NRDC v. SEC: A Question of Judicial Review

I. INTRODUCTION

The National Environmental Policy Act of 1969 ("NEPA")[1] is a broad policy statement of Congressional intent to maintain the quality of our environment. Section 101[2] of NEPA establishes environmental protection as a national priority requiring agencies to use all means possible to promote the protection of the environment without causing needless harm and undesirable consequences.[3] Section 102[4] contains procedural obligations to implement the substantive policies of Section 101. Section 102 provides, in pertinent part, that:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
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> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-

1. 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976).
2. 42 U.S.C. § 4331 (1976).
3. Section 101(b), 42 U.S.C. § 4331(b) states the goals of NEPA:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

4. 42 U.S.C. § 4332 (1976).

making along with economic and technical considerations;

* * *

(E) study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves conflicts concerning alternative uses of available resources. . . .[5]

Natural Resources Defense Council v. Securities and Exchange Commission[6] ("*NRDC*") focused on the appropriate standard of judicial review required under the Administrative Procedure Act ("APA")[7] of attempts by the SEC to comply with both NEPA and the federal securities laws. However, in this area, NEPA and the securities laws conflict. NEPA requires an in-depth review of administrative actions in order to give effect to its substantive provisions. On the other hand, the principal purpose of the federal securities laws is full disclosure of material information to shareholders. The securities laws vest broad discretion in the SEC to determine materiality. Courts usually defer to these administrative determinations.

NRDC resulted from an initial request in 1971 by the Natural Resources Defense Council ("NRDC") and other corporate responsibility groups to force the SEC to promulgate more comprehensive environmental disclosure rules than those in existence at the time.[8] The SEC adopted a few new rules[9] as a result of that request, but the NRDC, unsatisfied, brought suit; the District of Columbia District Court remanded the case to the SEC for further rulemaking proceedings.[10] Again, the SEC refused to promulgate the additional rules.

The case came before the District Court for a second time; the court finding that the SEC did not fulfill its duties under NEPA "to the fullest extent possible."[11] On appeal, the Court of Appeals for the District of Columbia Circuit initially determined that judicial review of the issues before it was proper. The court then sepa-

5. *Id.*

6. 606 F.2d 1031 (D.C. Cir. 1979).

7. 5 U.S.C. §§ 551-576, 701-703, 3105, 3344, 5371, 7521 (1976).

8. The court also reviewed an equal employment issue which will not be dealt with in this comment.

9. Securities Act Release No. 5386 (April 20, 1973), 38 Fed. Reg. 12,100 (1973).

10. Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D.D.C. 1974).

11. Natural Resources Defense Council v. SEC, 432 F. Supp. 1190, 1205 (D.D.C. 1977), *rev'd* 606 F.2d 1031 (D.C. Cir. 1979).

rated the procedural issues from the substantive issues arising under NEPA and ostensibly applied different standards of review to each.

This comment, after reviewing the Court of Appeals' opinion, will examine whether determining the standard of judicial review based on a distinction between "procedural" and "substantive" issues was in accord with NEPA and case law. Assuming that such a distinction was correct, this comment will analyze whether the court actually invoked the standards it purported to apply and whether those standards actually give effect to the substantive provisions of NEPA.

II. Case History

NRDC involves an attempt by the NRDC and other corporate responsibility groups to force the SEC to promulgate rules requiring comprehensive disclosure by corporations of their environmental policies.[12] The groups' original request, made on June 7, 1971, asked the SEC to promulgate rules requiring corporations to disclose, in both registration and proxy statements, (1) the impact upon the environment caused by the production of major products, and attempts to remedy that impact, and (2) changes in production and advertising made to advance environmental concerns.[13] Petitioners alleged that NEPA supports, and may even require, such rules.

Although the SEC refused to promulgate the requested rules, they proposed rules requiring a more limited amount of corporate disclosure.[14] The final rules adopted by the SEC required disclosure of only the material financial effects of corporate compliance with the federal environmental laws.[15] These rules were less sweeping than the petitioners' proposals. Unsatisfied with these adopted rules, the petitioners sought review in the District Court for the District of Columbia,[16] which found that the SEC had failed to comply with the procedural requirements of NEPA.[17] The

12. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1036 n.1 (D.C. Cir. 1979).
13. Natural Resources Defense Council v. SEC, 389 F. Supp. 689, 694 (D.D.C. 1974).
14. Securities Act Release No. 5235 (Feb. 16, 1972), 37 Fed. Reg. 4365 (1972).
15. Securities Act Release No. 5386 (April 20, 1973), 38 Fed. Reg. 12100 (1973).
16. Natural Resources Defense Council v. SEC, 389 F. Supp. 689 (D.D.C. 1974).
17. *Id.* at 699.

District Court remanded the case to the SEC with instructions to develop a record with respect to two key factual issues: (1) the extent of "ethical investor"[18] interest in the type of information plaintiffs were seeking; and (2) alternatives that ethical investors may pursue which will help eliminate corporate practices which adversely affect the environment.[19]

In response to the remand, the SEC began further rule-making proceedings.[20] After extensive hearings, the SEC announced that the plaintiffs' proposed rules would not be adopted and instead promulgated a final set of disclosure rules which were largely the same as those the agency had proposed earlier.[21] The new rules required disclosure of information concerning: (1) material effects that compliance with all environmental protection laws may have upon capital expenditures, earnings and the competitive position of public corporations; (2) all litigation involving environmental concerns against the company by a governmental authority (including any litigation being contemplated); and (3) all other environmental information which the average, prudent investor would consider important.[22]

Upon rejection by the SEC of the NRDC's proposals, the parties cross-moved in the District Court for summary judgment.[23] The court ruled that the SEC's actions were arbitrary and capricious and granted the NRDC's motion.

