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## ENVIRONMENTAL DISCLOSURE IN CORPORATE SECURITIES REPORTING

*John Oliver Cunningham\**

### I. INTRODUCTION

For many years it was a common practice for barges to dump industrial acids, dredge spoils, and other wastes into the Atlantic Ocean just twelve miles south of Long Island and twelve miles east of the New Jersey coast. In March of 1970 a report was made on this dumping area by a team of scientists. The report stated that there was no life of any kind at the core of the dumping area, that this "dead sea" was almost twenty square miles in area, that the area appeared as a "black ooze" in a blue sea when viewed from the air, and that it would take anywhere from ten to one hundred years for the ocean currents to break up this dead sea.<sup>1</sup> The effects of this ecological disaster were not just limited to the immediate area. There were secondary effects on the atmosphere, the surrounding water and the food chain, with a resulting impact on our health and economy.<sup>2</sup> Although many large corporations or

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<sup>1</sup> W. JOHNSON, L. DELANNEY, T. COLE & A. BROOKS, *BIOLOGY* 874-75 (4th ed. 1972) [hereinafter cited as *BIOLOGY*].

<sup>2</sup> Over two-thirds of the planet's oxygen is produced by ocean algae and plankton. These and other marine life forms were affected by the "dead sea." Also, some chemical wastes were undoubtedly ingested by larger fish at the apex of the food chain. This kind of "food poisoning" was responsible for the many people killed, palsied and blinded in a Japanese village a few decades ago (Minamata Bay Disease). Undoubtedly, some of the pollution also reached bathing water on the beaches, making it unhealthy to enjoy water recreation. The pollution depleted the oxygen content of the sea, as well as its oxygen producing capacity, making the area incapable of supporting life. The consequential economic costs to commercial fisherman and others can not be known, but they were surely significant. See *BIOLOGY*, *supra* note 1, at 871, 874-75.

their subsidiaries had undoubtedly contributed to this pollution, these companies had no obligation to disclose their part in this pollution to their shareholders and prospective shareholders under securities law, even though shareholders are the theoretical "owners" of a corporation. Today, a decade after the report, environmental law has made great strides toward stopping this kind of activity; but under securities law, shareholders and prospective shareholders still have no right to know of this kind of corporate pollution.<sup>3</sup>

The limited obligations of corporations to make environmental disclosures to stockholders and prospective stockholders were challenged in the United States District Court for the District of Columbia in 1974 by the Natural Resources Defense Council (NRDC),<sup>4</sup> a public interest organization that attempts to prevent the continued degradation of the environment through media campaigns, lobbying, educational efforts and litigation.<sup>5</sup> Arguing that a federal environmental law affected the federal securities laws, the NRDC challenged a decision of the Securities Exchange Commission (SEC) not to adopt several NRDC proposals for broadening the scope of corporate environmental disclosure requirements.<sup>6</sup> The District Court twice remanded the issue to the agency after finding that the SEC had failed to fully consider adopting new environmental disclosure rules that would comply with the letter and spirit of federal environmental law.<sup>7</sup> Finally, in April of 1979, the United States Court of Appeals for the District of Columbia upheld the agency's refusal to promulgate new disclosure requirements;<sup>8</sup> in so doing, the court temporarily stifled

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<sup>3</sup> Even under existing securities laws, this corporate pollution would be "material," and thus subject to disclosure to shareholders, only if it was the subject of administrative or judicial prosecution. See Securities Release No. 5386, 38 Fed. Reg. 12, 101-02 (1973). Unfortunately, only an exceedingly small portion of the country's pollution - whether legal or illegal - ever becomes the subject of litigation. Thus, pollution by corporations is rarely disclosed. See statement by the Natural Resources Defense Council (NRDC) based on its experience as an educational and litigational group attempting to protect the environment, NRDC Brief at 46, NRDC v. SEC, 432 F. Supp. 1190 (1977).

<sup>4</sup> NRDC v. SEC, 389 F. Supp. 689 (D.D.C. 1974).

<sup>5</sup> Court's description of NRDC in NRDC v. SEC, 606 F.2d 1031, 1036 (D.C. Cir. 1979).

<sup>6</sup> The specific NRDC proposals are outlined in the Appendix to Stevenson, *The SEC and the New Disclosure*, 62 CORNELL L. REV. 50 (1976).

<sup>7</sup> NRDC v. SEC, 389 F. Supp. 689, 693 (D.D.C. 1974); NRDC v. SEC, 432 F. Supp. 1190, 1208-09 (D.D.C. 1977).

<sup>8</sup> NRDC v. SEC, 606 F.2d 1031, 1062 (D.C. Cir. 1979) (reversing NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977)).

judicial recognition of corporate responsibility for environmental disclosure to shareholders and investors. This decision by the Court of Appeals halted a possible expansion of an important environmental law, the National Environmental Policy Act (NEPA),<sup>9</sup> into the territory of agencies having little or no direct environmental impact,<sup>10</sup> and it represents a narrow judicial view of the function and effectiveness of disclosure in securities law.

This article will discuss the applicable law at the root of the controversy and the history of *NRDC v. SEC*. The article will also offer an analysis of the case and the implications of the decision, as well as a look at the potential for corporate environmental disclosure.

## II. THE APPLICABLE LAW

Three statutory areas underlie the *NRDC v. SEC* controversy. While the Securities Exchange Commission (SEC) derives its authority and responsibility from the Securities Act of 1933<sup>11</sup> and the Securities Exchange Act of 1934,<sup>12</sup> the NRDC argued that the duty of the SEC was modified by the mandates of the National Environmental Policy Act of 1969.<sup>13</sup> They argued further that the rights of the parties in SEC rulemaking and the scope of judicial review over SEC actions were governed by the body of administrative law surrounding the Administrative Procedure Act.<sup>14</sup>

### A. Securities Law

The regulation of the selling and trading of securities<sup>15</sup> became

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<sup>9</sup> 42 U.S.C. §§ 4321-4361 (1976).

<sup>10</sup> Disclosure under NEPA has basically been limited to disclosure of the environmental impact of proposed "major federal actions" through environmental impact statements. The NRDC proposal was unique in its request that the agency seek disclosure of the environmental impacts of private activity not licensed or authorized by the agency.

<sup>11</sup> 15 U.S.C. §§ 77a-77bbbb (1976).

<sup>12</sup> 15 U.S.C. §§ 78a-78kk (1976).

<sup>13</sup> 42 U.S.C. §§ 4321-4361 (1976). See *NRDC v. SEC*, 389 F. Supp. 689, 695 (D.D.C. 1974).

<sup>14</sup> 5 U.S.C. §§ 551-559, and §§ 701-706 (1976).

<sup>15</sup> "Security" is defined in § 2(1) of the Securities Act of 1933 which provides;

(1) the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, an interest or instrument commonly known as a "security," or any certificate of inter-

a matter of national interest when fully half of the fifty billion new securities sold in the United States between World War I and 1930 proved to be worthless by 1933.<sup>16</sup> This collapse in value resulted in large part from abuses in issuing and trading securities. For example, sellers of securities had deliberately overstimulated the demands of buyers in order to float a mass of essentially worthless stocks and bonds.<sup>17</sup> Promises of easy wealth were made to the buyers without disclosing to investors any of the facts essential to estimating the real worth of the securities.<sup>18</sup> The investment literature offered to the public was often misleading and illusory.<sup>19</sup>

In order to prevent harmful manipulation of securities markets and the sale of worthless investments by those seeking personal gain, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>20</sup> These acts were designed to require securities issuers to make full and fair disclosure of corporate information to the investing public.<sup>21</sup> According to President Roosevelt, Congress sought in these acts "a return to a clearer understanding of the ancient truth that those who manage banks, corporations, and other agencies handling or using other people's money are trustees acting for others."<sup>22</sup> The Securities Acts were an attempt to rebuild investor confidence in the market, to create

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est or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. § 77b(1) (1976).

<sup>16</sup> See FEDERAL SUPERVISION OF TRAFFIC IN INVESTMENT SECURITIES IN INTERSTATE COMMERCE H.R. REP. No. 85, 73d Cong., 1st Sess. 2 (1933).

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

<sup>20</sup> The Securities Act of 1933, ch. 38, § 1, 48 Stat. 74 (1933) (current version at 15 U.S.C. §§ 77a-77bbbb (1976)); The Securities Exchange Act of 1934, ch. 44, § 1, 48 Stat. 881 (1934) (current version at 15 U.S.C. §§ 78a-78kk (1976)). The purpose of the 1933 Act is "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." Ch. 38, 48 Stat. 74 (1933) (Preface to Act). The 1933 Act deals with the distribution of new securities for sale. See 15 U.S.C. § 77e (1976). The 1934 Act deals with regulation of securities trading. See 15 U.S.C. § 78b (1976). After the 1964 amendments to the acts, the SEC regulations applied to issuers having securities listed and traded on an exchange, and to all issuers with 500 holders of record of a class of equity securities plus at least one million dollars in assets. See 15 U.S.C. §§ 77d, 78l(g)(1), 78w(a) (1976); Cohen, "Truth in Securities" Revisited, 79 HARV. L. REV. 1340, 1340-41 (1966).

<sup>21</sup> R. SHIELDS & E. THOMAS, FEDERAL SECURITIES ACT HANDBOOK 13 (4th ed. 1977).

