ATTACHMENT 5

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& ADMITTED TO THE DISTRICT OF COLUMBIA BAR

September 12, 1979

Mr. Victor Stello, Jr.
Director, Office of Inspection
and Enforcement
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Docket Nos. 50-546, 50-547

Dear Mr. Stello:

On September 10, 1979, we were advised that the Sassafras Audubon Society ("SAS") had sent you a request for a hearing concerning the validity of your "Order Confirming Suspension of Construction" issued August 15, 1979. Since we had not received a copy of the SAS request for a hearing, we made inquiry of your office and, on September 11, were supplied with a copy of the hearing request dated September 1 addressed to you. It appears that copies of said request were not served either on us or on Public Service Company of Indiana, Inc. ("PSI").

As attorneys for PSI and Wabash Valley Power Association, Inc. in this proceeding, we wish to respond briefly to the SAS hearing request.

Your August 15 Order permits the filing of a request for a hearing by a person "whose interest may be affected by this Order". SAS has completely failed to identify what interest it has in the matters covered by your Order and has failed to specify how that interest may be affected. On page 3 of the SAS hearing request, SAS does refer to its "firm belief" that its interest would be adversely affected were certain parts of the Order to be sustained. No further specificity is provided, and, as further noted below, SAS never asserts that the Order should not be sustained. SAS therefore has failed to demonstrate that it has any interest that may be adversely affected by your Order.

Even assuming that SAS possesses the requisite interest, it has failed to demonstrate any necessity for a public hearing. After careful review of all 16 pages of SAS's hearing request, we find no allegation that the facts set forth in parts II and III of the Order are not true. Thus, SAS has not demonstrated any need for a hearing concerning the facts.

Similarly, there is no assertion by SAS that your Order should not be sustained. To the contrary, the whole tenor of the SAS pleading is that the Order was properly issued and should be sustained and implemented. SAS therefore cannot be adversely affected by the Order.

In summary, SAS has failed to demonstrate its interest and has failed to establish that there is any issue concerning the validity of the Order that necessitates a hearing. Therefore, the SAS hearing request should be denied.

Respectfully submitted,

Le Boeuf, Lamb, Leiby & MacRae

cc: Mr. Harold R. Denton
Mr. John A. Eyed
Thomas M. Dattilo, Esq.
Secretary, USNRC
Att'n: Docketing and Service Section

ATTACHMENT 6

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In Re:	)	
	)	
Environmental Defense Fund, et al.	)	FIFRA Docket Nos. 411, et al.
	)	
Petitioners.	)	
	)	
	)	

Final Decision

This case involves separate appeals by the Environmental Defense Fund ("EDF") and Florida Citrus Mutual from an Accelerated Decision of the Chief Administrative Law Judge (issued May 22, 1979) dismissing their respective objections to a Notice of Intent to Cancel Registrations and Deny Applications for Registration of Pesticide Products Containing Chlorobenzilate. 1/ The notice was issued pursuant to §6(b)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), which provides for the issuance of such a notice

> "[i]f it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment. . . ." 2/

1/ 44 FR 9548 et seq. (February 13, 1979).

2/ The term "unreasonable adverse effects on the environment" is the statutory standard for determining whether a particular use of a pesticide complies with the Act. It is defined in §2(bb) as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." In other words, this standard requires that the benefits of each use of a pesticide

(Continued on Next Page).

The action proposed in the notice becomes final and effective at the end of thirty (30) days from receipt by the registrant, or publication, of the notice, whichever occurs later, unless the registrant makes the necessary corrections (if possible), or a hearing is requested by a person "adversely affected" by the notice. If a hearing is requested, §6(d) of FIFRA provides that

> "such hearing shall be held after due notice for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties. . . ."

In this case, the notice was issued by the Assistant Administrator for Toxic Substances ("Respondent") pursuant to a delegation of authority. The notice proposed to unconditionally cancel the registrations (and deny applications for registration) of chlorobenzilate products for all uses other than citrus uses in Florida, Texas, California and Arizona. With respect to the latter uses, the notice proposed to cancel the registrations (and deny applications for registration) unless registrants (and applicants) modified the terms and conditions of registration to reflect specified changes and restrictions. This latter action is referred to as conditional cancellation.

(Footnote 2 Continued).

be balanced against its risks. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. at 14 (House Committee on Agriculture) (hereafter the "House Report"). (". . . [T]he Committee seeks to articulate the concept that the benefits of using pesticides should be balanced against the risks of using them."); S. Rep. No. 92-838, 92d Cong., 2d Sess. at 4 (Senate Committee on Agriculture and Forestry)(hereafter the Senate Agriculture Report) ("Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.")

Within thirty days of publication of the notice, EDF requested a hearing and filed objections alleging in effect that the conditional cancellation action did not go far enough, that the proposed restrictions were inadequate, and that the citrus uses should have been unconditionally cancelled. Florida Citrus Mutual, an organization representing segments of the citrus industry which use chlorobenzilate, also requested a hearing and filed objections, alleging in effect that the conditional cancellation action went too far in imposing restrictions on the citrus uses; however, the organization's objections and request for a hearing were not filed within thirty days of publication of the notice. No request for a hearing or objections were filed by registrants of chlorobenzilate; however, the principal manufacturer and registrant, Ciba-Geigy Corporation, petitioned for leave to intervene for the limited purpose of opposing the objections filed by EDF on the grounds that they went beyond the scope of the proceeding. The Secretary of Agriculture of the United States also opposed EDF's objections on similar grounds and petitioned for leave to intervene. Both petitions went unopposed and were subsequently granted.