First, the District Court decided that the SEC's refusal to consider requiring solely disclosure of environmental information to shareholders in proxy solicitations was arbitrary.[24] Second, the court found that the Commission did not substantiate its findings that disclosure of environmental information by registrants would be too costly.[25] Finally, the court held that the SEC failed to comply full with NEPA's Section 102 requirement that agencies consult

18. By "ethical investor," the court was referring to the average, prudent investor who is aware of and concerned with the environment. *See* Securities Act Release No. 5704 (May 6, 1976), 41 Fed. Reg. 21632 (1976).

19. Natural Resources Defense Council v. SEC, 389 F. Supp. 689, 699 (D.D.C. 1974).

20. Securities Act Release No. 5569 (Feb. 11, 1975), 40 Fed. Reg. 7013 (1975).

21. Securities Act Release No. 5386 (April 20, 1973), 38 Fed. Reg. 12100 (1973).

22. Securities Act Release No. 5704 (May 6, 1976), 41 Fed. Reg. 21632 (1976).

23. Natural Resources Defense Council v. SEC, 432 F. Supp. 1190 (D.D.C. 1977), *rev'd* 606 F.2d 1031 (D.C. Cir. 1979).

24. *Id.* at 1205.

25. *Id.* at 1206.

with the Council on Environmental Quality ("CEQ") to develop environmental standards.[26]

III. Standards of Review And The Court of Appeals

The SEC appealed the District Court's decision.[27] The NRDC and the other corporate responsibility groups responded by arguing that the SEC failed to comply with the procedures mandated by NEPA, both by not consulting adequately with CEQ and by refusing to consider the alternative of a limited disclosure rule.[28] In addition, the appellees claimed that the SEC's decision not to adopt the proposed rules was arbitrary and capricious because the Commission's analysis of the costs and benefits of environmental disclosure was not supported by the administrative record.[29]

The appellate court first determined whether the SEC decision was subject to judicial review at all. Section 701(a) of the APA[30] creates the presumption that judicial review should be granted unless, as the court stated, there is a "clear showing that judicial review would be inappropriate."[31] Section 701(a) provides for review of agency actions "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The court found that "judicial review was not precluded by the first Section 701(a) exception"[32] in that neither the APA nor the securities laws indicate an intent to negate judicial review under the circumstances present in this case.[33]

The second exception noted in Section 701(a), which was considered in greater depth by the court, reflects a conflict between the desire to provide agencies with freedom to act and to protect individuals who are subject to such agency action. While the preamble to Section 701(a) provides for review "except to the extent that . . .

26. *Id.* at 1207.

27. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1044 (D.C. Cir. 1979).

28. *Id.*

29. *Id.*

30. 5 U.S.C. § 701(a) (1976).

31. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1043 (D.C. Cir. 1979), citing Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

32. *Id.*

33. *Id.* at 1043 n.13, citing Morris v. Gresette, 432 U.S. 491, 501 (1977).

agency action is committed to agency discretion by law," Section 706(2)(A) requires that the reviewing court shall only set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[34]

In determining whether the second exception noted in Section 701(a) was applicable to the instant case, the court labeled the NRDC's claims as either "procedural" or "substantive."[35] The court said that two of the appellees' claims—that the SEC did not consult properly with the CEQ and that it failed to consider the alternative of limiting environmental disclosure to proxy material—were both procedural, though appellees' third claim, that the Commission's decision not to adopt the proposed rules was arbitrary and capricious, was categorized as substantive.[36]

The court made this distinction because, in its view, "the reviewability analysis is quite different in the two cases."[37] As to the alleged failure on the part of the SEC to comply with the procedures mandated by NEPA, the court concluded that the SEC's actions were reviewable for two reasons: (1) the SEC's effectiveness in carrying out its duties would not be impaired by judicial review of its procedural compliance with NEPA;[38] and (2) the issues were "appropriately framed for judicial consideration."[39]

The court then turned to the "substantive" issue and concluded that the SEC's decision not to adopt their proposed environmental disclosure rules was reviewable.[40] The court noted that there were several strong policy considerations which mitigated against review of "substantive" agency decisions. First, although NEPA makes "environmental considerations part of the SEC's substantive mission,"[41] NEPA does not require the Commission to reach specific results. Therefore, plaintiffs' interest in a particular outcome will rarely be so compelling as to require judicial review.[42] Also, the

34. 5 U.S.C. §§ 701, 706 (1976).

35. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1044 (D.C. Cir. 1979).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1045.

40. *Id.*

41. *Id.*, referring to Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 558 (1978); Calvert Cliffs' Coordinating Comm'n v. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

42. *Id.* at 1045.

court noted that: (1) review will interfere with the agency's performance as required by statute; and (2) the issues may not be well suited for judicial resolution, *i.e.*, they may be based on factors which are not ascertainable by the court but depend upon the specific knowledge of the agency.[43]

However, the court pointed out that the factors weighing against review were not dispositive in the instant case because the agency had already engaged in extensive rule-making proceedings.[44] The court also emphasized the importance of corporate democracy, and argued that judicial review would help to ensure that the SEC gives sufficient consideration to citizen participation.[45] While judicial review is useless without a record and a statement of reasons for the agency's decision, the SEC here had already held extensive rule-making proceedings which narrowly focused on the proposed rules at issue and gave detailed reasons for rejecting those rules.

In concluding that the substantive questions presented will be "amenable to at least a minimal level of judicial scrutiny,"[46] the court looked to two recent cases where it also reviewed agency decisions not to adopt specific rules. In *National Black Media Coalition v. Federal Communications Commission*,[47] the Federal Communications Commission ("FCC") was asked to promulgate quantitative standards for television broadcasters involved in comparative renewal proceedings. Those standards were the subject of extensive rule-making procedures conducted by the FCC. The court reviewed the FCC's actions even though the agency's decision was " 'a policy judgment traditionally left to agency discretion.' "[48] Similarly, in *Action for Children's Television v. Federal Communications Commission*,[49] the court reviewed the FCC's decision not to adopt rules proposed by a public interest group to improve children's television. In both those cases, review was conducted without explicit consideration by the court of whether such review was appropriate.[50]

43. *Id.*
44. *Id.* at 1045-46.
45. *Id.* at 1046.
46. *Id.* at 1047.
47. 589 F.2d 578 (D.C. Cir. 1978).
48. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1047 (D.C. Cir. 1979), quoting National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1978).
49. 564 F.2d 458 (D.C. Cir. 1977).
50. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1047 (D.C. Cir. 1979).

