

concern of the *Noerr* Court with the right to petition is of little importance. Furthermore, *Hecht* properly evaluated and applied the criteria used by the Supreme Court in *Silver* to determine that the congressional intent expressed in the Stadium Act did not preempt that of the antitrust laws. The rationale of the *Hecht* court has considerable merit and should provide the basis for further distinctions in the area of antitrust immunity.

FREDERICK J. DEANGELIS

Administrative Law—Reviewability of Final Orders under the FIFRA—Limits on Administrative Discretion—*Environmental Defense Fund, Inc. v. Ruckelshaus*.¹—In October, 1969, the Environmental Defense Fund, Inc. (EDF) and other public interest organizations representing ecological priorities petitioned the Secretary of the Department of Agriculture² under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)³ to issue notices of cancellation for the registrations of all products containing DDT and to suspend immediately those registrations because of the imminent hazard posed to the public health by widespread use of DDT⁴. The Secretary issued notices of cancellation for four uses of DDT,⁵ but he deferred his decision on the remaining uses pending a preliminary study of the matter. He took no action on the request for suspension.

In December, 1969, the petitioner sought review of the Secretary's action in the United States Court of Appeals for the District of Columbia.⁶ The Secretary moved to dismiss for lack of jurisdiction,

¹ 439 F.2d 584 (D.C. Cir. 1971).

² The functions of the Secretary of Agriculture under the Federal Insecticide, Fungicide and Rodenticide Act have been transferred to the Administrator of the Environmental Protection Agency. 5 U.S.C. App. § 2(8)(i) (1970).

³ 7 U.S.C. §§ 135-135k (1970).

⁴ The statutory grant of authority contained in the FIFRA gives the Administrator considerable discretion to determine whether the registration of an economic poison should be immediately suspended. The Administrator may order suspension when he determines that a pesticide does not conform with a provision in the FIFRA or when he finds that such action is necessary to prevent an imminent hazard to the public. The Administrator must give the affected party notice of such action and, if the party is a registrant, must afford him the "opportunity to have the matter submitted to an advisory committee and for an expedited hearing." The suspension procedure maintains the status quo and allows the registrant to submit evidence refuting any claim that the pesticide presents a danger to the public health. 7 U.S.C. § 135b(c) (1970).

⁵ 34 Fed. Reg. 18827 (1969). The cancellation notices directly affected the following uses of DDT:

- (a) all uses on shade trees, including elm trees, for control of the elm bark beetle which transmits the Dutch elm disease;
- (b) all uses on tobacco;
- (c) all uses in or around the home except limited uses for control of disease vectors, as determined by public health officials;
- (d) all uses in aquatic environments, marshes, wetlands and adjacent areas, except those which are essential for the control of disease vectors, as determined by public health officials.

⁶ 428 F.2d 1093 (D.C. Cir. 1970).

alleging, *inter alia*, that he had not made a reviewable final order and that petitioner lacked standing to sue.⁷ The court ruled that the Secretary's silence with respect to the request for suspension constituted a final order because it was tantamount to a denial of that request and effectively disposed of further consideration of the question of interim relief.⁸ Since it was arguable whether the Secretary's delay in issuing the remaining notices of cancellation amounted to a refusal to act, the court determined that further evidence of administrative inaction would have to be shown before it would find the necessary degree of ripeness for judicial review.⁹ The court remanded the case to the Secretary for a decision as to whether suspension and the issuance of cancellation notices for the remaining uses of DDT were warranted, and for a detailed statement of reasons for his decision.¹⁰ On remand, the Secretary decided not to suspend the DDT registrations. His decision not to suspend was accompanied by the statement that "scientific evidence . . . does not establish that the use of DDT constitutes an imminent hazard to human health."¹¹ The Secretary also concluded that further action on cancellation would have to await the outcome of departmental evaluation of the remaining uses of DDT.¹²

In the principal case the petitioners sought review of the Secretary's decision not to suspend and, by way of mandamus,¹³ sought to

⁷ Id. at 1096. The court had little difficulty in granting standing to EDF in light of both the legislative history of the FIFRA and recent Supreme Court decisions which have examined the concept of standing as a constitutional prerequisite for jurisdiction under Article III of the Constitution. The court found that the public interest in safety compels standing under the FIFRA. Furthermore, the court cited numerous cases which have expanded the concept of standing to include those parties who litigate in the public interest and, particularly, those parties whose interest falls within the zone of interests sought to be protected by the statute. See *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). The *EDF* court concluded that "they [EDF, Sierra Club et al.] are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." 428 F.2d at 1097.