On April 11, 1979, the Chief Administrative Law Judge issued sua sponte a Notice to Show Cause why an accelerated decision should not be entered against EDF pursuant to §164.91(a)(6) of the Agency's rules of practice and against Florida Citrus Mutual pursuant to §164.91(a)(1) 3/

3/ Section 164.91(a) provides, in pertinent part, as follows:

> (a) General. The Administrative Law Judge, in his discretion, may at any time render an accelerated decision (Continued on Next Page).

of the same rules (40 CFR §164.91(a)). After receiving briefs from the parties and intervenors, the Chief Administrative Law Judge entered his Accelerated Decision dismissing the proceedings and the objections filed by EDF and Florida Citrus Mutual: EDF's objections were improper because the relief it sought was outside the scope of the proceeding and therefore could not be granted; and Florida Citrus Mutual's objections were untimely.

EDF's Appeal

Respondent's decision not to impose a total ban (unconditional cancellation) on the citrus uses of chlorobenzilate was made following a three-year review of the risks and benefits of chlorobenzilate. The review was conducted in accordance with the Agency's Rebuttable Presumption Against Risk (RPAR) regulations (40 CFR §162.11), which, among other things, invited and took into account comments (both oral and written) from interested groups such as EDF in order to assist Respondent in determining whether the statutory standard for issuing a cancellation notice had been met. 4/ Based on that review, he concluded that conditional cancellation

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(Footnote 3 Continued)

> in favor of Respondent as to all or any portion of the proceeding, including dismissal without further hearing or upon such limited additional evidence such as affidavits as he may receive, under any of the following conditions:
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> (1) Untimely or insufficient objections filed pursuant to §164.20;
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> * * *
>
> (6) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel. . . .

4/ The RPAR process, described in the Shell decision (discussed supra at 6), provides for the "more finely tuned control of pesticides" as envisioned by Congress when it rewrote FIFRA in 1972. See Senate Agriculture Report at 5.

for all citrus uses would achieve the statutory mandate of §6(b) that a pesticide not cause "unreasonable adverse effects on the environment." In other words, contrary to EDF's wishes, he refused to impose a total ban (unconditional cancellation) on the citrus uses of chlorobenzilate. It is that refusal which is the undisputed source of EDF's objections. Such a refusal once finalized (after exhausting available administrative remedies), amounts to "final agency action" within the terms of the Administrative Procedure Act (5 U.S.C. §704) and is judicially reviewable under §16 of FIFRA. 5/ The issue thus raised by the dismissal of EDF's objections centers on what avenue of administrative relief EDF is entitled to pursue in order to have the requested relief either granted or denied (and thus finalized). Is it by filing objections in the adjudicatory hearing forum established by §6(d) of FIFRA, or is it by invoking the less formal administrative procedures which have evolved by regulation and practice under FIFRA?

5/ Section 16 provides in pertinent part, as follows:

> (a) District Court Review - Except as is otherwise provided in this Act, Agency refusals to cancel or suspend registrations or change classifications not following a hearing. . . . are judicially reviewable in the district courts.
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> (b) Review by Court of Appeals - In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States Court of Appeals . . . a petition praying that the order be set aside in whole or in part. . . .

The effect of the Accelerated Decision was to rule that the §6(d) hearing forum is not available to EDF. The Chief Administrative Law Judge reached this result by following the precedent established in a very recent decision of the Judicial Officer in another proceeding (involving a different pesticide) which dismissed objections similar to those voiced by EDF. In Re: Shell Oil Company, et al. FIFRA Docket Nos. 401, et al., April 9, 1979 (Decision on Interlocutory Appeal). The applicability of the Shell decision to the facts in this case is not disputed by EDF; instead, it argues that the Shell decision is erroneous and should therefore be reversed. 6/

In Shell, the Judicial Officer reversed an interlocutory ruling of the presiding Administrative Law Judge which allowed Carlos Amaya, et al., representing a coalition of farmworkers, to be heard on objections to a conditional cancellation proposal. Amaya sought to expand the scope of the hearing to include consideration of relief broader (i.e., more restrictive) than that proposed in the §6(b)(1) notice. In allowing Amaya's objections, the presiding officer relied principally on the language in §6(d) which

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6/ Initially there is the question of whether the Shell decision should be reconsidered in view of its undisputed applicability to this case and the fact that no intervening events have occurred to weaken its precedential value. It was rendered by the Judicial Officer pursuant to a delegation of authority from me and therefore has the same authority and finality as if penned under my own name. Nevertheless, upon the Judicial Officer's recommendation, I have decided to rule on the merits of EDF's claims. EDF's suggestions that the Shell decision unfairly deprives organizations such as its own of meaningful participation rights in matters raising serious health and environmental questions are not lightly taken and -- I presume -- not lightly made.

provides that, at the close of the hearing, the Administrator "shall issue an order either cancelling the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article." 1/ He concluded that nothing in this language indicates that the Administrator is limited to what has been proposed in the §6(b)(1) notice and that it grants the Administrator broad authority to take any remedial action appropriate to the facts which have been found. The Judicial Officer rejected this analysis on the basis that it usurped the Administrator's authority to define the scope of the proceeding; it ignored the role of the §6(b)(1) notice in setting the framework for the remainder of the proceeding.