The court concluded in *NRDC* that the SEC's decision not to adopt the environmental rules was reviewable:

> These cases, in our view, do not support a general rule that discretionary agency decisions not to adopt rules are reviewable *per se*. In this situation, as we have noted, the relevant factors incline against reviewability; the interests of plaintiffs are usually not compelling, there is a possibility of some minor interference with effective agency performance, and the issues will often be poorly suited for judicial resolution. Rather, *Action for Children's Television* and *National Black Media Coalition* stand for the more limited principle that, in light of the strong presumption of reviewability, discretionary decisions not to adopt rules are reviewable where, as here, the agency has in fact held a rulemaking proceeding and compiled a record narrowly focused on the particular rules suggested but not adopted.[51]

In determining the proper standard of judicial review to apply, the Court of Appeals pointed out that Congress' primary purpose in enacting the judicial review provision of the APA,[52] was to strike

51. *Id.* at 1047 n.19, citing, for support, Medical Comm'n for Human Rights v. SEC, 432 F.2d 659, 665-73 (D.C. Cir. 1970), *vacated and remanded with instructions to dismiss as moot*, 404 U.S. 403 (1972); and Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974). As the court's footnote points out, the court in *Medical Committee* reviewed a decision by the full Commission which allowed a corporation to omit from its proxy statements certain shareholder proposals. The court's decision was based on the "formality" of the SEC's actions. On the other hand, as the footnote also states, *Kixmiller* denied review under similar circumstances, distinguished only by the fact that the SEC decision was not supported by the full Commission.

Although the court in *NRDC* questioned the continued vitality of *Medical Committee*, it determined that the distinction between the two cases was a sound one. The court resolved that, in general, the more complete an agency's consideration on the issues, the more appropriate such a case is for judicial review.

52. Administrative Procedure Act, § 10(e), 5 U.S.C. § 706(e) (1976), notes the scope of judicial review as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The 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;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556

a balance between efficient and effective agency action and the fairness of agency decision making.[53] Where pure questions of law are involved, the APA demands a close review of the agency's actions.[54] However, administrative actions often involve the particular expertise of the agency making the fact determination. In such circumstances, the reviewing court is required to afford a significant amount of deference to the agency's decision[55] and the substantial evidence test of Section 706(2)(E) is applied. If there is "substantial evidence" in the factual record to support the agency's decision, a reviewing court will not interfere with it. The arbitrary and capricious standard of review of Section 706(2)(A) is applied in those situations where, for example, an agency is acting in a quasi-legislative manner. In such a case, the agency decision is afforded substantial deference and a reviewing court will only alter the agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[56]

The *NRDC* court decided that a different standard of review should be applied to the issues the court labeled "procedural" than to those termed "substantive."[57] The court applied an exacting review to determine whether the SEC complied with the procedures mandated by NEPA.[58] It developed this standard of review by analogizing the case before it to cases involving NEPA's environmental impact statement requirement,[59] in which a strict standard

and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

53. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

54. Administrative Procedure Act, §§ 10(e)(2)(B), (C), and (D), 5 U.S.C. §§ 706(2)(B), (C), and (D) (1976).

55. Administrative Procedure Act, §§ 10(e)(2)(A) and (E), 5 U.S.C. §§ 706(2)(A) and (E) (1976).

56. *Id.* at § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1976).

57. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

58. *Id.* The court decided that the Section 706(2)(D) standard is appropriate to deal with questions of procedural compliance with NEPA.

59. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1048-49 (D.C. Cir. 1979), comparing Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

of review to determine an agency's procedural compliance with NEPA was applied. The court also noted that environmental concerns, at times, run counter to the Commission's main purpose of protecting investors. Thus, it is left to the reviewing court to insure that the SEC carries out the procedural requirements of NEPA.[60] Therefore, with respect to review of whether the SEC complied with NEPA procedures (*i.e.*, consultation with the CEQ and the consideration of alternatives), the court stated that it would exercise fairly careful scrutiny. Further, the Commission will be required to consider reasonable alternative environmental disclosure rules and to give sufficiently detailed reasons for rejecting the proposed rules in order to allow proper judicial scrutiny.[61]

This strict review is based on Section 706(2)(D), which requires a reviewing court to invoke the substantial inquiry test.[62] Initially, this involves a determination by the reviewing court as to whether the agency acted within the scope of its authority. Such a determination takes into account both the extent of the agency's authority and whether the agency's decision was within the scope of that authority.[63] In so doing, the court is required to determine whether the necessary procedural steps were followed. The court in *NRDC* assumed that the SEC acted within the bounds of its established authority. The ultimate question for the court, then, was whether the SEC went "far enough."[64]

Unlike its review of the SEC's procedural compliance with NEPA, the court applied the lesser arbitrary and capricious standard of review to the SEC's refusal to adopt the environmental disclosure rules, since the Commission's decision was the result of informal rule-making procedures under Section 4 of the APA, 5 U.S.C. § 553.[65] While those issues that are within the area of the

60. *Id.* at 1049.

61. *Id.* at 1053.

62. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). *Overton Park* involved a challenge to the Secretary of Transportation's decision to bisect Overton Park, in Memphis, Tennessee, with a highway. Although the case predates NEPA, its interpretation of the APA and judicial review of agency decisions is helpful when questions of enforcement arise.

63. *Id.* at 415-16.

64. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979).