<sup>22</sup> President Roosevelt's Message to Congress (March 29, 1933), 77 Cong. Rec. 937, 937 (1933).

more stable markets, and to insure fair dealing in securities by imposing responsibilities of disclosure and fair dealing on all issuers of publicly traded securities.<sup>23</sup>

The agency responsible for achieving these goals through the administration of the securities laws is the Securities and Exchange Commission (SEC).<sup>24</sup> The Commission was established by the Securities Exchange Act of 1934 as an independent agency consisting of five commissioners appointed by the President.<sup>25</sup> These commissioners were authorized to appoint the lawyers, accountants, securities analysts and other experts necessary to perform the functions of the SEC under the Securities Acts.<sup>26</sup> As the agency responsible for implementing and enforcing the Acts, the Commission must insure that the investing public receives comprehensive information about securities issuers.<sup>27</sup> The SEC is empowered to accomplish this by the Securities Acts, which authorize the Commission to require securities issuers to disclose to investors such information as the SEC deems "necessary or appropriate in the public interest or for the protection of investors."<sup>28</sup>

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<sup>23</sup> See Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 625 (1964); Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 265 (1969).

<sup>24</sup> Securities Exchange Act of 1934, § 4, 15 U.S.C. § 78d (1976).

<sup>25</sup> *Id.* § 4(a), 15 U.S.C. § 78d(a) (1976).

<sup>26</sup> *Id.* at § 4(b), 15 U.S.C. § 77d(b) (1976).

<sup>27</sup> See R. SHIELDS & E. THOMAS, *FEDERAL SECURITIES ACT HANDBOOK*, *supra* note 21, at 13.

<sup>28</sup> This language appears throughout the Securities Acts. Examples include § 7 of the 1933 Act:

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents specified in Schedule A. . . . Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 77g (1976). Section 10(c) of the 1933 Act states:

(c) Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 77j(c) (1976). Section 14(a) of the 1934 Act covers proxy solicitations:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent, or authorization in respect of any security (other than an exempted security) registered

This comprehensive information reaches the public through the prospectus, a corporate disclosure statement that issuers must prepare before issuing a security.<sup>29</sup> The prospectus can not be issued until a registration statement containing material information about the issuer and its securities is in effect with the SEC.<sup>30</sup> The registration statement becomes effective within a specified period of time after it is filed with the Commission, but if the SEC finds the statement to be deficient for purposes of informing the investor, it can withhold approval and suspend the effective date until the statement is amended.<sup>31</sup> The registration statement

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pursuant to section 78l [§ 12] of this title.

15 U.S.C. § 78n(a) (1976).

<sup>29</sup> Section 5(b) of the 1933 Act states:

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 77; of this Title § 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title [§ 10].

15 U.S.C. § 77e(b) (1976).

<sup>30</sup> Section 5(a) of the 1933 Act states:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. § 77e(a) (1976).

<sup>31</sup> Securities Act of 1933, 15 U.S.C. §§ 77h(a), 77h(b) (1976). These sections state that:

(a) Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by

serves as the source for all information required in the prospectus. The statement contains important disclosure information about the nature and size of the issuer's business, the financial statements of the business, the management and other important aspects of the company.<sup>32</sup>

Important disclosure information also reaches the corporate shareholders through written proxy statements.<sup>33</sup> A proxy is a document that creates a voting-agency relationship by which a shareholder transfers his corporate voting power to the proxy holder.<sup>34</sup> Shareholder votes are important in determining who will compose the Board of Directors of a corporation,<sup>35</sup> in approving or disapproving shareholder proposals,<sup>36</sup> and in approving certain major corporate transactions.<sup>37</sup> The SEC's rules provide that no proxy solicitation<sup>38</sup> may be made unless each person solicited is furnished a proxy statement containing the information required by the Commission.<sup>39</sup> The information required in the statement concerns not only the company's business, but the shareholder's rights within the company,<sup>40</sup> in order to provide a fair opportunity for corporate suffrage.<sup>41</sup>

If a securities issuer does not provide the mandatory disclo-

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personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

<sup>32</sup> 15 U.S.C. §§ 77g, 77j and 77aa (1976).

<sup>33</sup> 15 U.S.C. § 78n (1976).

<sup>34</sup> A. FREY, J. CHOPER, N. LEECH & C. MORRIS, *CASES AND MATERIALS ON CORPORATIONS* 427 (2d ed. 1977), [hereinafter cited as FREY].

<sup>35</sup> *Id.* at 397.

<sup>36</sup> See *id.* at 475-506.

<sup>37</sup> Shareholder votes may be necessary in approving dissolutions or liquidations. *Id.* at 627-28. Shareholder votes may also be necessary to amend the articles of incorporation, or the by-laws of the company if so provided in the articles.

<sup>38</sup> Courts have held that a proxy solicitation can be any communication that is part of a continuous plan leading to a formal solicitation of votes. See, e.g., *SEC v. Okin*, 132 F. 2d 784, 786 (2d Cir. 1943).

<sup>39</sup> 17 CFR § 240.14a-3(a) (1979).

<sup>40</sup> *Id.* at § 240.14a-101 (1979).

<sup>41</sup> See *SEC v. Transamerica Corp.*, 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied* 332 U.S. 847 (1948); H.R. REP. No. 1383, 73d Cong., 2d Sess. 5, 13-14 (1934).



tures in its proxy statements or prospectuses, or if the issuer otherwise violates the Securities Acts, the company and those responsible for the issuance of the securities may face several sanctions.<sup>42</sup> Material misstatements in or omissions from a disclosure statement may lead to civil liabilities at the suit of a purchaser of the securities who was damaged by the misstatements or omissions.<sup>43</sup> Liability may extend to directors of the company, certain experts who helped prepare the statement, and even the underwriters of the securities.<sup>44</sup> A person who offers or sells a security without furnishing to the buyer a prospectus for which a registration statement is in effect may also suffer civil liability.<sup>45</sup> In addition to these sanctions, the SEC may enjoin the issuance of securities by a company,<sup>46</sup> and may transmit evidence of violation to the Attorney General for criminal proceedings.<sup>47</sup> The Attorney General may impose severe criminal penalties for wilful violations of any provision, rule or regulation of the Acts.<sup>48</sup> Thus, the securities laws provide strong incentive for issuers to make full and fair disclosures to the public.

Full and fair disclosure is "the keystone of the entire structure of federal securities legislation."<sup>49</sup> The Commission has said that "this emphasis on disclosure rests on two considerations. [One is in] seeing to it that investors and speculators have access to enough information to enable them to arrive at their own rational decisions. The other . . . rests on the belief that appropriate publicity tends to deter questionable practices and to elevate standards of business conduct."<sup>50</sup> The effectiveness of publicity as a deterrent is based upon a legislatively and judicially recognized notion that dishonest business conduct thrives upon ignorance and secrecy.<sup>51</sup> The eminent authority on securities law, Louis

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<sup>42</sup> Securities Act of 1933, 15 U.S.C. §§ 77k-77l (1976); Securities Exchange Act of 1934, 15 U.S.C. §§ 78r, 78t (1976).

<sup>43</sup> 15 U.S.C. § 77k(a), 78r (1976).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at §§ 77l, 77e, 77j.

<sup>46</sup> *Id.* at §§ 78r, 78u.

<sup>47</sup> *Id.* at 77t, 78u(d).

<sup>48</sup> Criminal sanctions may be levied up to \$500,000 or five years in prison, or both. *Id.* at 77x, 78ff.

<sup>49</sup> Report of special study of securities markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess. 1 (1963); cited by Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 607 (1964).

<sup>50</sup> SECURITIES EXCHANGE COMM., *THE WHEAT REPORT 10* (CCH) (1969).

<sup>51</sup> See H.R. REP. No. 1383, 73d Cong., 2d Sess. 11 (1934), reprinted in 78 Cong. Rec.

Loss, maintained that "the disclosure requirement . . . in itself prevent[s] some [unethical practices] that can not stand the light of publicity."<sup>52</sup> Similarly, Louis Brandeis, who left the greatest mark on the philosophy of federal securities legislation,<sup>53</sup> has often been quoted as saying, "Sunlight is . . . the best of disinfectants; the electric light the most efficient policeman."<sup>54</sup>

The question as to just what the issuer must disclose to the public is at the heart of *NRDC v. SEC*. The Commission has generally required disclosure only of "material" information.<sup>55</sup> Under the rules of the securities acts, "material" information includes all matters "as to which an average prudent investor ought reasonably to be informed."<sup>56</sup> In its administrative proceedings, the SEC has ruled that a material fact must be "of such importance that it could be expected to affect the judgment of investors whether to buy, sell or hold . . . stock [and, if] generally known, . . . to affect materially the market price of the stock."<sup>57</sup> This position on materiality is consistent with the Commission's view of its duty as requiring disclosure of "information which is or may be economically significant,"<sup>58</sup> and is supported by the decisions of the courts.<sup>59</sup>

Recently, however, the narrow economic view of materiality has been challenged by some groups who would like to expand the notion of what is "necessary or appropriate in the public interest,"<sup>60</sup> and by some commentators who have recognized that dis-

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7704-05 (1934); cited by *Kerber v. Kakos*, 383 F. Supp. 625, 628 (N.D. Ill. 1974).

<sup>52</sup> 1 L. LOSS, *SECURITIES REGULATION*, 125 (2d ed. 1961).