> "In procedural terms, the notice serves much the same function as a complaint in any other proceeding, and as such, 'set[s] a standard of relevance which shall govern the proceedings at the hearing.' [Citations omitted.] Thus, matters falling outside the scope of the notice of intent to

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1/ Section 6(d) provides, in relevant part, as follows:

> (d) Public Hearings and Scientific Review. - In the event a hearing is requested pursuant to subsection (b). . ., such hearing shall be held after due notice for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties . . . . As soon as practicable after completion of the hearing. . ., the Administrator shall evaluate the data and reports before him and issue an order either revoking his notice of intention issued pursuant to this section, or shall issue an order either cancelling the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article. Such order shall be based only on substantial evidence of record of such hearing and shall set forth detailed findings of fact upon which the order is based.

> cancel are of no relevance to the proceeding. Amaya's objections belong in that category to the extent that they are directed at expanding the scope of the hearing to include matters not contained in the notice of intent to cancel. Although the language of Section 6 does not expressly provide that the parties' objections must be relevant to the matters raised in the notice of intent to cancel, such a limitation on the right to file objections is necessarily implied.
>
> "The Administrative Law Judge's ruling, on the other hand, allows the parties, by their own objections, to set the standard of relevance for the conduct of the proceeding. This result is contrary to the statutory scheme. Under Section 6(b), the authority to issue a notice of intent to cancel, and hence, set the standard of relevance, is expressly reserved to the Administrator. The Administrator may, of course, delegate that authority to another Agency official, as he did in this case by designating the Assistant Administrator; however, there is no provision in the Act authorizing such notice to be issued by private parties." Shell decision at 10-11.

He also noted that limiting the scope of relief to what was contained in the §6(b)(1) conditional cancellation proposal did not preclude Amaya from pursuing other viable avenues of administrative relief in order to persuade the Agency to consider initiating proceedings for the purpose of establishing more stringent restrictions or unconditional cancellation.

The validity of EDF's claim that Shell is incorrect as a matter of law is premised on its assertion that it is a person "adversely affected" by the §6(b)(1) notice, 8/ a statutory prerequisite to standing to

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8/ Exceptions of Environmental Defense Fund to accelerated Decision at 1 June 2, 1979, and see generally Brief of Environmental Defense Fund in Support of Exceptions and Appeal from Accelerated Decision, dated June 11, 1979 ("EDF Brief").

request a hearing and file objections. 9/ This assertion was challenged by the Secretary of Agriculture, Ciba-Geigy and, in particular, by Respondent in his reply brief, where, based upon an analysis of the statute and its legislative history, Respondent argued that a person, such as EDF, whose primary objective is not to stop a conditional cancellation proposal from becoming final and effective (but rather is to force more restrictive action, such as unconditional cancellation), is not "adversely affected"

9/ Section 6(b) of FIFRA provides:

> "(b) Cancellation and Change in Classification. - If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may issue a notice of his intention either —
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> "(1) to cancel its registration or to change its classification together with the reasons (including the factual basis for his action, or
>
> "(2) to hold a hearing to determine whether or not its registration should be cancelled or its classification changed.
>
> "Such notice shall be sent to the registrant and made public . . . . The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), which ever occurs later, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for hearing is made by a person adversely affected by the notice. In the event a hearing is held pursuant to such a request or to the Administrator's determination under paragraph (2), a decision pertaining to registration or classification issued after completion of such hearing shall be final.
>
> "In taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation. . . ." (Emphasis added.)

within the meaning of §6(b) of FIFRA. 10/ EDF responds to this argument by contending that Respondent's position is erroneous, that it constitutes a reversal of a long-standing Agency construction of "adversely affected," that it ignores the plain words of §6(b), that it misreads the legislative history, and that it is not defensible as a matter of public policy. 11/

Notwithstanding EDF's arguments to the contrary, I am persuaded that Respondent's reading of FIFRA is correct. The controversy surrounding the meaning of "adversely affected" under §6(b) arises at this late date because, in the past, there has never been any need or occasion to address the issue head-on in an actual controversy. This case and Shell number among the first instances in which the Agency has sought to implement its authority to issue conditional cancellation notices. 12/ Prior to this time the Agency has had to confine itself to issuing unconditional cancellation notices. As a consequence, as was noted by the Chief Administrative Law Judge, EDF has heretofore participated in FIFRA cancellation proceedings

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10/ Respondent's Reply to Exceptions and Appeal by Environmental Defense Fund from Accelerated Decision, dated July 9, 1979 ("Respondent's Brief").

11/ Response of Petitioner Environmental Defense Fund to Respondent's Reply to Petitioner's Appeal from Accelerated Decision, dated July 30, 1979 ("EDF Response").

12/ The origin of the Agency's authority to issue conditional cancellation notices is discussed in detail in the Shell decision (pp. 11-13) and will not be repeated here. EDF does not contest the legality of conditional cancellation, but rather opposes limiting the scope of the proceeding to consideration of conditional cancellation (as opposed to including unconditional cancellation as well).

as an intervenor, not as a party who is allegedly adversely affected by the cancellation notice. 13/

The "internal logic" of FIFRA is structured so as to confer standing to request a hearing and file objections on those persons who want to stop the Agency's proposed action from going into effect. Under §6(b), the proposed action is self-executing: it becomes "final and effective" unless the registrant makes the necessary corrections (if possible) or a request for a hearing is made by a person "adversely affected" by the proposed action. EDF obviously has no interest in stopping the proposed action from going into effect, and it is clear that its objections were not filed for that purpose. Rather, EDF's grievance with the proposed action is that the conditional cancellation proposal for the citrus uses did not go far enough; in other words, EDF complains, not of the action proposed, but of the action not proposed. Put still differently, it is the Agency's refusal to propose action (unconditional cancellation of the citrus uses) that is the source of EDF's objections. However, FIFRA has never provided for a formal adjudicatory hearing under §6(d) in such circumstances. Instead, it expressly contemplates in §16 that unresolved controversies over Agency "refusals" to propose such action are to be heard in the Federal courts. It is clear, therefore, that FIFRA is not structured for the purpose of entertaining objections by