⁸ Id. at 1099.

⁹ Id. at 1100.

¹⁰ Id.

¹¹ In discussing the effects of DDT on human health and the environment, the Secretary made the following observations:

We know of no reported injury to any human as a result of the use of DDT in accordance with directions. Human injury has occurred only in instances of accidental and deliberate exposure to inordinately heavy dosages. . . . A review of animal populations shows no overall decline but, to the contrary, the harvests of fish and wildlife populations are continually increasing.

Statement of the Reasons Underlying the Decisions On Behalf of the Secretary With Respect to the Registration of Products Containing DDT, 3-4, filed on June 29, 1970 (D.C. Cir.).

¹² The Director of Science and Education, Department of Agriculture, stated that "the Department is presently conducting a thorough, active evaluation with respect to each use of every registered product that contains DDT." Id. at 8.

¹³ Under this type of proceeding the court could order the Secretary to issue notices

compel the Secretary to issue notices of cancellation for the remaining uses of DDT. The petitioners alleged, in effect, that the Secretary's continued evaluation of DDT was unwarranted after he had determined that the pesticide's use raised a substantial question of public safety.¹⁴ The court HELD: (1) an order denying suspension is sufficiently final in its impact to warrant judicial review under the FIFRA;¹⁵ (2) the Secretary is obliged to initiate the statutory procedure which might result in cancellation once he has determined that a substantial question as to the safety of DDT exists;¹⁶ and (3) the Secretary's decision not to suspend must be accompanied by an adequate statement of reasons.¹⁷ The court remanded the case to the Secretary and directed him to issue a statement setting forth the reasons for his decision not to suspend.¹⁸ The Administrator of the Environmental Protection Agency, who assumed the duties of the Secretary of Agriculture under the FIFRA¹⁹ subsequently issued those reasons,²⁰ and reaffirmed the decision not to suspend.²¹ The principal issues raised by the decision are (1) whether the *EDF* court correctly interpreted the FIFRA and relevant case law in concluding that a denial of a request for suspension constitutes a final reviewable order and (2) whether the court's requirement of reasons from the Secretary unduly circumscribed administrative discretion.

The *EDF* court viewed the question of finality for purposes of review under the FIFRA²² in terms of the impact of the Secretary's

of cancellation if it determined that such issuance constituted a statutory duty of the Secretary under the FIFRA.

¹⁴ 439 F.2d at 592-93.

¹⁵ *Id.* at 592.

¹⁶ *Id.* at 595.

¹⁷ *Id.* at 596-98.

¹⁸ *Id.* at 596.

¹⁹ See note 2 *supra*. Hereinafter the words "Secretary" and "Administrator" will be used interchangeably.

²⁰ In support of his position not to suspend, the Administrator indicated that in the future the following considerations will be weighed in deciding whether a pesticide presents an imminent hazard to the public: "(1) The nature and magnitude of the foreseeable hazards associated with use of a particular product. . . . (2) Concurrently, the nature of the benefit conferred by use of a given product must be weighed After applying the foregoing analysis . . . this agency has determined that no suspension of such [DDT] products is warranted" Reasons Underlying the Registration Decisions Concerning Products Containing DDT, 2, 4, 5-T, Aldrin and Dieldrin at 10-12, filed by the Administrator of the Environmental Protection Agency (March 18, 1971) (D.C. Cir.).

²¹ Petitioners have sought review of this ruling, appeal docketed, No. 71-1365, D.C. Cir., Aug. 2, 1971.