<sup>53</sup> *Id.* at 123.

<sup>54</sup> L. BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1932); quoted by 1 L. LOSS, *SECURITIES REGULATION*, 123 (2d ed. 1961).

<sup>55</sup> Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 *BUS. LAW.* 887, 919 (1977).

<sup>56</sup> 17 CFR § 230.405(l), § 240.12b-2(j) (1979).

<sup>57</sup> *Investors Management Co., Inc.*, 44 SEC 633 (1971), cited in Hewitt, *Developing Concepts of Materiality*, 32 *BUS. LAW.* 887, 911 (1977).

<sup>58</sup> Securities Release No. 5627, 40 Fed. Reg. 51,656, 51,658 (1975).

<sup>59</sup> The Courts have found that the following facts can be material: failure to disclose that important investigations were pending by the state security commissions. *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 691, 696 (5th Cir. 1971); failure to disclose firm offers, greatly higher than the book value for the physical facilities of an acquired company which the acquiring company intended to liquidate as soon as possible. *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1295 (2d Cir. 1973); failure to disclose active negotiations to sell significant assets substantially below book value. *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 368-69 (2d Cir. 1973). See also Hewitt, *Developing Concepts of Materiality*, 32 *BUS. LAW.* 887, 910-11 (1977).

<sup>60</sup> The Project on Corporate Responsibility, Inc. is one such group interested in ex-

closure has great potential as a method of regulation.<sup>61</sup> *NRDC v. SEC* involved an attempt to expand the meaning of "material" and "public interest" to include corporate environmental conduct. The legislative tool used in arguing for this expansion in the scope of mandatory disclosure was the National Environmental Policy Act.

### B. *The National Environmental Policy Act*

Like the securities acts, the National Environmental Policy Act (NEPA)<sup>62</sup> endorses and thrives upon the philosophy of full disclosure,<sup>63</sup> although the purpose of full disclosure in NEPA is somewhat different from the purpose of disclosure in the Securities Acts. In creating NEPA, Congress recognized the critical importance of maintaining the quality of the environment and made it the policy of the Federal Government to use all practicable means to preserve the environment.<sup>64</sup> In order to achieve NEPA's goal, Congress gave the agencies a procedural "action-forcing" mandate in § 102 of the Act.<sup>65</sup> This section requires that an agency propos-

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panding the notion of "public interest" in securities law. They joined a separate claim in *NRDC v. SEC*, asking for corporate disclosure of data concerning minority and female employment. This claim was part of the litigation in the District Court cases, and in the Court of Appeals. See, e.g., *NRDC v. SEC*, 606 F.2d 1031, 1036 n.1, 1060-62 (1979).

<sup>61</sup> See Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 648 (1964); Sonde and Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"* 16 HOWARD L. J. 831, 832-35 (1971); Stevenson, *The SEC and the New Disclosure*, 62 CORNELL L. REV. 50, 60-66 (1976).

<sup>62</sup> 42 U.S.C. §§ 4321-4361 (1976).

<sup>63</sup> *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973); Cf. *Environmental Defense Fund v. Corps of Eng'rs.*, 470 F.2d 289, 297 (8th Cir. 1972) (Court holding that NEPA is *more* than a full disclosure law); see also 42 U.S.C. §§ 4331-4333 (1976).

<sup>64</sup> NEPA § 101, 42 U.S.C. § 4331 (1976). See, in particular, sec. 101(a) which provides:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a) (1976).

<sup>65</sup> *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir.

ing to undertake major Federal action affecting the environment fully disclose the environmental impact of the action, and the alternatives to it.<sup>66</sup> This requirement lends itself to NEPA's fundamental purpose of compelling federal decisionmakers to consider the environmental consequences of their actions.<sup>67</sup>

The seminal NEPA case, *Calvert Cliffs' Coordinating Committee Inc. v. United States Atomic Energy Commission*,<sup>68</sup> held that the "action-forcing" mandate of § 102 is not highly flexible, but instead establishes a strict standard of compliance for the agencies to meet.<sup>69</sup> In *Calvert Cliffs'*, the Atomic Energy Commission (AEC), which licensed construction and operation of atomic power plants, for over a year after the passage of NEPA had refused to amend its rules precluding consideration of environmental issues in certain stages of its decisionmaking process.<sup>70</sup> The AEC, claiming reasons of expedience, said instead that it would defer to environmental agencies the job of setting standards for operations of a plant.<sup>71</sup> The Commission argued that full consideration<sup>72</sup> of environmental issues would delay the licensing necessary for much-needed sources of power for the nation.<sup>73</sup> The Court of Appeals rejected the Commission's argument and held that the AEC must revise its rules governing consideration of environmental issues in its proceedings.<sup>74</sup> Therefore, under the court's standard, agencies may not interpose considerations of administrative difficulty, delay or economic cost as a means of avoiding compliance with NEPA's procedural mandates.<sup>75</sup> Furthermore, subsequent NEPA cases have followed the *Calvert*

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1971).

<sup>66</sup> 42 U.S.C. § 4332(2)(c) (1976).

<sup>67</sup> *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333, 1344 (5th Cir. 1979); McGarity, *The Courts, the Agencies and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 804 (1977).

<sup>68</sup> 449 F.2d 1109 (D.C. Cir. 1971).

<sup>69</sup> *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

<sup>70</sup> *Id.* at 1119-20.

<sup>71</sup> *Id.* at 1122.

<sup>72</sup> The court in *Calvert Cliffs'* said that an agency's procedures must insure "full, good faith consideration of environmental factors." *Id.* at 1115.

<sup>73</sup> *Id.* at 1127.

<sup>74</sup> *Id.* at 1129.

<sup>75</sup> *Id.* at 1115. See also *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972); *Mobil Oil Corp. v. FTC*, 430 F. Supp. 855, 873 (S.D.N.Y. 1977), rev'd on other grounds, 562 F.2d 170 (2d Cir. 1977).

*Cliffs'* enunciation of a strict standard of compliance.<sup>76</sup>

The great bulk of litigation under NEPA's procedural section has centered around an agency's duty to issue an environmental impact statement (EIS) when it proposes to take an action significantly affecting the environment.<sup>77</sup> For example, one court has required that an agency EIS for a Navy defense project assess the long-term ecological marine damage from dumpings of dredge spoils at sea.<sup>78</sup> Another court has required that the Government Services Administration (GSA) assess the environmental impact of the location of a jail in an urban community if the impact would be significant.<sup>79</sup> In elaborating on what the EIS should do, two circuit courts have held that the EIS should provide a basis for evaluating the benefits of the proposed action and its environmental risks.<sup>80</sup>

There is a scientific process of weighing the benefits of the proposed action against the environmental risks, which is called cost/benefit analysis.<sup>81</sup> This analysis is complex and involves the quantification of the factors, environmental and otherwise, inherent in agency decisionmaking.<sup>82</sup> It is interesting to note that while agencies often prepare these analyses,<sup>83</sup> and courts have examined the

<sup>76</sup> See, e.g., *Shiffler v. Schlesinger*, 548 F.2d 96, 101 (3d Cir. 1977); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972); *Environmental Defense Fund v. Corps of Eng'rs.*, 470 F.2d 289, 297 n.12 (8th Cir. 1972).

<sup>77</sup> Section 1022(C) states 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 Act, and (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action . . .

42 U.S.C. § 4332(2)(c) (1976).

<sup>78</sup> *NRDC v. Callaway*, 524 F.2d 79, 90, 95 (2d Cir. 1975).

<sup>79</sup> *Hanly v. Mitchell*, 460 F.2d 640, 644-46 (2d Cir. 1972), cert. denied sub nom, 409 U.S. 990 (1972).

<sup>80</sup> See *Environmental Defense Fund v. Corps of Eng'rs.*, 492 F.2d 1123, 1136 (5th Cir. 1974); *NRDC v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

<sup>81</sup> Note, *Cost-Benefit Analysis in the Courts: Judicial Review Under NEPA*, 9 GA. L. REV. 417, 420-21 (1975) [hereinafter cited as *Cost-Benefit Analysis*].

<sup>82</sup> *Id.* at 420-29.

<sup>83</sup> Agencies have prepared cost-benefit analyses in several cases that have reached the courts. See, e.g., *Sierra Club v. Morton*, 510 F.2d 813, 820-22 (5th Cir. 1975); *Sierra Club v.*

sufficiency of the analyses,<sup>84</sup> there is a dearth of decisions requiring an agency to conduct scientific cost/benefit analysis in preparing its impact statement.<sup>85</sup> It may be that most agencies and courts tacitly believe that such analysis should be done to comply with NEPA.<sup>86</sup> Otherwise, the agencies' preparation of these expensive statements is hard to understand. In any event, the EIS provision of NEPA requires a federal agency to consider fully the environmental impact of its actions in decisionmaking.<sup>87</sup>

In its decisionmaking process, an agency must also "study, develop and describe" alternatives to its actions.<sup>88</sup> This NEPA provision is meant to assure consideration of all possible approaches to an agency project which would alter the environmental impact of the project.<sup>89</sup> Furthermore, the duty to "study, develop and describe" alternatives to agency action is independent of the EIS requirement, though it has usually been applied in EIS cases.<sup>90</sup> For example, in *Trinity Episcopal School Corp. v. Romney*,<sup>91</sup> the court held that the Department of Housing and Urban Develop-

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Callaway, 499 F.2d 982 (5th Cir. 1974); *Sierra Club v. Froehle*, 359 F. Supp. 1289, 1364-65 (S.D. Tex. 1973), *rev'd sub nom.*, *Montgomery v. Ellis*, 354 F. Supp. 517, 521, 533 (N.D. Ala. 1973); *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404, 413-16 (W.D. Va. 1973), *aff'd*, 484 F.2d 453 (4th Cir. 1973).