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13/ Accelerated Decision at 5, n. 4 (continued).

persons, such as EDF, who have no real interest in stopping the cancellation proposal from going into effect. If EDF's objections were to be entertained in this proceeding, they would automatically prevent the proposed action from going into effect even though no timely objections were filed by persons such as, registrants and users, who presumptively have a legitimate stake in stopping the proposed action, but who may, nonetheless, for reasons of their own, elect not to oppose it. This anomalous result was pointed out in the Accelerated Decision 14/ and would frustrate the statutory scheme for protecting human health and the environment. As Ciba-Geigy observed, " Ironically, EDF would be defeating its own purpose by requesting a hearing. From EDF's viewpoint, some restrictions are surely better than none." 15/ Thus, the statutory scheme of FIFRA can not logically support the conclusion that EDF is "adversely affected" by the conditional cancellation proposal. The legislative history of FIFRA and the controlling court decisions are also in accord with this analysis of the statutory scheme.

The legislative history of FIFRA demonstrates that the term "adversely affected" as used in §6(b) only includes registrants, users and other

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14/ Accelerated Decision at 4, n. 4.

15/ Response of Intervenor Ciba-Geigy Corporation to Exceptions of Environmental Defense Fund to Accelerated Decision at 13, dated June 21, 1979.

persons who want to stop the proposed cancellation action from going into effect. In McGill v. Environmental Protection Agency, 593 F.2d 631 (5th Cir. 1979), the court construed this language in the context of deciding whether users of a pesticide who oppose cancellation have the right to prevent the indefinite suspension of a §6(b)(2) hearing when the sole registrant and the Agency have agreed to it. Its analysis of the legislative history and meaning of the term "adversely affected" is applicable in the context of this controversy as well. The court observed that FIFRA, which was originally enacted in 1947 (the "1947 FIFRA") and which only granted registrants standing to request a hearing, 16/ was completely revised in 1972 for the general purpose of expanding the Agency's supervisory role over the use of pesticides and protecting the environment, and in the process of amending the 1947 FIFRA, "Congress also granted

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16/ The procedures for requesting a hearing under the 1947 FIFRA provide, in pertinent part, as follows:

> Whenever the Secretary . . . determines that registration of an economic poison [pesticide] should be cancelled, he shall notify . . . the registrant of his action and the reasons therefor . . . . A cancellation of registration shall be effective thirty days after service of the foregoing 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 USC 135)

If the matter was referred to an advisory committee and the Secretary thereafter issued an order of cancellation, the registrant (and only the registrant) was given another opportunity to file objections and request a hearing.

specific rights of participation to 'interested' and 'adversely affected' persons (e.g., non-registrants who are pesticide users) in . . . [§§6(a) and (b) of FIFRA]." 593 F.2d at 635 (emphasis added). The court examined the legislative history and concluded that such rights of participation were added to protect the interests of pesticide users who were not registrants.

> "The legislative history suggests that the rights of non-registrants were recognized in the statute because certain Congressmen were concerned that a pesticide producer would choose not to defend a particular registration that was of small importance to the manufacturer, but of great importance to a particular agricultural group. All parties to this litigation agree that the testimony of Dr. Edwin A. Crosby, a representative of the National Canners Association, was instrumental in securing rights for non-registrants in the revised statute. His proposed amendment was designed to protect the rights of users of established pesticides if the producer-registrant decided not to defend against the cancellation or change of a particular registration. See Hearings on H.R. 10729 Before the Sub-Committee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, 92d Cong., 2d Sess. 294 (1972)." 17/

Representatives of the United States Department of Agriculture (USDA) also supported an amendment to §6(b) in order to protect the interests of pesticide users who were not registrants.

17/ The amendment which Dr. Crosby referred to in his testimony read:

> "Any person who will be adversely affected by cancellation of a registration or change of classification also may file objections and request a public hearing within 30 days of public notice of the Administrator's intention to cancel the registration or to change the classification of a pesticide."

> "Such a provision would protect agriculture and other affected persons from the cancellation of a product in instances in which a product has an important use but for any number of reasons the registrant does not wish to appeal; for example, a use involving such a minor volume that the registrant does not find it feasible to appeal." 18/

In response to an inquiry by Senator Allen, the same USDA witness elaborated:

> "What we had in mind is an example of a small group To use an example, let us take an example of citrus growers in California. I believe that the registration for DDT on citrus was not appealed by the registrant when it was cancelled. The citrus growers therefore had no recourse under the existing law and under the proposed law [i.e., H.R. 10729]. What we would say is that user groups should have the right to appeal on their own behalf and this should not be limited to the registrant. This is our point." 19/

Based on the foregoing testimony and the testimony of Dr. Crosby, the Senate Agriculture and Forestry Committee reported a bill containing an amendment which is virtually identical to the present §6(b).

> "The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs latest, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice." 20/

18/ Hearings before Subcommittee on Agricultural Research and General Legislation of the Committee on Agriculture and Forestry, U.S. Senate (92nd Cong., 2nd Sess.), on H.R. 10729, Part II, March 7 and 8, 1972, p. 111 ("Senate Hearings").

19/ Id at 114-115.

20/ Senate Agriculture Report at 49.

In explaining the amendment, the Senate Agriculture Report demonstrates that the Senate intended the term "adversely affected" to refer to users of the pesticide.

> "The committee action permits persons adversely affected [i.e., registrants] to continue to be able to request review of the status of a registration and adversely affected persons, like users, also to participate in the administrative process." 21/ (Emphasis added.)