65. *Id.* at 1049, citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 535-36 n.14 (1978); FCC v. National Citizens Comm'n for Broadcasting, 436 U.S. 775, 802-03 (1978); Weyerhauser Co. v. Costle, 590 F.2d 1011, 1024 (D.C. Cir. 1978).

court's competence deserve more than minimal review, other aspects of administrative action, not properly suited for judicial scrutiny, are usually afforded more deference by a reviewing court. The court thus concluded that the stringency with which the arbitrary and capricious standard should be applied depends on the facts of each individual case.[66] Factors to be taken into account are: "the intent of Congress, as expressed in the relevant statutes, particularly the agency's enabling statute; the needs, expertise, and impartiality of the agency as regards the issue presented; and the ability of the court effectively to evaluate the questions posed."[67] The court considered these factors before deciding that the arbitrary and capricious standard was proper in the case before it.

First, the court noted that the legislative history of the 1933 and 1934 Securities Acts reflects an intent to delegate broad rule-making authority to the SEC.[68] This view is supported by the APA, which indicates that issues raised in informal rule-making cases under Section 4 of the APA[69] are not particularly well suited to judicial resolution and fall within the province of agency expertise.[70] The court decided that the factual issues before the Commission—*i.e.*, the extent of "ethical investor" interest in the information sought; the burden that corporations would incur in complying with the proposed disclosure rules; the extent to which the average investor would be confused by the additional information; and, the likelihood that the information requested would cause corporations to "adopt sounder environmental policies"—were within the field of the Commission's expertise.[71] To support this conclusion, the court argued that the review must be based on the record of an informal rule-making proceeding, and not on the result of an adversary proceeding. The undisciplined character of the record[72] in *NRDC* supported a more deferential standard of review.

The court declared that the question of whether it should review

66. *Id.* at 1050.
67. *Id.*
68. *Id.* at 1050-51.
69. 5 U.S.C. § 553 (1976).
70. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1051 (D.C. Cir. 1979).
71. *Id.* at 1052.
72. *Id.* The record was found by the court to be undisciplined because of the larger number of materials before the SEC, none of which passed through the filler of the rules of evidence nor the adversary process.

an agency decision at all is closely connected with the standard of review which will be applied.[73] Therefore, "considerations that counsel against judicial review of a decision not to adopt rules by informal rulemaking also call for . . ." special deference when the court exercises its review function.[74] Before remanding the case to the Commission, the court wanted to ensure that the agency's decision could not be sustained on the administrative record. Since the SEC was considering a large mass of materials, the proposed rules were not the primary focus of the proceeding, making the record less amenable to judicial review than it would normally be under the circumstances. Therefore, the court concluded that, with respect to the SEC's factual and policy determinations, review would be limited to requiring these determinations to have "some basis in the record."[75] The court's next step was to determine whether a reasonable person could have made the decision made by the SEC, given the factual and policy considerations involved.[76]

IV. APPLICATION OF STANDARDS OF REVIEW UNDER NEPA

The court first found that NEPA did not require the SEC to consider the alternative of a rule limiting required disclosure of environmental information to proxy statements. Despite the strict standard of judicial review it had developed earlier in its opinion, the court stated that it would apply a "rule of reason" test when analyzing this issue.[77] In an earlier case, *Natural Resources Defense Council v. Morton*,[78] the issue of an agency's obligation to consider alternatives under NEPA also arose, and that court decided that a rule of moderation, *i.e.*, the "rule of reason," should be applied. Although the rule requires the statute to be construed "in the light of reason,"[79] it does not release an agency from the obligation to consider alternatives "to the fullest extent possible."[80] Even though *Natural Resources Defense Council v. Morton* was an environmental impact statement case, the court found the rule of

73. *Id.*
74. *Id.*
75. *Id.* at 1053.
76. *Id.*, citing Weyerhauser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978).
77. *Id.*
78. 458 F.2d 827 (D.C. Cir. 1972).
79. *Id.* at 837.
80. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1054 (D.C. Cir. 1979), citing Section 102 of NEPA, 42 U.S.C. § 4332 (1976).

reason flexible enough to apply in *Natural Resources Defense Council v. SEC*.

The court then determined "whether the alternative of requiring environmental disclosure limited to proxy materials and related information statements was 'readily identifiable by the agency.' "[81] The court found it was not. First, the appellees, in commenting before the Commission, failed to focus specifically on that particular alternative.[82]

Second, the court pointed out that NEPA does not require agencies to consider alternatives when such consideration would serve no purpose. Since many of the Commission's reasons for rejecting across-the-board disclosure were "equally apposite"[83] to a limited proxy disclosure rule, the court found that the SEC was justified in limiting its consideration to across-the-board disclosure. Some of the reasons which the court found to be "equally apposite" to both disclosure rules are: (1) that investors are basically not interested in across-the-board disclosure,[84] (2) the disclosure of massive amounts of environmental information would confuse the average investor by obscuring more important information,[85] and (3) although proxy disclosure would entail lower costs than comprehensive disclosure, the former is not significantly less burdensome to registrants than the latter.[86]

Finally, the court noted that the SEC recognized that further consideration of the issue was necessary and decided to study the issues further.[87] The court accepted the administrative law principle invoked by the SEC that the court should not interfere with the structuring of agency proceedings.

It is the generally accepted procedure for an agency to decide whether to proceed by rule-making or by adjudication.[88] Likewise, on remand, agencies are usually allowed to determine which procedures will be used in decision-making.[89] Finally, the general rule,

81. *Id.*, citing Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972).
82. *Id.*
83. *Id.*
84. *Id.*, citing 40 Fed. Reg. 51662 (1975).
85. *Id.*, citing 40 Fed. Reg. 51660 n.27 (1975).
86. *Id.* at 1055.
87. *Id.* at 1056.
88. *See, e.g.*, NAACP v. FPC, 425 U.S. 662, 668 (1976); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).
89. Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976).

articulated by the Supreme Court in *Vermont Yankee Nuclear Power Plant v. Natural Resources Defense Council*,[90] ("Vermont Yankee") is that agencies, not courts, enlarge the minimum procedures required for rule-making by the APA.[91] In *Vermont Yankee*, the Supreme Court showed great deference to a decision by the Nuclear Regulatory Commission to license a nuclear plant, despite allegations that the procedures used by the agency made full evaluation impossible of many of the issues involved in that decision.