²² The appropriate sections of the FIFRA dealing with judicial review are §§ 135b(c) and (d). Subsection (c) states that "[f]inal orders of the Administrator under this section shall be subject to judicial review, in accordance with the provisions of subsection (d). . . ." Subsection (d) provides, in relevant part, that:

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 . . . in the United States court of appeals for the circuit wherein

order upon the parties. The court determined that the concept of finality includes broader considerations than whether an order is the "last" order in an administrative adjudication.²³ Thus, the court rejected the argument that the availability of additional administrative procedures under the statute is determinative of the test of finality for purposes of review.²⁴ The irreparable public injury alleged by EDF as a result of the imminent hazard posed by DDT was considered by the court a deprivation of rights sufficient to warrant the requested judicial intervention.²⁵

The *EDF* court's emphasis on "immediacy of impact" as the criterion for granting judicial review was in conflict with another recent decision upon which the Secretary had relied. In *Nor-Am Agricultural Products, Inc. v. Hardin*,²⁶ a case decided by the Seventh Circuit Court of Appeals, the Secretary had suspended the registration of Panogen, a mercury compound manufactured by Nor-Am.²⁷ The court determined that the statutory provisions granting judicial review of the Secretary's decision were quite explicit and that the "flexibility of the finality concept does not . . . permit facile disregard of the purposes of Congressional delegation of power and of the clear procedural scheme delineated in the particular statute."²⁸ Because the provisions in the FIFRA dealing with suspension precede those dealing with the registrant's right to petition for the public hearing and for the appointment of a scientific advisory committee, the court concluded that the statutory scheme indicated a clear congressional intent to withhold judicial review of suspension orders until remaining administrative proceedings have been exhausted.²⁹ The *EDF* court, however,

such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit . . .

7 U.S.C. §§ 135b(c), (d) (1970).

²³ 439 F.2d at 591.

²⁴ *Id.* at 589-590 n.8.

²⁵ The *EDF* court explained its rationale in the following terms:

The test of finality for purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether it imposes an obligation or denies a right with consequences sufficient to warrant review. . . . [T]he denial of a suspension order must be reviewable as a final order where, as here, the moving papers before the court support the allegation that the denial subjects the public to an imminent hazard and that any injury is irreparable.

Id.

²⁶ 435 F.2d 1151 (7th Cir. 1970).

²⁷ Suspension of Panogen followed soon after a nationally publicized incident involving the fatal ingestion by three children of pork from hogs which had been fed with Panogen-treated hog seed. In letters to Nor-Am, the Secretary explained that the decision to suspend was made "to prevent an imminent hazard to the public . . ." and that "to allow new stocks to enter channels of trade would increase the risk of injury to man and other vertebrate animals." *Id.* at 1153.

²⁸ *Id.* at 1157-58.

²⁹ *Id.* at 1157. The statutory scheme is set out in § 135b(c) of the FIFRA. This section provides, in part, that:

The Administrator, in accordance with the procedures specified herein, may

made the important distinction that the correctness of the *Nor-Am* conclusion depends upon the identity of the parties involved.³⁰

It is submitted that the courts must distinguish the status of the parties seeking review in resolving the question whether judicial review should defer to further administrative process. A judicial examination of the parties may demonstrate that the interest of the administrative agency in establishing a record undisturbed by judicial intervention preempts the need of a party such as the manufacturer-registrant in *Nor-Am* to obtain immediate interlocutory relief. However, in a situation such as that in *EDF*, where irreparable harm to the public interest is alleged, the resolution of the rights in controversy demands that the judiciary not defer to further administrative hearings. The *EDF* court rejected the contention advanced in *Nor-Am* that an order *granting* suspension is not a final reviewable order, while one *denying* suspension may be, for the reason that a denial effectively cuts off further administrative proceedings.³¹ The *Nor-Am* court stated that in the latter instance the only recourse available to the aggrieved party may be to seek judicial review. It is submitted that such a distinction is irrelevant, for, as *EDF* indicates, the FIFRA makes no differentiation between the granting or the denial of suspension orders as far as the availability of further administrative relief is concerned.³² Under both sets of circumstances, a party should be able to secure judicial review, provided he can demonstrate that the impact of the decision will cause irreparable harm. Moreover, in dicta, the *EDF* court stated that any suspension order of the Secretary is reviewable in a "proper case."³³ In fact, the *EDF* court implied that it would have granted review of the order denied judicial consideration in *Nor-Am* as long as the parties demonstrated the requisite harm.³⁴