At the same time that users were securing new rights of standing from Congress to request hearings and file objections under §6(b), various public interest groups, including EDF, were waging a battle to retain their established right of standing to obtain judicial review of Agency refusals to initiate cancellation hearings under §16 (formerly §4(d) under the 1947 FIFRA). 22/ Under the 1947 FIFRA, the right of environmental groups to initiate cancellation proceedings by petitioning the Agency (outside the framework of a cancellation hearing) was recognized in Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970). The court held that EDF had standing to seek judicial review of a refusal by the Secretary of Agriculture (who then administered FIFRA) to issue a

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21/ Id at 12.

22/ See, e.g., Senate Hearings at 135 (Sierra Club), 140 (National Audubon Society), 147-150 (Alabama Conservancy) and 168 (Environmental Defense Fund).

notice cancelling all uses of DDT.

> "The statute affords a right of review to 'any person who will be adversely affected' by an order (7 U.S.C. 135b (d) (1964) . . . .The 'zone of interests' sought to be protected by the statute includes not only the economic interest of the registrant but also the interest of the public in safety." 428 F.2d at 1096.

As noted by the court, the judicial review provisions of the 1947 FIFRA allowed any person "adversely affected" by an order to seek judicial review. The House of Representatives tried to change this language to "any party at interest," 23/ but the Senate Agriculture Committee "rejected the House language which refers to 'interested persons' so as to avoid any implication of desiring to change present law." 24/ Under the "present law" at that time, non-registrants (including users and environmental groups) did not have the right to request an administrative hearing. They could, however, participate in the administrative hearings as intervenors. Consequently, the Senate's restoration of "adversely affected" in the judicial review provisions of FIFRA did not, contrary to EDF's assertions, indicate an intent to grant environmental groups standing to request a hearing for the purpose of contesting an Agency refusal to initiate a cancellation proceeding. EDF glosses over these facts in its selection of excerpts from the legislative history and thus fails to make the proper distinction between standing to intervene in an

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23/ House Report at 62.

24/ Senate Agriculture Report at 12.

administrative hearing and standing to obtain judicial review of challenged administrative action. 25/ For example, EDF cites the following statement of David D. Dominick, a former EPA Assistant Administrator, which was made before the Senate Agriculture Subcommittee, as support for its contention that "[e]nvironmental groups such as EDF had standing to request and to participate in cancellation hearings under the 'present law' referred to by the Senate Committee." 26/

> "On a related subject [i.e., EPA's authority to phase-out use of a cancelled pesticide], this matter underscores the importance for broad public participation in our regulatory process. As the law stands at present, users and interested groups, like environmentalists, have standing to participate in our decisions. The House Bill has changed the language in the present act. It is our view that this change in language does not create a change in substance in view of the case law which does not suggest that courts view these two phrases

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25/ As noted by Professor Davis in his treatise on administrative law,

> "The problem of right to intervene in administrative proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action. But intervention and standing to challenge are not the same and are not governed by the same considerations. Intervention is affected by Agency rules and statutory provisions not affecting standing to challenge. The problems of case or controversy, the heart of many standing problems, do not affect intervention in administrative proceedings. Furthermore, the consequences of intervention are different from the consequences of allowing a party to obtain review. Intervention depends not only upon the directness and importance of the effect of the proceeding upon the interest of the party seeking to intervene, but it also depends upon the effects upon the proceeding of allowing intervention. Thus, an undue broadening of the issues is a common ground for denying intervention." K. Davis, Administrative Law Treatise, §8.11, at 564 (1958).

26/ EDF Brief at 7.

> differently. While we do not believe a change back to the original FIFRA is required, the Committee may wish to include language in the committee report which would clarify what we believe to be the case." 27/ (Emphasis added.)

Mr. Dominick's reference to "standing to participate in our decisions" was obviously intended to refer to standing to participate as an intervenor; only registrants had standing to request a hearing under the 1947 FIFRA. In his prepared comments for the Senate subcommittee hearings, Mr. Dominick addressed this point directly:

> "We agree that any interested person should be able to intervene in a hearing. This is the practice under the present law and that practice is, we believe, carried forward by H.R. 10729 and no further language is necessary. ." 28/

Based on this testimony, the Senate Agriculture and Forestry Committee rejected an amendment proposed by the Senate Commerce Committee which would have made such a right to intervene an express part of the law. 29/

Another example of EDF's failure to distinguish between the different types of standing is the following passage in the Senate Agriculture and Forestry Committee's Supplemental Report, which explained that committee's

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27/ Senate Agriculture Report at 14.

28/ Senate Hearings at 84.

29/ See Senate Agriculture Report (Supplemental) at 42 (October 3, 1972). H.R. 10729 was referred to both Senate committees, but the Committee on Agriculture and Forestry ultimately prevailed in asserting a predominant role in influencing the final legislation.

reasons for rejecting a Senate Commerce Committee proposal to include an amendment to provide for citizens' suits:

> "The bill as recommended by the Committee on Agriculture and Forestry affords adversely affected parties with the opportunity for administrative and judicial review of decisions with respect to registration, cancellation, suspension, classification and the imposition of additional involvement of citizens in the administration of the law provided for by this amendment. * * * The Agriculture Committee bill already permits any citizen to initiate cancellation proceedings, obtain judicial review of every action and inaction he disagrees with, and intervene in every proceeding. . . ." (Emphasis supplied in EDF Response at 10). 30/

The underscored language is plainly not "dispositive" of the issue as EDF contends. 31/ First, there is no indication in this language that the Senate Agriculture and Forestry Committee intended to rescind its previous statements which equated "adversely affected" persons under §6(b) with registrants and users. Second, the passage simply does not address the issue of whether environmental organizations have standing to request a hearing under §6(b). Third, the right of citizens to "initiate cancellation proceedings" by petitioning the Agency to issue a cancellation notice was established in Environmental Defense Fund v. Hardin, and that right is distinctly different from the right to request a hearing after the cancellation notice has been issued. And finally, the express

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30/ Id at 39.

