C. § 701 *et seq.*, was meant to codify the previously formulated rule that exhaustion was not required in cases where irreparable injury would result. JAFFE, *supra* note 26, at 424-37; 3 K. DAVIS, *supra* note 26, at § 20.08. *See also* SENATE JUDICIARY COMM. REPORT, S. Doc. No. 248, 79th Cong., 2nd Sess. 369 (1946) and Statement of Attorney General in Appendix at 230.

Prior case law demonstrates that, in cases of irreparable injury, review is allowed before exhaustion. L. JAFFE, *supra* note 26, at 431; 3 K. DAVIS, *supra* note 26, at § 20.01. *See also* *Utah Fuel Co. v. National Bituminous Coal Comm'n.*, 306 U.S. 56 (1939) (Threat of revealing a confidential document).

71. 211 F.2d 51 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 989 (1954).

72. *Id.* at 55. *See also* *Algonquin Gas Transmission Co. v. FPC*, 201 F.2d 334, 337 (1st Cir. 1953); *C.B.S. v. United States*, 316 U.S. 407, 422 (1942); *Rochester Telephone*

One of the major sources of disagreement in *Nor-Am* was whether the plaintiff had suffered irreparable injury. Although the dissent found finality in the order because the plaintiff's losses were unrecoupable,⁷³ the majority viewed the hardship as a cost of litigation under the statutory scheme:

We do not mean to demean plaintiffs' possible losses when noting moreover, that the temporary suspension affects business profits, not the very existence of the commodities plaintiffs seek to purvey. Where public health and safety demand emergency removal of a commodity from the market even unrecoverable financial losses incurred *pendente lite* must be deemed an expense of litigation itself.⁷⁴

The distinction between the categories of costs of litigation per se and collateral irreparable loss caused by the litigation, which the court coalesced, has always been a subtle one. In *Myers v. Bethlehem Shipbuilding Corp.*,⁷⁵ plaintiff sought an injunction to stop the National Labor Relations Board from holding hearings concerning unfair labor practices. The asserted basis for the injunction was plaintiff-employer's complaint that if the NLRB were permitted to hold hearings without jurisdiction, the plaintiff would suffer irreparable injury because the hearings would cause employee dissatisfaction, and would place a heavy financial burden on the employer.⁷⁶ Justice Brandeis, writing for the Court, rejected plaintiff's claim of collateral consequences:

. . . the rule requiring exhaustion of the administrative remedy

Corp. v. United States, 307 U.S. 125, 143-44 (1939); *Phillips v. SEC*, 171 F.2d 180, 183 (2nd Cir. 1948).

The Supreme Court also utilized this approach in *Leedom v. Kyne*, 358 U.S. 184 (1958), a case dealing with a similar decision by the National Labor Relations Board. In *Leedom* the Supreme Court held that a ruling by the NLRB was reviewable under the APA even though the NLRB had not issued a "final order" as required by § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f) (1964). The controversy arose when a labor organization, contrary to the provisions of § 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1) (1964), refused to take a vote among professional employees before representing the professionals in bargaining. The NLRB, over the objections of complaining professionals, included both professional and non-professional employees in the bargaining unit.

73. *Nor-Am*, rehearing (Nov. 1970), at 16.

74. *Id.* at 14.

75. 303 U.S. 41 (1938).

76. *Id.* at 53. Other examples of costs of litigation per se, which the plaintiff in *Myers* contended were collateral irreparable losses caused by litigation, were that the hearings would cause irreparable harm because they would discredit the current Plan of Representation in the eyes of plaintiff's employees; that the employees would be deprived of their right to negotiate by the method of their choice; and that the operation of the plant would be disrupted. *Id.*

cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.⁷⁷

Judge Cummings' analogy between the plaintiff's alleged potential losses in *Myers* and the actual losses acknowledged in *Nor-Am* is tenuous. In *Myers*, the plaintiff sought to preclude the hearing completely, and the Court simply considered the inevitable burdens that litigants must endure in order that facts may be determined.⁷⁸ The plaintiff in *Nor-Am*, however, was contesting the consequences of administrative action additional to the costs of the ensuing proceedings, that is, removal from the market, rather than the inevitable burdens of the proceedings themselves.

The majority's assertion that *Nor-Am*'s losses must be viewed as a cost of litigation is indicative of its underlying policy decision to protect the Secretary's emergency discretionary powers against judicial intrusion. The majority took the position that the statutory scheme is the single, indivisible means of protecting the public's health and safety,⁷⁹ and once this essential policy decision had been made, the case was functionally resolved. The inevitable question that must be raised by this decision is: How far would the majority go to insulate this scheme from interference? The Secretary contended⁸⁰ that the permissive language of section 135b(c) of the FIFRA which states that the Secretary "may . . . suspend the registration of an economic poison,"⁸¹ precluded review under the APA since section 701 specifically excludes agency actions "committed to agency discretion by law."⁸² The majority chose

77. *Id.* at 51-52.

78. The expense and woe of litigation are risks to which whatever the modes of justice—and though one may win in the end—we are all subject. There are, however, certain collateral risks of litigation which the law should seek to minimize.

L. JAFFE, *supra* note 26, at 428-29.

79. *Nor-Am, rehearing* (Nov. 1970). "Where public health and safety demand emergency removal of a commodity from the market . . ." *Id.* at 14. See also *Nor-Am* (Jul. 1970). "Congress balanced the public and private interests in fashioning not only the Secretary's discretionary power to suspend registration but also the administrative procedures to follow exercise of that power." *Id.* at 32-33.

80. Brief for Appellants at 24, *Nor-Am, rehearing* (Nov. 1970).

81. 7 U.S.C. § 135b(c).