The Circuit Court's decision in *NRDC* was consistent with *Vermont Yankee*—the court ruled that the SEC's structuring of its own procedures must receive strong consideration in the determination of whether the procedural provisions of NEPA have been complied with.[92] The court concluded that where the agency in question, here the SEC, acknowledged the need for further rule-making proceedings, a large amount of deference would be shown to that decision in light of the difficulty of agency decision-making.[93]

The court in *NRDC* stated that it would also apply an exacting standard of judicial review to determine whether the SEC worked "to the fullest extent possible . . . in consultation with the Council on Environmental Quality," as the statute requires.[94] The District Court found that the SEC failed to comply with this mandate, and instead left to the Council on Environmental Quality and the Environmental Protection Agency the task of considering the requirement of comprehensive environmental disclosure.[95] The Court of Appeals, on the other hand, found that the SEC had consulted sufficiently with the Council.[96] During the SEC's proceedings, the CEQ appeared twice and offered support for corporate environmental disclosure requirements.[97] The CEQ felt that such require-

90. 435 U.S. 519 (1978).

91. *Id.*

92. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1056 (D.C. Cir. 1979).

93. *Id.* at 1057, citing Environmental Defense Fund v. Costle, 578 F.2d 337 (D.C. Cir. 1978).

94. National Environmental Policy Act of 1969, § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1976).

95. Natural Resources Defense Council v. SEC, 432 F. Supp. 1190, 1207-08 (D.C. Cir. 1977), *rev'd* 606 F.2d 1031 (D.C. Cir. 1979).

96. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1057 (D.C. Cir. 1979).

97. *Id.*

ments would be economical as well as responsive to the purposes of NEPA, provided that the Commission would be willing to develop specific enough standards to make the disclosure requirement work.[98]

The SEC rejected the CEQ's proposal after careful consideration. As the court pointed out, it was the SEC's view that

> the comprehensive type of disclosure sought by CEQ was not restricted 'to information which appears to be of interest to investors, but must [include also] disclosure which would be of interest to other persons and entities. For this reason, the Council's suggestion is not designed to, and would be unlikely to, produce information of the type which investors appear to be interested in.'[99]

In other words, the SEC felt that the CEQ's proposal lacked adequate grounding in the securities laws. The court agreed.[100] In addition, the court stressed that the SEC was planning to hold future rule-making proceedings on the environmental disclosure issue. In these proceedings, the CEQ, after "adjusting its proposals better to fit the intent of the securities laws and the needs of investors," would have another opportunity to act as consultant to the SEC.[101]

Finally, the Court of Appeals accepted the SEC's conclusion that the proposed disclosure requirements would place excessive financial and administrative burdens upon registrants. Applying the arbitrary and capricious standard of Section 706(2)(A) of the APA,[102] the court determined that the SEC could not be required to support its decision by factual proof given the limited extent of hard data available on the costs and benefits of disclosure.[103] The SEC was not precluded from adopting or declining to adopt rules because of this lack of hard data. The agency could act in a quasi-legislative manner, as does Congress when it legislates in a new area.[104] *Industrial Union Department v. Hodgson*[105] held that the mere absence of hard proof does not preclude an agency from en-

98. *Id.*
99. *Id.* at 1058, citing 41 Fed. Reg. at 21634 (1976).
100. *Id.* at 1058.
101. *Id.*
102. 5 U.S.C. § 706(a)(A) (1976).
103. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1058 (D.C. Cir. 1979).
104. *Id.* at 1059.
105. 499 F.2d 467, 474-75 (D.C. Cir. 1974).

gaging in rule-making; some agency rule-making decisions must occur before such proof becomes available. Therefore, the court in *NRDC* concluded that the SEC was justified in declining to adopt the proposed rules, even given the absence of factual data to support its decision.[106]

The highly deferential standard of review applied by the court when analyzing this "substantive" issue is in accord with the case[107] and statutory law in the area. Section 25 of the Securities Exchange Act of 1934 states: "The finding of the Commission as to the facts, if supported by evidence, shall be conclusive."[108] The court followed this when determining the scope of review of the administrative findings of fact in question. Accordingly, the Court of Appeals concluded that it would not disturb the findings of the SEC regarding the costs and benefits of environmental disclosure.

V. CRITICISM OF THE COURT'S APPROACH

The preliminary issue in *NRDC*—whether the case was an appropriate one for judicial review—was soundly reviewed by the court. The statutory presumption in favor of judicial review is strong.[109] In light of this presumption and the failure of this case to fall within any of the exceptions to judicial review found in Section 701(a) of the APA, the court was correct in holding the SEC's actions reviewable.

The court's analysis of the appropriate standard of judicial review to be applied to each issue was much more complicated. It classified the issues as either procedural or substantive and, based on these labels, determined which standard of review to apply. Thus, one must first determine whether the court was justified in the administrative law approach to a case which also involved NEPA and the securities laws.

Analyses of NEPA by both courts and commentators have tended to employ the traditional distinction between substance and procedure.[110] Sections 101 and 102(1) are usually labeled substan-

106. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1059 (D.C. Cir. 1979).

107. FCC v. National Citizens Comm'n, 436 U.S. 775, 814; FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 326, 329 (1976).

108. 15 U.S.C. § 77(i) (1976).

109. Administrative Procedure Act, § 10(a), 5 U.S.C. § 701(a) (1976).

110. *See, e.g.*, Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *See also* Leed, *NEPA of 1969: Is the fact of compliance a procedural or substantive question?* 15 SANTA CLARA LAW 303

tive while Section 102(2) is deemed to create specific procedural obligations designed to implement the substantive provisions of the statute.