31/ EDF Response at 11.

reference in the quoted passage to the right of "any citizen" to "intervene in every proceeding" onstitutes tacit recognition of the fact that the Senate expected such persons to participate as intervenors. 32/

Thus, the Senate's restoration of the "adversely affected" language in the judicial review provisions of §16 was intended to avoid any implication of changing the "present law" regarding the right of third parties, such as EDF, to obtain judicial review. That action did not purport to create any new rights of standing for such persons in cancellation hearings under §6(b). However, because the focus of the Senate's deliberations over §16 are heavily identified with rights of environmental groups to obtain judicial review, EDF argues that the identical "adversely affected" language in §6(b) must also have been intended to reflect the same Congressional concern over their rights in cancellation hearings. 33/ This argument is too simplistic. It seeks to always equate environmental

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32/ In resolving the discrepancy between the House and Senate judicial review provisions, the Committee of Conference similarly stated that §16

> ". . . provides judicial review of any order following a public hearing for 'any person who will be adversely affected by such order and who had been a party to the proceedings.' It is the intent of the conferees that anyone who intervenes in a public hearing under this Act shall be considered a party for purposes of this provision [i.e. §16(b)]. . . . The conferees intend the words 'adversely affected' to have the same meaning that they have under 5 U.S.C. 702." S. Rep. No. 92-1540, 92d Cong., 2d Sess. at 33 (1972).

33/ See EDF Response at 8.

organizations with the term "adversely affected." However, this ignores the plain meaning of the words: whether one is "adversely affected" depends not so much on his status as a registrant, user or environmentalist, but rather on how he is affected by the proposed action. There must be some legally recognizable injury as a result of the proposed action in order for the person to be "adversely affected." As stated in Sierra Club v. Morton, 405 U.S. 727, 739 (1972), "a mere 'interest in the problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . ." Under this definition, EDF is clearly not "adversely affected" by the conditional cancellation proposal; if anything, EDF is benefited, not injured, by the restrictions on the citrus uses. EDF's oversimplication of the relationship between §6(b) and §16 also ignores the legislative history, discussed earlier, which demonstrates that the "adversely affected" language in §6(b) was added to protect the interests of non-registrants, like users, whose potential for injury is manifest if the proposed action goes into effect.

EDF's real grievance, as stated earlier, is not with the action proposed, but with the action not proposed. FIFRA has never provided for an automatic right to a cancellation hearing in such circumstances.

If EDF is unsuccessful in convincing the Agency that its refusal to initiate a cancellation hearing is wrong, EDF's recourse is to convince a Federal court that the Agency's refusal violated the statutory standard under which the Agency is required to issue cancellation notices. Thus, in Environmental Defense Fund v. Hardin (after holding that EDF had standing to obtain judicial review of the Secretary's refusal to initiate a cancellation hearing), the court remanded the case to the Secretary of Agriculture for an explanation of the grounds for his refusal. When, after remand, the Secretary affirmed his original decision not to initiate a cancellation hearing, the court held that based upon the Secretary's own findings respecting the hazards of DDT, the statutory standard for issuing cancellation notices had been violated. Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

> "[W]hen, as in this case, he reaches the conclusion that there is a substantial question about the safety of a registered item, he is obliged to initiate the statutory procedure that results in referring the matter first to a scientific advisory committee and then to a public hearing." 439 F.2d at 595.

Since the Secretary had made a finding about the safety of DDT which met the statutory standard for issuance of a cancellation notice, the court ordered him to issue a cancellation notice and thereby commence the formal administrative process. Consequently, when the opposite finding is made,

i.e., that the statutory standard has not been met, it follows that the issuance of a cancellation notice would be inappropriate. This important aspect of the statutory scheme is explained in the Shell decision in the specific context of conditional cancellation notices.

> "As a necessary corollary to the court's holding in EDF v. Ruckelshaus, the Agency is not required to commence the formal administrative process if an affirmative determination has been made that the statutory standard for issuing a cancellation notice has not been met. Therein lies the key difference between the Secretary's action in EDF v. Ruckelshaus and the Assistant Administrator's decision in this case. Here the Assistant Administrator has, by clear implication, determined that the statutory standard for issuing a cancellation notice will not be met under certain specified circumstances. Specifically, if the required modifications in the terms and conditions of registration are made (in other words, if the proposed restrictions are adopted), then the risks posed by the use of DBCP products covered by the conditional cancellation proposal will not be greater than the social, economic and environmental benefits of those uses. Consequently, the decision to exclude consideration of more stringent restrictions in the §6(b)(1) Notice is not in conflict with EDF v. Ruckelshaus. And, as previously shown, it is in accord with the statutory mandate requiring the Administrator to consider restriction as an alternative to unconditional cancellation." Shell at 14-15.

This reasoning applies with equal force to the chlorobenzilate notice, where a factual determination was made by Respondent that the citrus uses will not meet the statutory standard for unconditional cancellation when subject to the changes and restrictions on use identified in the notice. 34/

34/ As stated in the chlorobenzilate §6(b)(1) notice,

> ". . .use of chlorobenzilate on citrus crops in Florida, Texas, California, and Arizona, in accordance with the modifications to the terms or conditions of registration determined herein to be necessary, does not cause unreasonable adverse effects on the environment." 44 F.R. 9551.