<sup>84</sup> See *Sierra Club v. Morton*, 510 F.2d 813, 820, 827 (5th Cir. 1975); *Cost-Benefit Analysis*, *supra* n.81, at 434-441.

<sup>85</sup> This is true in the case of the circuit courts, but several district courts have found that an EIS is insufficient without cost-benefit analysis, see *Cost-Benefit Analysis*, *supra* n.81, at 435 & n.138.

<sup>86</sup> But some district courts have held that such analysis need not be conducted by the agency or included in the EIS. See *Cost-Benefit Analysis* n.81, at 435 & n.136. If a duty to conduct cost-benefit analysis does exist, it should be independent of the EIS requirement, since the most supportive language for such a duty in NEPA appears in a separate provision from NEPA § 102(2)(C). The language of § 102 (2)(B) requires agencies to "(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently *unquantified* environmental amenities and values may be given *appropriate consideration* in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B) (1976). For support of the proposition that NEPA requires an agency to do cost-benefit analysis, see *Cost-Benefit Analysis*, *supra* n.81 at 442-47.

<sup>87</sup> *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976).

<sup>88</sup> 42 U.S.C. § 4332(2)(E) (1976). An agency must . . . "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." *Id.*

<sup>89</sup> *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>90</sup> *Id.* The duty is part of NEPA § 102(2)(E), which is independent of NEPA § 102(2)(C). See *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975); *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>91</sup> 523 F.2d 88 (2d Cir. 1975).

ment, though it did not have to issue an EIS, had to consider alternative sites for its locations of middle and low income housing in New York.<sup>92</sup> The purpose of considering the alternatives was to provide a racially, economically and ethnically integrated neighborhood environment.<sup>93</sup> By its holding, the court enforced NEPA's strict procedural mandate to federal agencies to consider alternatives to their actions.

The duty of agencies to consider alternatives to their actions is not absolute, however, and is subject to a "rule of reason."<sup>94</sup> This rule of reason was announced in *NRDC v. Morton*,<sup>95</sup> where the Department of the Interior had approved oil and gas leases on the continental shelf in Louisiana.<sup>96</sup> The approval was made in order to cope with an imminent energy shortfall projected for the coming years.<sup>97</sup> In that case, the department was not required to consider alternatives to the leases such as desulfurization of coal, or development of oil shale.<sup>98</sup> The court said that no consideration was required because these alternatives were technologically undeveloped and could not realistically offer anything but long-term hope for new energy.<sup>99</sup> Other courts have applied this "rule of reason" in holding that agencies need not consider alternatives having defects similar to explicitly considered alternatives<sup>100</sup> or alternatives with purely speculative effects.<sup>101</sup> Thus, the procedural mandates of § 102 are not altogether inflexible, though they are strictly enforced.

These procedural mandates are designed to advance NEPA's substantive policy, set forth in § 101.<sup>102</sup> That policy declares that "the Federal Government [shall] use all practicable means consistent with other essential considerations of national policy" to pro-

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<sup>92</sup> *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 92-94 (2d Cir. 1975).

<sup>93</sup> *Id.* at 91.

<sup>94</sup> *Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975); *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974); and *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

<sup>95</sup> 458 F.2d 827 (D.C. Cir. 1972).

<sup>96</sup> *NRDC v. Morton*, 458 F.2d 827, 830 (D.C. Cir. 1972).

<sup>97</sup> *Id.* at 837.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975); and *Iowa Citizens for Env'tl Quality, Inc. v. Volpe*, 487 F.2d 849, 852-53 (8th Cir. 1973).

<sup>101</sup> See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978); *NRDC v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975); *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974); and *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973).

<sup>102</sup> 42 U.S.C. § 4331 (1976).

tect and enhance the environment.<sup>103</sup> Congress also declared in this segment of the Act, "the critical importance of restoring and maintaining environmental quality" as a part of the policy of the federal government.<sup>104</sup> The courts have not yet settled the issue of whether substantive review of agency decisionmaking is available under Section 101.<sup>105</sup> Some courts have maintained that the procedures mandated by NEPA, such as EIS requirements, serve only to insure that the agency is environmentally informed, with discretion reserved in the agency to accept or reject a proposal for action.<sup>106</sup> Other courts have held that NEPA is more than an environmental full disclosure law, and that the Act was intended to effect substantive changes in agency decisionmaking.<sup>107</sup>

Although the Supreme Court has not resolved the issue, it has said in dicta that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."<sup>108</sup> Nonetheless, the word, "essentially", should not be construed as "exclusively." Some substantive compliance with the policies of the Act must be demanded since one of the strict procedural directives of NEPA is that the "regulations, and public laws of the United States shall be interpreted and administered in accordance with the *policies* set forth in [the Act]."<sup>109</sup> The best view, maintained by some courts, is that substantive review of agency action is not available unless the agency "clearly gave insufficient weight to environmental values" in making its decision.<sup>110</sup> This approach creates a deferential standard of review

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<sup>103</sup> 42 U.S.C. § 4331(b) (1976).

<sup>104</sup> 42 U.S.C. § 4331(a) (1976).

<sup>105</sup> See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 28.16-1 at 643 (1976); see also notes 104-05 *infra*.

<sup>106</sup> Cases against substantive review under NEPA § 101 include: *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974); *Bradford Township v. Illinois State Highway Toll*, 463 F.2d 537, 539 (7th Cir. 1972); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971); *Conservation Council v. Froehlke*, 340 F. Supp. 222, 225-26 (D.N.C. 1972).

<sup>107</sup> The following authorities favor substantive review under NEPA § 101: *Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060, 1072-73 (8th Cir. 1977); *Environmental Defense Fund v. Corps of Eng'rs.*, 470 F.2d 289, 299-300 (8th Cir. 1972); *Cohen and Warren, Judicial Recognition of the Substantive Requirements of the National Environmental Policy of 1969*, 13 B.C. IND. AND COM. 685, 692-94 (1972); *Rheingold, A Primer on Environmental Litigation*, 38 BROOKLYN L. REV. 113, 121 (1971).

<sup>108</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

<sup>109</sup> 42 U.S.C. § 4332(1) (1976) (emphasis added).

<sup>110</sup> *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). See also *Environmental Defense Fund v. Hoffman*, 566 F.2d 1060, 1072-73 (8th Cir. 1977); *Environmental Defense Fund v. Corps of Eng'rs.*, 470 F.2d 289, 300 (8th Cir. 1972).



for agency decisionmaking<sup>111</sup> falling far short of the strict standard of review that courts apply to an agency's procedural compliance with NEPA. In order to comprehend these standards of court review of an agency's performance, it is necessary to have a basic understanding of administrative law.

### C. *Administrative Law*

Judicial review of agency procedures and decision-making in *NRDC v. SEC* was affected not only by NEPA but by the body of administrative law surrounding the Administrative Procedure Act<sup>112</sup> (APA) as well. The APA is a comprehensive statute regulating agency procedures and judicial review thereof.<sup>113</sup> The case law surrounding the APA explains the judicial standards for reviewability and scope of review of agency action.

The important agency action in *NRDC v. SEC* involved informal rulemaking.<sup>114</sup> Administrative rulemaking is part of the legislative aspect of an agency's function.<sup>115</sup> A rule is designed to implement, interpret or prescribe law or policy<sup>116</sup> and has the practical effect of a statute.<sup>117</sup> An agency rule, like a legislative

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<sup>111</sup> This standard of review is so deferential that there are few, if any, circuit cases overturning the agency's decisions thereunder.

<sup>112</sup> Federal Administrative Procedure Act of 1946 (APA), 5 U.S.C. §§ 551-559 and §§ 701-706 (1976).

<sup>113</sup> See B. SCHWARTZ, *ADMINISTRATIVE LAW*, 21 (1976). The APA has had a strikingly unusual and somewhat inconsistent history of development in the courts. This article can not give a comprehensive treatment to that development. The purpose of this section of the article is merely to familiarize the reader with those aspects of administrative law that played a major role in *NRDC v. SEC*. Specifically, this section of the article explores the basic judicial tenets concerning reviewability, standard of review, and scope of review of agency action, and it offers a brief description of agency rules and rulemaking. The article necessarily does not examine the difference between formal and informal agency procedures, the standards of review over formal procedures, or the precise occasions where courts have expanded or narrowed their scope of review. For a thorough analysis of administrative law and the history of the APA in the courts, see generally, K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* (1976), and G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* (1974).

<sup>114</sup> Formal rulemaking is prescribed in rare instances by statute. See e.g., the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 371(e)(3) (1976). It requires a hearing and the rules must be based on evidence in the hearing record. See 5 U.S.C. §§ 553(b), 556, 557 (1976). However, the case of *NRDC v. SEC* did not involve formal rulemaking, and, therefore the article does not examine that aspect of administrative law.

<sup>115</sup> The legislature may be said to exercise the primary legislative function, while an administrative agency exercises a secondary one. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 8 (1976); 5 U.S.C. § 551(5) (1976).