These distinctions illustrate the differing rationales of *EDF* and *Nor-Am* as regards the question of finality. Underlying the *Nor-Am* court's interpretation of the FIFRA is a concern for the efficient functioning of the administrative process. The court preferred to withhold review on the theory that premature judicial intervention without the benefit of an extensive administrative record would unduly interfere with agency autonomy. This approach is consistent with the court's finding, stated above, that an order issued pursuant to the

suspend or cancel the registration of an economic poison whenever it does not appear that the article or its labeling of other material required to be submitted complies with the provisions of section 135 to 135k of this title A cancellation of registration shall be effective thirty days after service of . . . notice unless within such time the registrant (1) makes the necessary corrections; (2) files a petition requesting that the matter be referred to an advisory committee; or (3) files objections and requests a public hearing.

7 U.S.C. § 135b(c) (1970).

³⁰ 439 F.2d at 591.

³¹ 435 F.2d at 1157, 1159.

³² 439 F.2d at 591.

³³ *Id.* at 592.

³⁴ *Id.*

FIFRA is final and ripe for review only at the completion of the administrative process. The emphasis in *EDF*, however, was to protect the interests of the parties seeking review. The dispositive consideration for the *EDF* court was not whether there exists a prospect of further administrative proceedings, but whether the impact of the agency decision is final in its effect on the parties. The court's rationale was that once the decision not to suspend had been made, the issue of whether DDT poses an imminent hazard was effectively determined. It should be noted that the impact rationale presupposes that review will be granted only when the data supporting a party's allegations evidences a harm which can satisfy the statutory standard of an "imminent hazard."³⁵

The conflict between the two rationales is reflected in numerous cases which antedate the principal case. In *Phillips Petroleum Co. v. FPC*,³⁶ a case involving a Federal Power Commission decision to suspend a rate schedule, the court faced a dilemma similar to that in *EDF* and *Nor-Am*. The Tenth Circuit Court of Appeals had to decide whether to review the Commission's suspension determination even though it did not necessarily represent the last order on the matter. Deciding in favor of review, the court applied a test based upon the consideration of whether the order "finally determines the legal rights of the parties."³⁷ It appears that the *Phillips* court utilized the same type of "impact" standard subsequently articulated in *EDF*. Indeed, the *Phillips* court commented that the "legal consequences which attach to these orders have conclusive effect upon the rights and duties of Phillips."³⁸ More specifically, the court recognized that while the Commission's order freezing the rates would be subject to administrative change at a later date, the order nevertheless "purports to establish with finality the rates which Phillips was authorized to charge"³⁹ during the suspension period. Thus, under the approach utilized in *Phillips* and *EDF*, review should arise upon the making of any administrative decision which has a final effect upon one's rights.

The majority in *Nor-Am* cited *Ewing v. Mytinger & Casselberry, Inc.*⁴⁰ to support its rationale of judicial deference to administrative activities. *Ewing* also involved unilateral action by an agency, that is, immediate action without a prior hearing provided to the disadvantaged party. It is submitted, however, that this case was misapplied by

³⁵ Id. at 589-590 n.8.

³⁶ 227 F.2d 470 (10th Cir. 1955). The Federal Power Commission had ordered all independent producers of natural gas to set forth in a schedule the rates they would charge for the transportation and sale of natural gas. Pursuant to this order, Phillips filed the requested rate schedule with the Commission. The Commission, however, determined that the schedule was "unjust, unreasonable and otherwise unlawful" and immediately suspended it. The suspension had the effect of preventing Phillips from including in its rates charges which it felt reflected costs of production. Id. at 472-73.

³⁷ Id. at 474.

³⁸ Id. at 475.

³⁹ Id.