EDF's recourse to the decision to exclude these uses from unconditional cancellation is the same as it was in 1970. It may petition the Agency to reconsider the refusal to issue an unconditional cancellation notice and, if the petition is subsequently denied, have that decision judicially reviewed as provided in §16 of FIFRA. The law has not changed in this respect, and therefore, contrary to EDF's suggestions, its rights of public participation in pesticide decisions are not narrowed by this result. In fact, EDF, as well as registrants, users and others, were given the opportunity, as part of the RPAR review of this chemical, to participate in the decision which resulted in Respondent's issuance of the chlorobenzilate cancellation notice. The highlights of this review were summarized by Respondent as follows:

> "The Chlorobenzilate Notice was issued after almost three years of intensive review under the RPAR process, which afforded multiple opportunities for interested parties, including EDF, to make their views known to the Agency. Parties were invited to submit comments in response to the initial RPAR Notice (41 FR 21517; May 26, 1976); were allowed to make written and oral presentations to the Agency's FIFRA Scientific Advisory Panel; and were invited to submit comments on the Agency's preliminary decisions concerning the balancing of risks and benefits of Chlorobenzilate which were announced in a Notice of Determination Concluding the Chlorobenzilate RPAR, and which were explained in detail in an accompanying Position Document (43 FR 29824; July 11, 1978). Moreover, the Agency responded in detail to the last set of comments on the Agency's evaluation of risks, benefits and chosen regulatory options in

> another Position Document which accompanied the final Chlorobenzilate Notice (44 FR 9548; February 13, 1979). Following this sequence of events, the Administrator's delegatee for these decisions (Respondent Assistant Administrator for Toxic Substances) has taken an action that he has determined will achieve the statutory mandate that a pesticide not cause unreasonable adverse effects on the environment, and has issued a §6(b)(1) notice to effectuate that decision." (Respondent's Brief at 28-29.)

Thus, public participation in pesticide decisions is actually broadened in contrast to earlier times when decisions on cancellation matters were not made public until a cancellation notice was actually issued. At the same time, the RPAR process implements the spirit of the Congressional mandate that FIFRA provide for "more finely tuned control of pesticides." 35/ (This latter point is discussed at length in the Shell decision.) Yet, in spite of these parallel achievements, EDF is urging an interpretation of FIFRA which if openly acknowledges will cause the environmentally protective restrictions contained in the conditional cancellation proposal to be "stayed pending the outcome of the hearing." 36/ Such an interpretation simply does not make any sense and is contrary to the statutory scheme as discussed above.

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35/ Note 4, supra.

36/ EDF Response at 25.

EDF raises a number of other arguments in its briefs which are primarily intended to support its contention that the Shell decision is erroneous. For example, in arguing that the Agency has broad authority under FIFRA to enlarge the scope of relief beyond what is proposed in the notice of intent to cancel, EDF suggests that the due process problems with respect to the registrant who elects not to oppose the proposed action (and thereby allows his registration to be cancelled by operation of law) can be ignored since the registrant was on notice during the RPAR review that unconditional cancellation was an option open to the Administrator and "it is in this context that the registrant was advised of EDF's objections to the Administrator's proposal." 37/ The practical effect of this suggestion is to nullify the purpose of the notice itself, which is to inform the registrant of what action the Agency intends to take (5 U.S.C. 554(b)), not what action EDF intends to take. It is also based on the unlikely assumption that the registrant has the prescience required to know what EDF's position will be after the cancellation notice is issued, based upon the position it took during the RPAR review . EDF also argues that the scope of relief is not limited to what was proposed in the notice by relying on court decisions arising in the context of rulemaking proceedings; 38/ however,

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37/ See EDF Response at 22 and Appendix C at 8.

38/ EDF Response, Appendix C at 11.

these decisions are inapposite to license revocation proceedings (cancellation) conducted in accordance with FIFRA and the Administrative Procedure Act. These and all other arguments made by EDF have been considered and rejected as either being irrelevant or lacking in merit; in any event, they are not sufficient to overcome the conclusion that EDF is not "adversely affected" by the conditional cancellation notice within the meaning of §6(b).

Florida Citrus Mutual's Appeal

The issue in this appeal is whether Florida Citrus Mutual filed a timely request for a hearing in connection with the chlorobenzilate notice. 19/ The chlorobenzilate notice, issued on February 5, 1979, was published in the Federal Register on February 13, 1979, and specified the time for requesting a hearing as follows:

> "Registrants affected by the actions initiating cancellation of the registered uses of chlorobenzilate may request a hearing on specific registered uses within 30 days of receipt of this notice, or on or before March 15, 1979, whichever occurs later. Any person adversely affected by the cancellation actions initiated by this notice may request a hearing on specific registered uses affected by this notice on or before March 15, 1979." 44 F.R. at 9551.

Florida Citrus Mutual's request was not filed with the Hearing Clerk until March 20, 1979, five (5) days after the deadline set forth in the notice. Accordingly, the Chief Administrative Law Judge issued a notice to show cause why the request for a hearing should not

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19/ Florida Citrus Mutual is not a registrant, but its status as "a person adversely affected" by the notice is not contested by any party.

be dismissed as untimely. Rather than respond directly to the notice to show cause, and in apparent recognition of the untimeliness of its request, Florida Citrus Mutual filed a motion pursuant to 40 CFR 164.6(b) to enlarge the time within which to file its objections. As grounds for granting the extension, Florida Citrus Mutual stated that it did not receive the Federal Register notice until March 2, 1979, and it "understood" that it had 30 days from that date to file its request for a hearing.