<sup>116</sup> APA, 5 U.S.C. § 551(4) (1976).

<sup>117</sup> See, *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959).

enactment, does not have to emerge from a public hearing or rest upon any recorded evidentiary foundation.<sup>118</sup> Rather, an agency must merely show some rational basis for its decision.<sup>119</sup> The agency may act on the basis of information in its own files, or on its own knowledge and expertise.<sup>120</sup> Thus, informal rulemaking leaves an agency great freedom to structure its proceedings and decisions.

This freedom does not, however, allow an agency to escape judicial review. The APA provides that agency actions are reviewable except where statutes preclude judicial review, or where agency action is committed to its discretion by law.<sup>121</sup> The Supreme Court has said that this provision creates a strong presumption of reviewability, which can only be rebutted by a clear showing that Congress intended to foreclose judicial review.<sup>122</sup> The narrow exception to the presumption of reviewability that has stirred the most litigation is the exception for agency action committed to agency discretion by law.<sup>123</sup> In *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>124</sup> the Supreme Court said that this exception is a narrow one, applying only to those cases where a statute is so broadly drawn that there is no law to apply.<sup>125</sup> The Court has come under criticism for this statement, and it has been persuasively argued that what the Court said does not represent what it, or other courts, actually consider in finding agency action unreviewable.<sup>126</sup>

The best explanation of the unreviewable cases where agency action is committed to its discretion by law appeared in *Hahn v. Gottlieb*.<sup>127</sup> In *NRDC v. SEC*, the Court of Appeals followed

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<sup>118</sup> See *Assigned Car Cases*, 274 U.S. 564, 582-83 (1927).

<sup>119</sup> See *American Trucking Ass'n. Inc. v. United States*, 344 U.S. 298, 314-15 (1953).

<sup>120</sup> *Chrysler Corp. v. Dep't of Transp.*, 472 F.2d 659, 669 (6th Cir. 1972).

<sup>121</sup> The APA prescribes when its standards of judicial review are applicable:

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

(1) statutes preclude judicial review; or

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

5 U.S.C. § 701(a)(1)-(a)(2) (1976).

<sup>122</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

<sup>123</sup> 5 U.S.C. § 701(a)(2) (1976).

<sup>124</sup> 401 U.S. 402 (1971).

<sup>125</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

<sup>126</sup> K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* at 637-45 (1976) [hereinafter cited as DAVIS].

<sup>127</sup> 430 F.2d 1243 (1st Cir. 1970), *Davis* views *Hahn v. Gottlieb* as the best opinion in this area. See K. DAVIS, *supra* note 126, at 642.

*Hahn* as if it were an elaboration on the *Overton Park* holding.<sup>128</sup> The *Hahn* case assessed three factors in determining reviewability: the appropriateness of the issues raised for review;<sup>129</sup> the need for protection of the plaintiffs' interests; and the impact of review on the agency's effectiveness.<sup>130</sup> In that case, the Court held that approval of public housing rents was a matter "committed to agency discretion by law," and therefore unreviewable.<sup>131</sup>

When a court does find an agency's actions reviewable, it must then decide what standard of review to apply. The standard of review generally governs the scope with which a court examines the agency's action.<sup>132</sup> The concepts of scope and standard are rarely distinguished,<sup>133</sup> but a distinction deserves to be made. The standard of review is normally prescribed by the APA, while the scope of review usually follows from that standard.<sup>134</sup> Scope is flexible in both breadth and depth, and determines what a court will examine<sup>135</sup> and how deeply it will probe.<sup>136</sup>

The standard of review over the SEC's rulemaking action in *NRDC v. SEC* was the "arbitrary and capricious" standard prescribed by the APA.<sup>137</sup> Under this standard, a plaintiff challenging an agency's rulemaking decision must show that an agency

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<sup>128</sup> *NRDC v. SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979). The court's reliance on *Hahn* as an elaboration on *Overton* is ironic, since *Hahn* preceded *Overton Park* by a year. Compare note 125 with note 127 *supra*.

<sup>129</sup> See *Chicago and Southern Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948). The court refused review because the administrative decision could be based on secret diplomatic material.

<sup>130</sup> *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970).

<sup>131</sup> *Id.* at 1251.

<sup>132</sup> See *DAVIS*, *supra* note 126, at 657 (discussing "whether the *standard* of substantial evidence . . . govern(s) *scope* in the absence of a (formal) hearing.")

<sup>133</sup> A review of administrative law treatises shows that the discussion of both scope and standard generally appears under scope. A careful reading of the authorities does reveal, however, that the two are different. Standard is spoken of in connection with the APA. Scope is spoken of in relation to the actual stringency of review which courts apply. See generally *DAVIS*, *supra* note 126; *B. SCHWARTZ, ADMINISTRATIVE LAW* (1976); *G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS* (1974).

<sup>134</sup> This is not always the case, however, and *DAVIS* says that it is not really the rule anymore. *DAVIS*, *supra* note 126, at 653 (1976).

<sup>135</sup> Under the rule of law formulated in *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), the court in *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979) could have, but did not, examine the agency's view of the law as part of the judicial scope of review.

<sup>136</sup> The depth of the court's probe in *Udall v. FPC*, 387 U.S. 428 (1967) was greater than the typical depth of examination by a court. See text at notes 144-148.

<sup>137</sup> 5 U.S.C. § 706(2)(A) (1976).

"had no reasonable ground for the exercise of its judgment."<sup>138</sup> However, the Supreme Court has held in *Overton Park* that judicial review of an agency decision must be based on the full administrative record in existence at the time of the decision, and if the record proves unable to support the decision, the agency must offer an explanation to justify its decision.<sup>139</sup> If the agency fails to meet these tests under the arbitrary and capricious standard, the court may remand the case to the agency for further consideration.<sup>140</sup> The court can not, however, substitute its judgment for the agency's,<sup>141</sup> except as to matters of law.<sup>142</sup> The arbitrary and capricious standard is, therefore, one of deference to the judgment of the agency.

The scope of review applied under this standard is less easily defined. Formulas about scope of review "can be bent in any direction, in accordance with what the reviewing court deems to be the needs of justice or the public welfare."<sup>143</sup> The Supreme Court case of *Udall v. FPC* is a good example of a court applying a broad scope of review under the deferential "arbitrary and capricious" standard.<sup>144</sup> That case involved the licensing of a hydroelectric power project by the Federal Power Commission (FPC).<sup>145</sup> The FPC compiled an administrative record of over 14,000 pages to support its decision to license the project, with the record probing the energy needs of the region as well as the effect of the proposed project on the wildlife and recreational use of a river.<sup>146</sup> The court remanded the decision to the FPC, holding that the agency must further explore whether delaying construction of the project or preserving the river would better serve "the public interest," than immediate construction of the project.<sup>147</sup> The Court spent some time elaborating on its opinion that "a river is more than an amenity, it is a treasure."<sup>148</sup> The dissent

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<sup>138</sup> *American Trucking Ass'n., Inc. v. United States*, 344 U.S. 298, 314-15 (1953).

<sup>139</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>140</sup> The Court remanded to the agency in *Overton Park*, *id.* at 421.

<sup>141</sup> See *Atlantic and Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794, 802 n.32 (5th Cir. 1960). DAVIS, *supra* note 126, at 653.

<sup>142</sup> DAVIS, *supra* note 126, at 653.

<sup>143</sup> *Id.* at 653. See also G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 235-37 (1974).

<sup>144</sup> *Udall v. FPC*, 387 U.S. 428 (1967); DAVIS, *supra* note 126, at 653-54.

<sup>145</sup> *Udall v. FPC*, 387 U.S. 428, 430 (1967).

<sup>146</sup> *Id.* at 441-49, 452.

<sup>147</sup> *Id.* at 450.

<sup>148</sup> *Id.* at 439.

persuasively argued that the Court had gone so far as to substitute its judgement for the discretion of the FPC.<sup>149</sup> The case illustrates the conclusion of Judge Carl McGowan of the Court of Appeals for the District of Columbia that "judicial review can, if so minded, find great latitude to range widely, no matter how the standard of review is articulated."<sup>150</sup> The scope of review, therefore, depends on whatever factors the reviewing court finds relevant to the needs of justice.<sup>151</sup>

Armed with an understanding of the reviewability and scope of review of agency actions, a basic understanding of NEPA, and a general background in securities law, one can then explore the controversy of *NRDC v. SEC*.

### III. THE HISTORY OF *NRDC v. SEC*

The Natural Resources Defense Council (NRDC) (see note 4, *supra*) attempted to breathe new meaning into the duty of the Securities Exchange Commission (SEC) to require disclosure by securities issuers of information "necessary or appropriate in the public interest."<sup>152</sup> The SEC resisted the attempt, and the two parties struggled in the courts for several years. The confrontation can best be understood by viewing it in three distinct stages. In the first stage, the NRDC sought to compel SEC rulemaking; first by petition, and then in court. In the second stage, the SEC conducted rulemaking and returned to the District Court for review. Finally, the Court of Appeals resolved the issue in favor of the SEC in April of 1979,<sup>153</sup> thus ending an eight year confrontation.