This treatment is in accord with NEPA's language and legislative history. NEPA was intended to be more than an environmental full-disclosure law; it was intended to effect substantive changes in agency decision-making in accordance with the policies stated in Section 101.[111] To insure that these changes would be made, Congress included the "action-forcing" provision of Section 102(2).[112] To insure that agencies act "to the fullest extent possible" in accord with the policies of NEPA, "the prescribed procedures [must be] faithfully followed: grudging, pro forma compliance will not do."[113] Therefore, although most courts have characterized the substantive policies of NEPA as flexible,[114] the procedural section requires an agency to engage in a "careful and informed decision-making process and creates judicially enforceable duties."[115]

(1975); Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 So. Dak. L. Rev. 279 (1974); Note, *Judicial Review, Delegation, and Public Hearings Under N.E.P.A.*, 1974 Duke L.J. 423 (1974); Comment, *National Environmental Policy Act: What Standard of Judicial Review?* 39 J. Air L. & Com. 643 (1973).

111. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

112. *Id.* at 297-98.

113. Congress, upon discussing the intended effect of these "action-forcing" provisions, revealed that

> the . . . language does not in any way limit the congressional authorization and directive to all agencies . . . unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . . Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in Section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 4 n.62 (1969). *See* Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974). *See also* Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972), where the court held that "purely mechanical" compliance is not sufficient; agencies are under an obligation to give good faith consideration to adverse environmental consequences.

114. *See, e.g.*, Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1139 n.33 (5th Cir. 1974); Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

115. Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

Given the Congressional intent in creating NEPA, the strict standard of review of the APA appears to be warranted. Anything less would mean that NEPA would have little effect. For example, if the less stringent "arbitrary and capricious" standard of Section 706(2)(A) were applied, courts would very rarely interfere with agency decisions. Although these decisions do deserve much deference, especially given the discretion accorded the Commission by the securities laws, the purposes of NEPA must be kept in mind. As was just indicated *supra*, strict compliance with the statute's procedural provisions is necessary in order for it to have any significant substantive effect. Therefore, Section 706(2)(D) provides the appropriate standard of judicial review.

Courts ruling on the subject have stated that a strict standard of compliance with the procedures of NEPA will be imposed upon agencies.[116] This is consistent with the NEPA requirement that agencies comply with its provisions "to the fullest extent possible."[117] In other words, NEPA's procedural requirements are not inherently flexible; they must be complied with to the fullest extent possible, regardless of the administrative or economic cost, unless there is a clear conflict of statutory authority.[118]

However, when courts have actually been faced with reviewing agency compliance with the procedural provisions of NEPA, they have generally applied the "rule of reason" standard.[119] In dealing with the requirements of NEPA, Section 102(2)(E),[120] the Court of Appeals in *Natural Resources Defense Council v. Morton*[121] formulated the "rule of reason" test. It stated that "[t]he statute must be

116. *See, e.g.*, Scientists Inst. for Public Information, Inc. v. AEC, 481 F.2d 1079, 1091 (D.C. Cir. 1973); Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

117. Sierra Club v. Morton, 510 F.2d 813, 818-19 (5th Cir. 1975); Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 297 n.12 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

118. Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

119. *See, e.g.*, Sierra Club v. Morton, 510 F.2d 813, 818-19 (5th Cir. 1975); Carolina Environmental Study Group v. United States, 510 F.2d 796, 798 (D.C. Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

120. 42 U.S.C. § 4332(2)(E) (1976), requires all federal agencies to:

> study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . . .

121. 458 F.2d 827, 834 (D.C. Cir. 1972).

construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite."[122] The court also noted that although such a standard does not relieve an agency from the consideration of alternatives, which must be considered "to the fullest extent possible,"[123] the rule is merely one of reasonableness.[124]

The rule of reason has also been applied in cases dealing with the sufficiency of environmental impact statements.[125] Though courts have reviewed environmental impact statements to determine whether the procedural requirements of NEPA Section 102(2)(C) have been met, they have refused to substitute their judgment regarding the wisdom, advisability, and benefits of undertaking a particular project for that of the agency.

The *NRDC* court,[126] after declaring its intention to use a strict standard of judicial review in the early part of its opinion, later stated that it would apply the "rule of reason" test set out in *National Resources Defense Council v. Morton*[127] to determine whether the SEC had fulfilled its obligation under NEPA to examine "appropriate alternatives to recommended courses of action."[128] In applying that test, however, the court appears merely to check whether the Commission has mechanically complied with the requirements of Section 102 of NEPA. When the court decided that the Commission was justified in not considering the alternative of a disclosure rule limited to proxy statements, it in effect gave full deference to the SEC's determination.[129] For example, the court accepted the SEC's view that the agency's reasons for rejecting a comprehensive disclosure requirement were equally apposite to a

122. *Id.* at 837.

123. National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4332 (1976).

124. Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972).

125. *See, e.g.*, Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974); Sierra Club v. Froehlke, 345 F. Supp. 440 (D.C. Wis. 1972), *aff'd*, 486 F.2d 946 (7th Cir. 1973).

126. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

127. 458 F.2d 827 (D.C. Cir. 1972).

128. National Environmental Policy Act of 1969, § 102(2)(E), 42 U.S.C. § 4332(2)(E) (1976).

129. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1042 (D.C. Cir. 1979).

limited disclosure rule.[130] It did not examine the possibility that there might be a significant difference between disclosure in registration statements and disclosure in proxy statements, based on the greater significance of the latter for the protection of shareholders. In fact, it seems that the court was not even exercising a standard of review as strong as the "rule of reason." Arguably under that standard, as formulated in *Natural Resources Defense Council v. Morton*,[131] the proxy alternative would have to be considered. Therefore, even though the court stated that it was applying the "rule of reason" test, as other courts had, it was really paying more deference to the SEC than that test normally permits. While such deference to the Commission's decisions is in accord with the discretion afforded the agency by the federal securities laws, it is not in accord with either the purposes or the language of NEPA.[132] As discussed *supra*, this can be effectuated only through an exacting judicial review, one stronger than the "rule of reason" test. If courts continuously refuse to apply a stringent standard of judicial review to the procedural mandates of NEPA, the substantive effect of NEPA will be diminished significantly.