⁴⁰ 339 U.S. 594 (1950).

the *Nor-Am* court. In *Ewing*, the Supreme Court reviewed an appeal of a probable cause finding made by the Administrator of the Federal Food, Drug and Cosmetic Act that the petitioner's products were illegally misbranded. Under the Act, such a finding would allow the immediate seizure of the misbranded articles prior to the filing of a formal suit by the Attorney General.⁴¹ The Supreme Court ruled that the district court⁴² had erred in reviewing the probable cause finding, even though the seizures could have a serious impact on the petitioner's business.⁴³ The Court reasoned that review at such a preliminary stage would destroy the effectiveness of the Act's seizure provisions.⁴⁴

Although *Ewing* seems to support the *Nor-Am* view, a closer analysis reveals that the *Nor-Am* court ignored a consideration crucial to the holding in *Ewing*. Ultimately, the *Ewing* Court withheld review because the probable cause finding had no binding legal consequence by itself, but was merely a statutory prerequisite to a formal suit to be filed at the discretion of the Attorney General.⁴⁵ Thus, while the probable cause hearing for which review was sought had finally determined that probable cause existed as to the illegal misbranding of petitioner's products, the finding did not have any legal effect under the Act until after the institution of the aforementioned suit. In contrast, however, in *EDF* and *Nor-Am* the effect of a suspension determination upon the parties was not conditioned upon the happening of a later event; rather, the action presented for review produced immediate and serious consequences for the parties, whether to the economic interests of a manufacturer in *Nor-Am*, or to the public health in *EDF*. Therefore, the necessary degree of ripeness for judicial intervention which the Court had found to be lacking in *Ewing* was present in both *EDF* and *Nor-Am*.

Abbott Laboratories v. Gardner,⁴⁶ a more recent Supreme Court case, distinguished *Ewing* on the hereinabove mentioned ground and, more importantly, expanded the doctrines of reviewability and finality. In *Abbott* the Secretary of Health, Education and Welfare (HEW) promulgated a ruling which required manufacturers of prescription drugs to include on the labels of their products not only the familiar trade name but also the Department of HEW "established name" for each drug. The petitioner, a drug company, sought review of the statutory authority for this regulation, prior to its enforcement by HEW. Thus, "pre-enforcement" review of an agency regulation was the principal question presented to the Court.⁴⁷ *Abbott* reaffirmed the view that finality must be interpreted in a "pragmatic" way, that is,

⁴¹ Id. at 599.

⁴² 87 F. Supp. 650 (D.D.C. 1949).

⁴³ 339 U.S. at 600.

⁴⁴ Id. at 598-99, 601-02.

⁴⁵ Id. at 598.

⁴⁶ 387 U.S. 136 (1967).

⁴⁷ Id. at 138-39.

in terms of the *impact* the agency action has on the affected party.⁴⁸ Moreover, the Court stated that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."⁴⁹ Because the language in the FIFRA does not make clear whether review was meant to be absolutely precluded until completion of the administrative process, and in light of the pragmatic interpretation given to the concept of finality by *Abbott*, it is submitted that the rationale of *EDF* is more appropriate than that of *Nor-Am* in deciding when review of a suspension decision should be granted.

Although the foregoing discussion suggests that judicial review of orders to *suspend* products should be easily obtained, a different question regarding reviewability arises where the Administrator has discretion to decide whether to issue notices of *cancellation*. There exists dispute as to whether the Administrative Procedure Act (APA)⁵⁰ permits judicial review of agency action "committed to agency discretion."⁵¹ Professor Davis has interpreted the words "committed to" as meaning "unreviewable" discretion.⁵² Opponents of this view rely upon the legislative history⁵³ of this section to support the position

⁴⁸ Id. at 149.

⁴⁹ Id. at 141, quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1961).

⁵⁰ 5 U.S.C. §§ 500 et seq. (1970). Section 706 provides, in part that "[t]he reviewing Court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

⁵¹ Section 701 of the APA states that "(a) [t]his chapter applies, according to the provision thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1970).

For a full discussion of this subject, see Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968); Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965 (1969); 4 K. Davis, *Administrative Law Treatise* § 28.16 (Supp. 1970).

⁵² Davis, *Administrative Arbitrariness—A Postscript*, 114 U. Pa. L. Rev. 823, 825 (1966). Davis supports this interpretation by noting that it "will carry out the probable intent" of the legislators who enacted it, and that it "will produce some substantial results." Id. at 825. The cases which are in accord with the Davis interpretation are discussed in 4 K. Davis, *Administrative Law Treatise* § 28.16 (Supp. 1970). But see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 402 U.S. 401 (1971), decided after *EDF*, where the Supreme Court ruled that, based on the legislative history of the provision, "committed to agency discretion" must be viewed as a narrow exception to the general presumption of reviewability under the APA. Only where "statutes are drawn in such broad terms that in a given case there is no law to apply" is review of a discretionary decision precluded. Id. at 410. See discussion at pp. 417-18 *infra*.