#### A. *NRDC Seeks to Change Securities Disclosures*

On June 7, 1971, NRDC filed a rulemaking petition with the SEC<sup>154</sup> alleging that the Commission should amend its disclosure rules in order to implement fully its new environmental obligation under NEPA to "[m]ake available to . . . individuals . . . information useful in restoring, maintaining, and enhancing the quali-

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<sup>149</sup> *Id.* at 451-53 (Harlan dissenting); DAVIS, *supra* note 126, at 654.

<sup>150</sup> McGowan, Book Review, 74 COLUM. L. REV. 1015, 1021-22 n.14 (1974).

<sup>151</sup> DAVIS, *supra* note 126, at 653. Davis' conclusion is that the law of scope of review is presently in disarray. *Id.* at 656.

<sup>152</sup> See note 28 *supra*.

<sup>153</sup> *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

<sup>154</sup> *NRDC v. SEC*, 389 F. Supp. 689, 694 (D.D.C. 1974).

ty of the environment.”<sup>155</sup> NRDC proposed that the SEC adopt new rules requiring securities issuers to disclose a wide array of environmental information in statements filed with the Commission. This information to be disclosed included the nature and extent of pollution of natural areas and resources due to business operations or use of business products, the feasibility of and plans for curbing such pollution, any pending civil or government proceedings concerning a registrant’s non-compliance with environmental standards, and a general statement of the registrant’s corporate environmental policies.<sup>156</sup>

The SEC, in its initial response to this petition and in its subsequent consideration of the proposal, maintained a steadfast position in opposition to NRDC. Before denial of the petition, when explaining the Commission’s position, the SEC chairman stated that he “would have trouble justifying in [his] mind diverting our scarce SEC manpower from its statutory obligation to protect investors to kibitzing on the statutory obligation of other agencies to protect the environment.”<sup>157</sup> The SEC later appeared to soften its position by proposing and adopting two amendments to its disclosure rules.<sup>158</sup> One amendment required the disclosure of the “material” effects of compliance with environmental laws on the earnings and the competitive position of a registrant; the other amendment called for disclosure of any administrative or judicial proceedings involving the company arising under environmental laws.<sup>159</sup> The new rules, however, did not represent a significant change in policy. Instead, the focus of the first rule was still on “materiality” and not on corporate pollution, and the second rule required disclosure of proceedings which are often financially “material” anyway.<sup>160</sup>

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<sup>155</sup> *Id.* at 695. This language was quoted from NEPA § 102(2)(G), 42 U.S.C. § 4332(2)(G) (1976).

<sup>156</sup> The NRDC’s rulemaking proposals are outlined in the Appendix to Stevenson, *The SEC and the New Disclosure*, 62 CORNELL L. REV. 50 (1976).

<sup>157</sup> NRDC Memorandum in support of Summary Judgment [hereinafter cited as NRDC Memo] at 12, NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977) (quoting speech of Chairman Casey).

<sup>158</sup> See Securities Release No. 5235, 37 Fed. Reg. 4,365 (1972); Securities Release No. 5386, 38 Fed. Reg. 12,100-03 (1973).

<sup>159</sup> Securities Release No. 5386, 38 Fed. Reg. 12,100-01 (1973).

<sup>160</sup> See Chrysler Corp., Form 8-K report, SEC file No. 1-686; Armco Steel, Preliminary Prospectus, SEC file No. 2-38312; Outdoor Sports Industries, Inc., Preliminary Prospectus, (Dec. 29, 1970). See generally, Sonde and Pitt, *Utilizing the Federal Securities Laws to “Clear the Air! Clean the Sky! Wash the Wind!”* 16 HOWARD L.J. 831, 870-71, 879-80

NRDC, unsatisfied with these minor changes in disclosure policy, sued the SEC in the Federal District Court for the District of Columbia.<sup>161</sup> Seeking injunctive relief, NRDC asked the court to compel SEC adoption of broader changes in its rules on corporate environmental disclosures.<sup>162</sup> NRDC argued that NEPA superimposed upon the SEC's broad rulemaking authority a congressional mandate to all federal agencies that gave "specific content to the SEC's authority under the securities laws to require disclosure of information 'in the public interest.'" <sup>163</sup> NRDC contended that in order to comply with Congress' directive that "regulations and public laws of the United States shall be interpreted and administered in accordance with the policies of NEPA" <sup>164</sup> the SEC must interpret the words, "in the public interest," to the fullest extent possible in accordance with NEPA's mandate to protect and enhance the nation's environment.<sup>165</sup> Thus, the plaintiffs sought major changes in corporate disclosure policy through the vehicle of NEPA.

The District Court substantially accepted NRDC's contentions,<sup>166</sup> and it ordered the SEC to undertake further rulemaking in order to bring its disclosure regulations into "full compliance with the letter and spirit of NEPA."<sup>167</sup> The Court also told the Commission what it would have to do in order to justify its rulemaking decision on the disclosure proposals as a reasoned choice of discretion. The SEC, said the court, should carefully consider the extent of investor interest in environmental disclosures,<sup>168</sup> and should demonstrate what alternatives it considered in rulemaking, as well as presenting the reasons for rejecting those alternatives.<sup>169</sup> The Court warned that such considerations might require a legislative-type hearing in order to resolve the issues fully.<sup>170</sup>

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(1971).

<sup>161</sup> NRDC v. SEC, 389 F. Supp. 689 (D.D.C. 1974).

<sup>162</sup> *Id.* at 692.

<sup>163</sup> NRDC v. SEC, 389 F. Supp. 689, 695 (D.D.C. 1974). This argument appeared in NRDC Memo at 38, NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977).

<sup>164</sup> NRDC Memo at 35, quoting NEPA § 102(1), 42 U.S.C. § 4332(1) (1976).

<sup>165</sup> NRDC Memo at 35-38.

<sup>166</sup> NRDC v. SEC, 389 F. Supp. 689, 695 (D.D.C. 1974).

<sup>167</sup> *Id.* at 693.

<sup>168</sup> *Id.* at 701.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 701-02.

*B. The SEC Conducts a Rulemaking Proceeding*

Pursuant to the Court order, the SEC announced a public rulemaking proceeding in a Securities release on February 11, 1975.<sup>171</sup> The testimony in much of that proceeding concerned two factual issues - the extent of investor interest in environmental disclosures, and the costs of such disclosures to registrants. The true extent of investor interest in the general concept of environmental disclosures could not be ascertained from the participation in the proceeding alone, since obviously fewer than all interested investors participated in the proceeding.<sup>172</sup> Nonetheless, the participants who supported disclosure of environmental information represented many organizations<sup>173</sup> controlling or substantially influencing investment assets exceeding twelve billion dollars.<sup>174</sup> The actual costs of preparing environmental disclosure was also not clearly determined in the proceedings. Most testimony came from major industries. It was their position that the NRDC proposal would require publicly-held companies, in effect, to prepare an environmental impact statement for major facilities.<sup>175</sup> The minimum cost estimates for preparing such studies were diverse, ranging from an estimated \$30,000 per plant operation (Council on Economic Priorities)<sup>176</sup> to \$300,000 per operation (National Association of Manufacturers).<sup>177</sup> Obviously, therefore, the proceeding did not establish the specific costs or interest in corporate environmental disclosures.

Many participants in the proceeding also pointed to policy reasons for environmental disclosure. NRDC pointed out that the idea of using securities law to aid the environment was first ad-

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<sup>171</sup> Securities Act Release No. 5569, 40 Fed. Reg. 7013 (1975).

<sup>172</sup> See NRDC Memo at 23, NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977).

<sup>173</sup> Some of the organizations supporting expanded environmental disclosure were: Interfaith Center for Corporate Responsibility; American Baptist Church National Ministries; Unitarian Universalist Association; National Council of Churches of Christ; National Wildlife Federation; National Audubon Society; Environmental Defense Fund; Common Cause; American Civil Liberties Union; Zero Population Growth; University of Pennsylvania Trustee Committee on Corporate Responsibility; Univ. of Notre Dame; Boston Univ.; Bryn Mawr; Haverford; Vassar; Stanford; Harvard; Ford Foundation; Carnegie Foundation; Rockefeller Family Fund; and the McIntosh Foundation. See NRDC Memo at 18-22, NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977).

<sup>174</sup> See NRDC Memo at 17, citing "Topical Analysis of Independent Testimony and Letters of Comment."

<sup>175</sup> See Reply Brief for SEC at 24, NRDC v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

<sup>176</sup> See NRDC Memo at 28, NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977).

<sup>177</sup> Reply Brief for SEC at 24, NRDC v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).



vanced by the SEC General Counsel at the time of the suit, Harvey L. Pitt.<sup>178</sup> Before assuming his position as General Counsel, he expressed the belief that the SEC "should impose affirmative environmental disclosure requirements [similar to those proposed by the NRDC] regardless of whether such disclosure is considered 'material' in the traditional sense"<sup>179</sup> because disclosure could greatly improve the environment by increasing corporate responsibility.<sup>180</sup> Pitt had supported this argument by pointing out that the draftsmen of the Securities Acts viewed disclosure as a "method of control" over corporate management.<sup>181</sup> He also noted NEPA's applicability to all Federal agencies.<sup>182</sup> His arguments were the main ones that the NRDC pressed in the rulemaking proceeding.