In denying the motion and dismissing the request for a hearing, the Chief Administrative Law Judge did not comment on the organization's obvious misreading of the notice, but instead held that the Agency's rules of practice did not allow him to enlarge the 30-day statutory deadline. On appeal, Florida Citrus Mutual does not contest the Chief Administrative Law Judge's conclusion that the Agency's rules of practice do not allow for the enlargement of a statutory deadline; instead, it asserts that Respondent's notice of intent to cancel misinterprets the statutory requirements and thus had the unlawful effect of shortening the 30 day deadline. In other words, Florida Citrus Mutual argues that the March 15 deadline specified in the notice conflicts with §6(b), which, in pertinent part, is restated here as follows:

> "The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs later, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice."

The thrust of Florida Citrus Mutual's argument is that this language should be interpreted to allow the timeliness of a non-registrant's request for a hearing to be measured from either (i) 30 days following the date of publication of the notice in the Federal Register or (ii) 30 days following any registrant's receipt of the notice, whichever occurs later. It argues that the interpretation contained in Respondent's notice favors registrants and unfairly penalizes non-registrants: non-registrants must always measure the timeliness of their requests by reference to the publication date, whereas registrants have the option of measuring it from either the date of receipt or the date of publication, whichever occurs later. However, Florida Citrus Mutual fails to note that its interpretation has the opposite effect: if just one registrant receives his notice after it was published in the Federal Register, the 30-day period following the publication date may be ignored by all non-registrants, notwithstanding the fact that other registrants who received their notices on or before the publication date must abide by that date or suffer the consequences of having their registrations cancelled by operation of law. Consequently, neither interpretation offers complete parity under all circumstances. The only instance where both achieve it is when all registrants receive their copies of the notice on the same day that the notice is published. The likelihood of this occurring, even under the best of circumstances, is of course extremely remote.

Thus, in the absence of any indication to the contrary in the legislative history, it is reasonable to assume that Congress did not expect this provision of FIFRA to operate in a way that would require registrants and non-registrants to be treated equally. Some inequality was bound to occur. 40/

As noted in connection with EDF's appeal, the 1947 FIFRA did not authorize non-registrants to request a hearing. In addition, there was no provision for publication of the notice; it was simply sent to the registrant, who then had 30 days after service thereof to file a request for a hearing. 41/ However, with the 1972 amendments to FIFRA which expanded the right to request a hearing to include non-registrants who are adversely affected by the notice, an obvious need arose to provide some means of notifying them that the proposed action would become final and effective unless they made a timely request for a hearing. Since the number of individuals who fall in that class is not known and their identities are not readily ascertainable, publication in the Federal Register was clearly the only feasible way of putting them on notice

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40/ Actually there is a third interpretation which does achieve parity between the two categories. It is based on the assumption that the notice provisions of §6(b) permit a registrant who allowed both periods to lapse before requesting a hearing (i.e., 30 days from actual receipt, and 30 days from publication) to later come in and have his untimely request ruled "timely" by virtue of the fact that it was nevertheless filed before the expiration of some other registrant's deadline (regardless of whether or not the latter actually filed a request). However, this interpretation is so obviously at odds with common sense that it must be dismissed as being totally implausible.

41/ See note 16, supra.

that their interests might be adversely affected by the Agency's proposed action. Therefore, it is reasonable to infer that the publication provision in §6(b) was primarily intended to prescribe a deadline for non-registrants. The fact that it might also benefit registrants must be viewed as incidental. Constructive notice through publication in the Federal Register is not normally regarded as a satisfactory substitute for actual notice when the identity and location of the affected person is known or readily ascertainable, as is the case with registrants. Constructive notice by publication in the Federal Register is, however, normally regarded as adequate when the identity and location of the affected person is not known or readily ascertainable, as is the case with non-registrants who are adversely affected by the notice. Therefore, it is unlikely that Congress intended to put non-registrants, such as Florida Citrus Mutual, on the same footing as registrants in terms of defining when their rights to request a hearing would be cut-off by the passage of time. Non-registrants were given the right to request a hearing as a matter of legislative grace in order to ensure that the interests of farmers and other consumers would be considered before a pesticide's availability was restricted or terminated, not because they were entitled to a hearing as a matter of law. Cf. McGill v. Environmental Defense Fund, supra at 637.

It is unreasonable to assume that Congress intended to grant a grace period to non-registrants (in order to cure a lack of due diligence in

responding to the published notice) which has the cloudy contours envisaged in the interpretation advanced by Florida Citrus Mutual. In order for Florida Citrus Mutual to establish that its request was timely under its interpretation, Florida Citrus Mutual was forced into the position of attempting to locate a registrant who had not received a copy of the notice until after the publication date. Based on that search, it uncovered a reg strant, Tower Chemical Company of Clermont, Florida, which did not receive a copy of the notice until March 1, 1979. Therefore, according to Florida Citrus Mutual, it had 30 days from the receipt of Tower Chemical Company's notice, or until March 31, 1979, to file its request for a hearing. Notwithstanding Florida Citrus Mutual's ingenuity and success in locating Tower Chemical Company, it is unlikely that Congress intended §6(b) to operate in this way. It seems more likely that it intended a more objective and easily ascertainable method of judging the timeliness of non-registrants' hearing requests. By referencing the timeliness of such requests to the date of publication in the Federal Register, Respondent established such a method.

Conclusion

The Accelerated Decision of the Chief Administrative Law Judge is affirmed in its entirety.

Douglas M. Costle
Administrator

Dated: August 20, 1979