⁵³ See, S. Doc. No. 248, 79th Cong., 2d Sess. 36 (1946). Raoul Berger, one such opponent, cites a statement of Senator McCarran, Chairman of the Senate Committee on the Judiciary, who explained the meaning of the section in an article published shortly after the enactment of the APA. McCarran stated that agency action committed by law to the discretion of the agency means "of course, that claimed discretion must have been intentionally given to the agency by Congress, rather than assumed by it. . . .

that "committed to" means merely that discretion has been "granted" to the particular agency and not that the courts are thereby precluded from reviewing any exercise of agency discretion. The *EDF* court adopted the latter approach.

The court also cited the recently decided case of *Mulloy v. United States*⁵⁴ to support its decision to grant review. In *Mulloy*, petitioner had presented to his draft board new evidence which justified a reopening of his 1-A classification. However, the draft board arbitrarily refused to reconsider his classification, thus precluding his right to further administrative appeal and judicial review. Although the Selective Service regulations give the local boards discretion to decide whether to reopen a registrant's classification,⁵⁵ the Court held that where a prima facie case for reclassification has been made, a board cannot deprive the registrant of a statutorily guaranteed right to review. Furthermore, the Court held that such refusal amounts to a reviewable abuse of discretion.⁵⁶ *Mulloy* suggests that there are certain limits within which even seemingly unlimited discretion must be restricted by the reviewing court. *EDF* applied the same rationale with respect to the Secretary's decision to conduct his own evaluation of the remaining uses of DDT rather than to issue immediately notices of cancellation of their registration. The *EDF* court reasoned that although the FIFRA authorizes the Secretary to issue cancellation notices at his discretion,⁵⁷ his continued delay in issuing notices after finding a substantial question as to the safety of DDT constituted a reviewable abuse of discretion.⁵⁸ *EDF* found support for its decision in a report of the House Committee on Government Operations reviewing the administration of the FIFRA.⁵⁹ The Committee emphasized that in deciding whether a cancellation action was warranted "a mistaken belief that positive evidence of hazard rather than simply a lack of adequate assurance of safety . . . appears to have been a factor in the failure to initiate such action in cases where it was obviously justified."⁶⁰ The court concluded that the Secretary's Statement of Reasons, which had indicated "that the uses of DDT should be

'[A]buse of discretion' is expressly made reviewable." McCarran, Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review, 32 A.B.A.J. 827, 831 (1946) cited in Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965, 977 (1965).

⁵⁴ 398 U.S. 410 (1970).

⁵⁵ 32 C.F.R. § 1625.4 (1971) provides that "when a registrant . . . files with the local board a written request to reopen . . . [his] classification and the local board is of the opinion that the information accompanying such request . . . would not justify a change in such . . . classification, it shall not reopen the registrant's classification."

⁵⁶ 398 U.S. at 418.

⁵⁷ 7 U.S.C. § 135b(c) (1970).

⁵⁸ 439 F.2d at 593.

⁵⁹ See "Deficiencies in Administration of Federal Insecticide, Fungicide, and Rodenticide Act," H.R. Rep. No. 91-637, 91st Cong., 1st Sess. (1969).

⁶⁰ Id. at 16.

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reduced in an orderly, practical manner,"⁶¹ raised doubt as to the safety of DDT sufficient to warrant immediate issuance of the cancellation notices.

One important consequence of the *EDF* decision is its requirement that even discretionary decisions, such as the decision to suspend, will henceforth have to be supported by reasoned opinions.⁶² Although the courts⁶³ and the Administrative Procedure Act⁶⁴ have long required agencies to articulate the reasons for their decisions in those instances where the decision followed *formal* hearings, *EDF* in effect advocates the application of a reasons requirement to informal agency decision making. The court determined that such a requirement ensures that the administrator will confine his decision-making within the statutory limits of the discretion granted to him.⁶⁵