After conducting this extensive proceeding, the SEC rejected all of the proposed disclosure rules, including one proposed by the Commission itself.<sup>183</sup> In rejecting the plaintiffs' main proposal for comprehensive disclosure of the environmental effects of corporate activity, the SEC reasoned that existing investor interest was being directed more specifically at non-compliance with environmental law rather than at environmental matters generally.<sup>184</sup> In addition, the Commission concluded that the costs of implementing the proposed disclosure rules would be overly burdensome to itself and to its registrants.<sup>185</sup> The SEC also rejected a proposal

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<sup>178</sup> Sonde and Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!"* 16 HOWARD L.J. 831 (1971).

<sup>179</sup> *Id.* at 850.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 843.

<sup>182</sup> *Id.* at 839.

<sup>183</sup> The Commission's own proposal would have required disclosure of non-compliance with environmental laws as determined in administrative non-compliance reports. See Securities Release No. 5704, 41 Fed. Reg. 21,632, 21,633-34 (1976); Securities Release No. 5627, 40 Fed. Reg. 51,656, 51,663 (1975). NRDC's proposal for disclosure of corporate environmental policy was also rejected for being too susceptible to "public relations" statements.

<sup>184</sup> Securities Release No. 5627, 40 Fed. Reg. 51,656, 51,662 (1975).

<sup>185</sup> *Id.* Impact statement analysis can be long and expensive. NRDC's broad proposal, however, called for an impact analysis, but of a less formal kind than is done by agencies. In *Env'tl Defense Fund v. Corps of Eng'rs.*, 470 F.2d 289 (8th Cir. 1972), the EIS for a dam project was over 1700 pages in length and it was done at a cost of over \$250,000. *Id.* at 294. The author examined a sample impact statement for New York State Electric and Gas Corporation's Cayuga Station utility plant which exceeded 11 volumes. The maze of technical terms, graphs and analyses in these statements is understandable only to the expert. For this reason, it is not reasonable to construe NRDC's proposal as calling for anything so extensive as a formal EIS.

by the Council on Environmental Quality (CEQ). CEQ suggested that the SEC require registrants to summarize and file already existing comprehensive environmental information used to obtain government environmental licenses and permits.<sup>186</sup> The SEC expressed doubt as to whether the availability of such summaries would promote environmental goals,<sup>187</sup> and asserted that the proposal would require the Commission to venture into areas beyond its expertise.<sup>188</sup> Another proposal for disclosure of environmental information solely in connection with proxy statements was not even considered.<sup>189</sup> An SEC release in 1976 formally rejected all environmental disclosure proposals, and represented the agency's final action on the rulemaking petition.<sup>190</sup>

Later that year, the parties returned to District Court in a challenge to the adequacy of the rulemaking proceedings.<sup>191</sup> The parties largely repeated their arguments of the first court battle, although NRDC expanded its arguments to attack the SEC's rulemaking action on procedural grounds. NRDC argued that the SEC did not attempt to comply with NEPA to the fullest extent possible because the agency did not actively seek outside advice on formulating rules and did not contract for any studies on the costs and benefits of the proposed rules.<sup>192</sup> The SEC responded that it was not subject to judicial review because the Securities Acts vested such broad discretion in the agency that the final decision under NEPA was "committed to agency discretion by law."<sup>193</sup> Even if subject to review the SEC continued, the results of informal rulemaking are "presumptively valid," so that those challenging such rulemaking bear a heavy burden of showing that the agency's action was unjust and unreasonable.<sup>194</sup>

The Court rejected the SEC's contention that its rulemaking action was unreviewable, holding that the Commission's decision

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<sup>186</sup> NRDC v. SEC, 432 F. Supp. 1190, 1204 (D.D.C. 1977).

<sup>187</sup> Securities Release No. 5704, 41 Fed. Reg. 21,632, 21,634 (1976).

<sup>188</sup> *Id.*

<sup>189</sup> NRDC v. SEC, 432 F. Supp. 1190, 1205 (D.D.C. 1977).

<sup>190</sup> Securities Release No. 5704, 41 Fed. Reg. 21,632, 21,635 (1976).

<sup>191</sup> NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977).

<sup>192</sup> Plaintiffs recommended the Commission to undertake such actions in a letter to Chairman Garrett dated June 4, 1975. See NRDC Memo at 55, NRDC v. SEC, 432 F. Supp. 1190 (D.D.C. 1977).

<sup>193</sup> The District Court did not even consider this argument, but the Court of Appeals gave it serious attention. NRDC v. SEC, 606 F.2d 1031, 1043-47 (D.C. Cir. 1979).

<sup>194</sup> The SEC cited the Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). See Opening Brief of the SEC at 54, NRDC v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

not to impose additional environmental disclosure requirements on its registrants was "arbitrary and capricious."<sup>195</sup> The Court cited three important reasons why the SEC's action was arbitrary and capricious. First, the Commission failed to consider the possibility of requiring disclosure of environmental information solely in connection with proxy solicitations in order to provide fair opportunity for corporate suffrage.<sup>196</sup> Second, the SEC's determination that the costs of developing and implementing comprehensive environmental disclosure rules were excessive was not based on fact.<sup>197</sup> Instead, according to the court, the SEC simply made "bald assertions" about both the costs and benefits of disclosure without adequate support on the record.<sup>198</sup> Finally, the court found that the SEC had not adequately consulted with the CEQ to identify and develop methods of considering environmental values along with technical and economic factors.<sup>199</sup> The court then issued an order remanding the case to the SEC for further proceedings.<sup>200</sup>

### C. *The Appeals Court Renders the Final Decision*

The SEC appealed the District Court decision, and the parties renewed their arguments in the Court of Appeals for the District of Columbia.<sup>201</sup> Neither party added any significant dimension to what they had argued before the District Court. Yet the Court of Appeals viewed the case differently from the District Court and, reversing the order of the District Court, dismissed the complaint against the SEC.<sup>202</sup> The Court of Appeals did not find that the SEC had acted in an arbitrary and capricious manner. The court reasoned that the SEC had no duty to consider the proxy alternative separately because it suffered from the same defects of cost and burden as did the across-the-board disclosure proposals.<sup>203</sup> In addition, the court noted, the SEC agreed to consider the merits of proxy disclosures in a later proceeding.<sup>204</sup> The court also rea-

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<sup>195</sup> NRDC v. SEC, 432 F. Supp. 1190, 1208 (D.D.C. 1977).

<sup>196</sup> *Id.* at 1205.

<sup>197</sup> *Id.* at 1206.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1207 (citing NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1976)).

<sup>200</sup> NRDC v. SEC, 432 F. Supp. 1190, 1208-09 (D.D.C. 1977).

<sup>201</sup> NRDC v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

<sup>202</sup> *Id.* at 1062.

<sup>203</sup> *Id.* at 1053-55. See text at notes 234-238, *infra*.

<sup>204</sup> NRDC v. SEC, 606 F.2d 1031, 1055 (D.C. Cir. 1979).

soned that the SEC could not be required to give factual support for its assessment of costs and benefits of environmental disclosure because little was known about the costs and benefits of traditional disclosures.<sup>205</sup> Finally, the court concluded that the SEC did adequately consult with CEQ, and was under no obligation to adopt CEQ proposals.<sup>206</sup> An NRDC application for rehearing was denied,<sup>207</sup> and NRDC decided not to carry the case any further.<sup>208</sup> Thus, the Court of Appeals temporarily foreclosed judicial recognition of any legal responsibility for environmental disclosure in securities reports.

#### IV. A CLOSE LOOK AT THE COURT OF APPEALS DECISION AND ITS IMPLICATIONS

A close look at the Court of Appeals decision in *NRDC v. SEC* reveals a number of potentially important implications for the law of judicial review and for NEPA, especially as it affects the actions of agencies not directly involved in environmental decisionmaking. In its decision the court focused on two legal issues, reviewability and standard of review.<sup>209</sup> The court, however, treated these issues differently in assessing the agency's procedural compliance with NEPA than it did in testing the substantive decisionmaking of the agency. The court's review of the SEC's procedural compliance with NEPA was an exacting one, while its review of the substantive rationality of the SEC's decision not to adopt the proposed environmental disclosure rules was far more circumscribed in scope.

##### A. *The Agency's Procedural Compliance with NEPA*

The Court of Appeals determined that the SEC's procedural compliance with NEPA was reviewable and applied a strict standard of scrutiny in measuring that compliance. The only issues of procedural compliance facing the court, however, concerned the agency's duty to consult with CEQ, and the duty to consider the alternative of requiring environmental disclosure solely in connec-

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<sup>205</sup> *Id.* at 1058-59.

<sup>206</sup> *Id.* at 1057-58.

<sup>207</sup> *Id.* at 1031.

<sup>208</sup> Telephone conversation with David Doniger, Esq., NRDC representative in Manhattan, New York (October, 1979).