The other "procedural" issue, whether the SEC consulted with the CEQ sufficiently to fulfill the requirements of NEPA, Section 102(2)(B),[133] received only cursory treatment. The CEQ, which has broad power and specialized knowledge, was established to advise the President. The CEQ is empowered to: (1) issue "guidelines" to federal agencies for the preparation of environmental impact statements;[134] (2) issue regulations to Federal agencies for implementation of the procedural provisions of NEPA;[135] (3) issue instructions to agencies to perform their duties under the Act; and (4) aid the President in the preparation of his annual environmental quality report to Congress. The CEQ serves a purely advisory function; though it can use the resources of public and private agencies

130. *Id.*

131. 458 F.2d 827 (D.C. Cir. 1972).

132. The purposes and language of NEPA place agencies under a duty to actively develop alternatives. *See* National Environmental Policy Act of 1969, § 102(2)(E), 42 U.S.C. § 4332(2)(E) (1976).

133. Section 102(2)(B) of NEPA requires that federal agencies, in consultation with the CEQ, develop methods and procedures designed to give previously unquantified environmental amenities appropriate weight in decision making with technical and economic considerations. 42 U.S.C. § 4332(2)(B) (1976).

134. Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970).

135. Exec. Order No. 11991, 42 Fed. Reg. 26967 (1977).

when carrying out its functions, it has no power to compel agencies to act. Despite this, the CEQ has broad powers and was intended by NEPA to help agencies deal with environmental issues.

Courts have found that the purpose of Section 102(2)(B) of NEPA is to lend methodology to a broad interdisciplinary approach.[136] The requirement of consultation with the CEQ helps agencies to develop purposeful methods and procedures to evaluate objectively the full environmental impact of a proposed project. It has therefore been held that where several agencies are in communication regarding the evaluation of actual environmental impact, interagency contact must be "true consultation."[137]

Given the purposes of the requirement of consultation with the CEQ and how this requirement has been interpreted, it is obvious that the court in *NRDC* did not fully comply. The court never questioned the SEC's decisions (i) not to discuss alternatives other than comprehensive disclosure with the CEQ, and (ii) that full consultation with the CEQ was unnecessary because its proposal was not adequately grounded in the securities laws.[138] Such treatment of the Commission's consultation with the CEQ does not satisfy the mandates of NEPA.

As noted above, courts have drawn distinctions between the procedural and substantive provisions of NEPA, and then applied the "rule of reason" standard to determine compliance with procedural provisions. However, courts do not generally distinguish between the underlying substantive agency action and whether the agency followed the procedural steps required to comply with NEPA, as the court did in *NRDC*. The substantive agency action involved a determination of the costs and benefits of the proposed disclosure rules. Applying an arbitrary and capricious standard of judicial review, the court found that the SEC's decision on this issue was sound. Although it may be argued that such a deferential standard of review is appropriate when dealing with cost-benefit analyses,[139] the agency action viewed by the Court of Appeals as substantive is

136. *See, e.g.*, Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974); Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973).

137. "True consultation" involves something more than mere mechanical compliance with NEPA's requirement that agencies consult with the CEQ. Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973).

138. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1057 (D.C. Cir. 1979).

139. *See, e.g.*, Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 527 (1941).

not usually classified as such.[140] Moreover, such deference to the agency's judgment in this matter conflicts with the Congressional intent to give substantive effect to NEPA, *i.e.*, to protect the environmental interests of all citizens by making consideration of environmental factors a primary duty of all federal agencies.[141]

In fact, the *NRDC* decision, in this regard at least, seems contrary to current trends in this area of the law. In *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*,[142] a case involving Section 102 of NEPA in the water resource area, the court required agencies to engage in extensive cost-benefit analyses to lead to "optionally beneficial action."[143] Although it may be read narrowly and limited to the water resource area, the opinion suggests that such cost-benefit analysis, previously immune from judicial review, should not be scrutinized by courts because of NEPA.[144]

In *Sierra Club v. Froehlke*,[145] the court proved willing to expand judicial review of agency cost-benefit analyses in fact situations covered by NEPA. It involved an action to enjoin further work on a dam, the Wallisville Project. The court refused to bypass an examination of a cost-benefit analysis, at least insofar as it was relevant to environmental considerations within the Trinity and Wallisville projects, where the procedures used tended to intertwine environmental and non-environmental factors so that some environmental costs have not been qualified or considered at all.[146]

VI. OTHER APPROACHES TO THE DISCLOSURE PROBLEM

On September 27, 1979, the Securities and Exchange Commission issued two releases concerning the adequacy of disclosure with respect to environmental protection requirements.[147] The purpose of the releases was to remind registrants that the SEC, acting in accord with its NEPA duties, will monitor environmental disclosure and bring enforcement actions in cases of non-compliance. However,

140. Calvert Cliffs' Coordinating Comm'n v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

141. City of Davis v. Coleman, 521 F.2d 661 (C.A. Cal. 1975).

142. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

143. *Id.* at 1123.

144. Comment, *Judicial Review of Cost-Benefit Analysis Under NEPA*, 53 NEBRASKA L. REV. 540 (1974).

145. 359 F. Supp. 1289 (S.D. Tex. 1973).

146. *Id.* at 1363.

147. Securities Act Releases Nos. 33-6130, 34-16224 (September 27, 1979).

the Commission did not create any disclosure requirements.[148]

The release also clarified the necessity of disclosing the total costs of complying with environmental laws and the necessity of disclosing administrative proceedings.[149] Finally, it made clear that although there is no across-the-board environmental disclosure requirement, registrants continue to have disclosure obligations in two limited instances. First, if a corporation does disclose its environmental policy, such disclosures must be accurate and must be periodically updated so as not to become misleading.[150] Second, if a corporation engages in a policy which is likely to result in substantial fines or penalties, the corporation is required to disclose such information in order to prevent other disclosed information from being considered misleading.