82. The APA, 5 U.S.C. § 701(a) provides:

This chapter applies, according to the provisions thereof, except to the extent that—

not to adopt the Secretary's contention and instead relied upon its exhaustion theory,⁸³ thereby precluding complete insulation from judicial intrusion. Moreover, the majority avoided adding another piece of kindling to the fiery debate over whether arbitrary and capricious decisions in matters committed to agency discretion are ever reviewable.⁸⁴ In disposing of the case on the exhaustion requirement, the court has struck a compromise: on one hand, the Secretary's determination of imminence of hazard is normally unreviewable in the first instance; on the other hand, if abuse is flagrant enough in a future case, as it might be if a suspension included a broad range of products without justification,⁸⁵ a court is not precluded from determining that the administrative remedy would be inadequate and, therefore, allowing review.

V. CONCLUSION

The *Nor-Am* decision raises several questions concerning the discretionary power of the Secretary and the statutory scheme of the FIFRA. The court was unrealistic in its characterization of that harm which befell *Nor-Am* as not irreparable. First, *Nor-Am* is out of business until a hearing and investigation are completed because Panogen products comprise approximately 90 per cent of its sales.⁸⁶ Second, although

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

83. See *Nor-Am (Jul. 1970)*, at 32 where, in the footnote, Judge Cummings suggests that analogous cases may have been decided upon the "committed to agency discretion" provision of the APA.

84. The controversy over whether an abuse of agency discretion is ever reviewable has been dealt with extensively in a continuing debate between Kenneth Culp Davis and Raoul Berger. Davis contends that some abuses are not always reviewable while Berger asserts that abuses of discretion by an agency are always reviewable. See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55; 4 DAVIS § 28.16 (Supp. 1965); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word"*, 114 U. PA. L. REV. 816 (1966); Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967); Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L. J. 965 (1969).

85. See *Nor-Am (Jul. 1970)*, at 9 where Judge Pell notes that:

Apparently on the assumption that the Alamogordo incident was caused by Panogen (although this assumption is not necessarily supported by persuasive evidence) the Secretary's order of February 18 applied only to Panogen. Other alkyl mercury products used for seed treatment manufactured and sold by plaintiff's competitors were not suspended until more than a month later. There was no indication if in fact the distribution of Panogen constituted an imminent hazard to the public, that other alkyl mercury products were less hazardous to the public.

86. Transcript of Proceedings, Testimony of Mr. Charles Hutchinson, Product Manager of *Nor-Am Agricultural Products, Inc.*, at 100. "Sale of Panogen products

the statute purports to describe the hearing process as "expedited," there is a strong suggestion that this procedure is a lengthy one.⁸⁷ Finally, the impact of the decision is further magnified by the fact that loss of Panogen will reduce agricultural productivity and could result in an epidemic.⁸⁸ Considering Judge Bazelon's pragmatic determination of finality in *Environmental Defense Fund, Inc. v. Hardin*,⁸⁹ which recognized the reviewability distinction between hazardousness and imminence, and holds that the Secretary's power is not discretionary,⁹⁰ the majority's decision in *Nor-Am* creates an area of uncertainty⁹¹

amounts to about \$4,000.00 per day." *Nor-Am* (Jul. 1970), at 4.

87. See note 44 *supra*.

88. See *Nor-Am, rehearing* (Nov. 1970), at 14 where the majority discusses the nature of the claimed irreparable injury:

The primary interests threatened in this case are not public but private. They are interests of property rather than of life or liberty. Although plaintiffs claim danger to farmers and consumers from removal of their products, their direct and immediate concern is the impact of suspension upon their businesses.

But see, in the Transcript of Proceedings in the district court, at 29-65 (April 13, 1970), Mr. Laurel C. Meade, General Manager of the Agricultural Alumni Seed Improvement Association, a non-profit corporation under contract with Purdue University, testified that he had used Panogen for ten years. *Id.* at 33. Panogen is the most effective treatment to control soil-borne diseases, such as seedling blights, damping-off disease, and smuts. *Id.* at 33-34. "The suspension of mercury seed treatment products . . . [w]ill have a far more deleterious effect on agriculture production and the eventual price of consumer food than any harmful effect it has ever had or ever would have . . ." *Id.* at 46-47.

It is possible that Judge Cummings' statement concerning private, rather than public interests, may raise an issue of standing. See generally L. JAFFE, *supra* 459-543 and *Keco Industries, Inc. v. United States*, 428 F.2d 1233, 1238 (Ct. Cl. 1970).

89. 428 F.2d 1093.

90. *Id.* In response to the Secretary's contention that, because the FIFRA was drafted in permissive terms the determination of imminence is committed to agency discretion and is therefore not reviewable, Judge Bazelon stated:

Preclusion of judicial review is not lightly to be inferred, however; it requires a showing of clear evidence of legislative intent. That evidence cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms We conclude that his decision is not thereby placed beyond judicial scrutiny.

Id. at 1098. See also *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

91. See *Nor-Am* (Jul. 1970), where Judge Cummings in the footnote distinguishes the applicability of *Environmental Defense Fund* on the grounds that it dealt with an exception to the rules of review "because the refusal to act in fact represents agency disposition of a matter." *Id.* at 32. *But see*, *City of Chicago v. United States*, 396 U.S. 162 (1969), citing *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939), where, in a case involving reviewability of the Interstate Commerce Commission's decision not to investigate under § 13a(1) of the Interstate Commerce Act, 49 U.S.C. § 13a(1) (1964), a railroad's request for discontinuance of interstate passenger service, the Court stated:

We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been

in administrative law which makes the reviewability issue appropriate for determination by the Supreme Court.

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controlled by this distinction, they can no longer be guiding.

See also Medical Comm. for Human Rights v. SEC, CCH FED. SEC. L. REP. ¶192,708 (D.C. Cir., July 8, 1970).