A recent Supreme Court decision has considered the related problem of requiring agency findings where the decision of the administrator has not been based on formal hearings. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁶⁶ petitioners sought to enjoin the release of federal funds for a project to construct a highway through a public park in Memphis, Tennessee. They maintained that the decision of the Secretary of Transportation approving the project was invalid without accompanying formal findings to indicate whether his decision was made in accordance with the standards for approval set forth in two federal statutes.⁶⁷ The Court rejected the request of *Overton Park Inc.*, and ruled that the absence of formal findings did not "necessarily require" a remand of the case to the Secretary.⁶⁸ The Court also determined that it would be wasteful to remand for formal findings since an administrative record had already been established, in the form of affidavits filed by the Secretary, which indicated that his decision was justified.⁶⁹ Since the "bare" record alone may not provide sufficient

⁶¹ Statement of the Reasons Underlying the Decisions on Behalf of the Secretary with Respect to the Registrations of Product Containing DDT, note 11 *supra* at 8.

⁶² 439 F.2d at 598.

⁶³ For a discussion of cases where reasons were required after formal hearings, see 2 K. Davis, *Administrative Law Treatise* § 16.12 (Supp. 1965).

⁶⁴ 5 U.S.C. § 557(a) (1970) provides that "[t]his section applies, according to the provisions thereof, when a hearing is required to be conducted. . . ." Section 557 (c) provides that "[a]ll decisions . . . shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor. . . ."

⁶⁵ 439 F.2d at 598.

⁶⁶ 401 U.S. 402 (1971).

⁶⁷ The Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970), and the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1970), both provide that "the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such programs include all possible planning to minimize harm to such park. . . ."

⁶⁸ The Court stated that formal findings would be required "when the nature of the agency action is ambiguous" or where the enabling statute specifically requires formal findings to be made. 401 U.S. at 417.

⁶⁹ *Id.* at 419.

data to support an effective judicial review, the Court held that the reviewing court may "require the administrative officials who participated in the decision to give testimony explaining their action."⁷⁰ This procedure would facilitate the process of determining whether the officials acted within the scope of their authority and whether their action was justifiable under the applicable standard.⁷¹ The Court emphasized that this may be the only way of ensuring an adequate review where the decision of the administrator under consideration is not based on formal findings.⁷²

In *EDF*, the court objected to the summary fashion in which the Secretary had treated the decision not to suspend DDT. The Secretary had concluded that "scientific evidence . . . does not establish that the use of DDT constitutes an imminent hazard to human health"⁷³ without enumerating the criteria upon which his decision was based. The court ruled that it would be necessary for the Secretary to establish "suspension criteria" so that the reviewing court can determine whether the standards thus established conform to the legislative purpose "to prevent an imminent hazard" to the public.⁷⁴ The court concluded that judicial review will be enhanced when administrators "articulate the standards and principles that govern their discretionary decisions."⁷⁵ Thus, both *Overton Park* and *EDF* propose that, in situations where the absence of a formal decision-making process would mean that administrative discretion would probably go unchecked, some form of judicial restraint may be placed on the exercise of that discretion for the purpose of effecting an adequate judicial review.

It is concluded that *EDF* correctly decided, on the basis of statutory construction and the relevant case law, that a denial of a request for suspension constituted a final reviewable order under the FIFRA. Once the decision not to suspend had been made by the Secretary of Agriculture, the issue of whether DDT posed an imminent hazard to the public was finally determined for purposes of review under the FIFRA. In analyzing the finality concept, the court emphasized the impact that the agency action would have upon the parties, rather than viewing at what point in the administrative process the decision had been made. The case law supports the pragmatic approach taken by *EDF*. The court's decision to require the Secretary to issue a statement of reasons for his decision not to suspend indicates an increasing inclination on the part of courts to confine the broad exercise of agency

⁷⁰ *Id.* at 420.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Statement of the Reasons Underlying the Decisions on Behalf of the Secretary with Respect to the Registrations of Products Containing DDT, note 11 *supra* at 8.

⁷⁴ 439 F.2d at 596.

⁷⁵ *Id.* at 598.

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discretion wherever possible. The decision in *Overton Park* supports the conclusion in *EDF* that even seemingly unlimited discretion may be restricted by the reviewing court so that an effective judicial review may be made.

JOHN K. MARKEY