Given that the SEC releases were promulgated only a short time after the Court of Appeals' decision in *NRDC*, it could be argued that the court was justified in not taking stronger action since the SEC appeared to be "in the process" of rule-making. However, the new SEC release did not expand the corporate disclosure requirements. Under the guise of deference to agency decision making, the court, in essence, permitted the SEC to indefinitely delay making a final decision on corporate disclosure of environmental information. Also, substantial deference to agency procedure is not in accord with the legislative intent behind NEPA, *i.e.*, to create a law which, by requiring full environmental disclosure, will assure substantial and consistent consideration of environmental factors in decision-making even where such disclosure may conflict with other federal objectives.[151] This intent, when considered together with the clear statutory language, strongly suggests that courts should not permit deference to administrative procedure to outweigh the realization of NEPA's underlying purposes.

Another possible approach is to question whether the proposed environmental disclosure rules should be adopted based on whether such information would be "material" to investors. This concept was defined by the Supreme Court in *TSC Industries, Inc. v. Northway*[152]—information is considered "material" if a reason-

148. See Securities Act Releases Nos. 5704 (May 6, 1976); 5386 (April 20, 1973); and 5170 (July 19, 1971).

149. Securities Act Releases Nos. 33-6130, 34-16224 (September 27, 1979).

150. *Id.*

151. *E.g.* Sierra Club v. Froehlke, 359 F. Supp. 1289, 1338 (S.D. Tex. 1973).

152. 426 U.S. 438 (1976).

able investor *would* consider the information in question important in determining whether to invest or how to vote.[153] The language in *TSC Industries* "permits the inference that standards of materiality may vary under different provisions of the securities acts."[154] If that is truly what the court intended, then materiality may not mean the same thing for purposes of registration statements as it does for proxy statements, since the latter protects investors more directly.

Even if the court in *TSC Industries* was being careful not to exceed the facts of the case before it, and did not mean to infer that varying standards of materiality apply under different provisions of the securities laws, it must be remembered that issues of materiality are mixed questions of law and fact. It involves the "application of a legal standard to a particular set of facts, and only if the established omissions are 'so obviously important to the investor, that reasonable minds cannot differ on the question of materiality' is the ultimate issue on materiality appropriately resolved 'as a matter of law' by summary judgment."[155] Therefore, when a case is before a court, the trier of fact is under a responsibility to look through the eyes of the "average, prudent investor."[156] In *NRDC*, the court could have taken a closer look at the question of materiality if it had initially determined that the SEC was not applying the appropriate legal standard, or was applying the correct standard incorrectly to the facts of the case. This approach would have been correct given both the procedural directives of Section 102 of NEPA and the purposes of the federal securities laws. The latter require disclosure to protect investors, to ensure that the securities markets operate in a free and open fashion, and to regulate corporations as major power centers of our society.[157]

The court could also have applied a stringent standard of review and thus acted in accordance with the purposes of NEPA, if it had viewed the agency's alleged violation of Section 102 of NEPA as presenting a federal question. If that were the case, judicial review

153. *Id.*

154. Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW 887 (1977).

155. *Id.* at 909-10, citing TSC Industries v. Northway, 426 U.S. 438 (1976); Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1129 (4th Cir. 1970).

156. TSC Industries v. Northway, 426 U.S. 438 (1976).

157. *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1980); Securities Exchange Act of 1934, 15 U.S.C. §§ 77b-e, 77j, 77k, 77m, 77o, 77s, 78a-o, 78p-hh, 78kk (1980).

would be under 28 U.S.C. § 1331 (1964). Since a question of law would then be involved, strict review of the SEC's actions would have been appropriate. Although this approach has been taken by a few courts,[158] it appears that most courts have referred to the APA to determine the applicable standard of review when the decisions of administrative agencies are involved.

VII. CONCLUSION

The question of what standard of judicial review to apply to administrative determinations under NEPA and the federal securities laws is a difficult one. In attempting to answer it, many courts have drawn a distinction between NEPA's procedural and substantive provisions. From there, they proceed to apply a very deferential standard of review to the substantive provisions, but a more exacting standard to the procedural provisions. Although most courts have recognized that strict compliance with the procedural provisions is mandated by NEPA, they generally refuse to apply a very strict standard of review to administrative actions which attempt to comply with procedural mandates.

The court in *NRDC* initially stated that it would apply a strict standard to determine whether the SEC complied with NEPA Section 102(2), which requires agencies both to consult with the CEQ[159] and to consider "appropriate alternatives."[160] When it later actually applied the standard to the facts, however, the court stated that it would follow the more deferential "rule of reason" test used by many other courts. Moreover, its actual review of all parts of the SEC's decision was extremely deferential. The court was very hesitant to disturb the judgment of the SEC which is vested with broad discretion by the federal securities laws. Also, the court's disposition of the case was significantly influenced by the SEC's decision to engage in further rule-making. As was mentioned earlier, this judicial deference to the Commission's procedure allows the agency to delay making a final decision on the question indefinitely. Thus, the agency is allowed to subvert, if not actually ignore, the very purposes NEPA was designed to serve.

158. Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va.), *aff'd* 484 F.2d 453 (4th Cir. 1973).

159. National Environmental Policy Act of 1969, § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1976).

160. National Environmental Policy Act of 1969, § 102(2)(E), 42 U.S.C. § 4332(2)(E) (1976).

In light of the Congressional goal of protecting the environmental interests of all citizens by mandating agencies to consider environmental factors in decision making, it seems wrong to merely require *pro forma* compliance with the procedural provisions of NEPA. Nevertheless, that is exactly what the Court of Appeals of the District of Columbia has done in *NRDC*. By paying substantial deference to the SEC's judgment, the court essentially ignored the underlying purposes of NEPA. Although NEPA does not mandate specific substantive results, it would make little sense for Congress to enact such a statute if it were to have virtually no effect. Therefore, the court should have applied a more exacting standard of judicial review to insure that the "action-forcing" procedural provisions of NEPA were complied with. Without such compliance, the broad policies articulated in Section 101 of NEPA have little meaning and less force.

Robin S. Miller