<sup>209</sup> Standard of review includes scope of review. See text and notes at notes 132-136, *supra*.

tion with proxy solicitations, since these were the major defects that the District Court found in the SEC's procedure.<sup>210</sup>

The Court of Appeals said that the question of the reviewability of the SEC's compliance with NEPA's procedural commands presented little difficulty.<sup>211</sup> First, it noted a congressional command in NEPA to the federal agencies, to consider alternatives to their actions which would reduce environmental harm.<sup>212</sup> Second, the court acknowledged NEPA's command that agencies consult with CEQ in attempting to identify and develop new methods and procedures for incorporating environmental values into their decisionmaking.<sup>213</sup> The court found that these clear commands, when added to the judicial presumption of reviewability of agency action, made the SEC's procedural compliance with NEPA reviewable.<sup>214</sup>

In reviewing the SEC's procedural compliance with NEPA, the court applied the well-established strict standard of scrutiny<sup>215</sup> founded in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*.<sup>216</sup> Using this standard of review, the Court of Appeals found that the SEC had not failed in its obligation to consult with CEQ. Rather, the court noted, the SEC did indeed consult with CEQ and gave consideration to CEQ's environmental disclosure proposal before rejecting it.<sup>217</sup> The CEQ proposal, said the court, lacked adequate grounding in securities law because it sought disclosure of information having significance to groups other than investors.<sup>218</sup> The proposal called for distillation and disclosure of existing corporate environmental data.<sup>219</sup> Since such data was not of direct financial concern to investors, the proposal served solely to aid the environment by making the information public. By finding that this proposal lacked adequate grounding in securities law, the court accepted the SEC's position that

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<sup>210</sup> The District Court also found that the SEC's determinations as to the expense of disclosures were "bald assertions." *NRDC v. SEC*, 432 F. Supp. 1190, 1206 (D.D.C. 1977). The SEC's failure to study the costs of disclosures is examined more closely in text at notes 299-314.

<sup>211</sup> *NRDC v. SEC*, 606 F.2d 1031, 1044 (D.C. Cir. 1979).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1044, 1057 (relying on NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1976)).

<sup>214</sup> *NRDC v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979).

<sup>215</sup> *Id.* at 1048-49.

<sup>216</sup> 449 F.2d 1109 (D.C. Cir. 1979). See also text and notes at notes 76-78, *supra*.

<sup>217</sup> *NRDC v. SEC*, 606 F.2d 1031, 1057-58 (D.C. Cir. 1979).

<sup>218</sup> *Id.* at 1058.

<sup>219</sup> See text at notes 184-185 *supra*, for thorough elaboration of the proposal.

NEPA did not change the narrow financial purpose of securities disclosures.<sup>220</sup>

In addition to reviewing the SEC's procedural duty to consult with CEQ, the court applied its strict standard of review to the Commission's duty to consider alternatives to its actions.<sup>221</sup> Specifically, the court scrutinized the SEC's failure to consider promulgating environmental disclosure rules solely in connection with proxy solicitations.<sup>222</sup> Disclosure through proxy statements plays a different role in corporate affairs than does disclosure in registration statements and prospectuses. Disclosure in connection with proxy solicitation is made only to shareholders and not to potential investors and the general public, who can receive the other forms of disclosure statements.<sup>223</sup> The shareholder, as an "owner" of the corporation, has a broader interest in the company's affairs than does an investor. The shareholder, for instance, has the right to submit proposals for major changes in corporate conduct via proxy statements for consideration by other shareholders.<sup>224</sup> Considering the shareholder's broad interest in the conduct of the company, and considering the purpose in the proxy provisions of requiring fair opportunity for corporate suffrage, the primacy of narrow economic concerns is somewhat less in proxies than in disclosures designed for potential investors as a whole. The court acknowledged these arguments in favor of full consideration of the proxy disclosure alternative, and also noted that proxy disclosure would involve less printing and processing costs for registrants than across the board disclosures.<sup>225</sup> Nonetheless, the court held that the SEC was not obligated to give independent consideration to the proxy alternative in the

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<sup>220</sup> The Appeals Court acknowledged the SEC's view of its authority as being limited to requiring disclosure of financial information in the narrow sense only. *NRDC v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979). Furthermore, the SEC stated that NEPA did not basically affect the purpose of the disclosure scheme. Securities Release No. 5627, 40 Fed. Reg. 51,656, 51,662 (1975). The court did not challenge or object to these SEC contentions.

<sup>221</sup> *NRDC v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

<sup>222</sup> *Id.*

<sup>223</sup> See Securities Exchange Act of 1934, 15 U.S.C. § 78n(c) (1976).

<sup>224</sup> See *Proposals of Security Holders*, 17 C.F.R. § 240.14a-8 (1979). Shareholder proposals, even when defeated by wide margins, have sometimes raised enough publicity to cause management to change its conduct. In 1971, General Motors took steps to meet many of the minority demands made in shareholder proposals by "Campaign GM," even though the proposals were all defeated. Sonde and Pitt, *Utilizing the Federal Securities Laws to "Clean the Sky! Clear the Air! Wash the Wind!"*, 16 *HOWARD L.J.* 831, 866-67 (1971).

<sup>225</sup> *NRDC v. SEC*, 606 F.2d 1031, 1055 (D.C. Cir. 1979).

rulemaking proceeding.<sup>226</sup>

The court gave three reasons to support its conclusion that the SEC did not have to consider disclosure proposals solely in connection with proxies. First, the court said that the alternative was not strongly "pressed" on the agency by the NRDC in the rulemaking proceedings, so it was questionable whether the proposal was "readily identifiable" to the SEC.<sup>227</sup> The Court of Appeals, however, did not define in its opinion its interpretation of "pressed." Other courts have also considered intervenors' degrees of participation as a factor bearing on the reasonableness of agency discussion of alternatives, but these cases involved slightly different contexts.

The Supreme Court has acknowledged that intervenors have a responsibility to state clear and specific contentions in a timely manner,<sup>228</sup> and the Fifth Circuit has held that an impact statement which failed to discuss alternatives was not deficient when the alternatives were not mentioned by any parties prior to the statement.<sup>229</sup> These cases, however, were factually distinguishable from *NRDC v. SEC*. In the Supreme Court case of *Vermont Yankee Nuclear Power Corp. v. NRDC* the intervenors raised before the Nuclear Regulatory Commission (NRC) the alternative of implementing energy conservation measures rather than constructing a nuclear power plant.<sup>230</sup> The Court saw this contention as too vague and unsupported on the record.<sup>231</sup> In the Fifth Circuit case, the intervenors failed even to mention their alternative proposal in the proceedings, so the court determined that it could not reasonably find the agency's failure to consider the alternative to be a fatal defect.<sup>232</sup> By contrast, the proxy alternative raised in *NRDC v. SEC* was neither vague nor untimely raised. Rather, it was simply raised by a party other than NRDC and, according to the court, was not "pressed" on the agency. Thus, *NRDC v. SEC* expands an agency's reasonable failure to consider alternatives to include cases where an alternative is not, as the court put it, "pressed" on an agency. The court's reasoning suggests, therefore,

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<sup>226</sup> *Id.* at 1054.

<sup>227</sup> *Id.*

<sup>228</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 534 (1978).

<sup>229</sup> *Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975).

<sup>230</sup> *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 533, 550-51 (1978).

<sup>231</sup> *Id.* at 552-55.

<sup>232</sup> *Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975).

that intervenors in future agency proceedings should try to focus equal attention on all of the alternatives they wish considered, since the agency may not have to consider lesser emphasized ones.<sup>233</sup>

The court's second reason for allowing the SEC not to consider the proxy disclosure alternative was that the agency's duty to consider alternatives under NEPA was subject to a "rule of reason."<sup>234</sup> Under this rule of reason, an agency need not consider alternatives with defects similar or identical to those of an explicitly rejected alternative.<sup>235</sup> The court concluded that the principal burdens of the other disclosure proposals — preparation of the materials by the registrant, and evaluation of their adequacy by the agency — would not be reduced in the alternative of proxy disclosure.<sup>236</sup> Therefore, in the court's eyes, it was not reasonable for the agency to devote additional energy to considering the proxy alternative.

This use of the rule of reason limitation on alternatives is consistent with cases involving environmental impact statements, such as *Sierra Club v. Morton*.<sup>237</sup> In that case, the court held that an agency need not discuss the alternative of federal oil exploration in an area leased for private exploration, since federal, rather than private exploration could not be shown to decrease significantly the possibility of environmental hazards.<sup>238</sup> The noteworthy effect of *NRDC v. SEC*'s use of the "rule of reason" lies in the court's excluding the proxy alternative because it was subject to defects similar to those of another proposal. The court did not find overriding importance in the fact that the alternative had

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<sup>233</sup> Not all courts have placed so much emphasis on the duties of intervenors to raise alternatives in agency proceedings. Three courts, at least, have clearly stated that the agency has an independent duty to "study, develop and describe" alternatives to its actions. *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975); *Environmental Defense Fund v. Corps of Eng'rs.*, 470 F.2d 289, 296-97 (8th Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Three courts have also noted that the agency is in a much better position to develop the record than intervenors are, since an agency usually has greater resources, expertise and funds than do intervenors. *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620-21 (2d Cir. 1965), *cert. denied sub nom.*, 384 U.S. 941 (1966).

<sup>234</sup> *NRDC v. SEC*, 606 F.2d 1031, 1054 (D.C. Cir. 1979).

<sup>235</sup> *Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975).

<sup>236</sup> *NRDC v. SEC*, 606 F.2d 1031, 1055 (D.C. Cir. 1979).

<sup>237</sup> 510 F.2d 813 (5th Cir. 1975).

<sup>238</sup> *Id.* at 826.



policy considerations of broad corporate suffrage in its favor, not shared by the other proposals, that arguably overrode the defects. Where the proposed alternative may merit consideration for its other unshared aspects, the court's use of this approach appears to be contrary to NEPA's goal of ensuring that agencies fully consider alternatives to an action. Nevertheless, as a result of the court's focus on a "similar defects" test, an agency may be able to reject an alternative deserving further consideration on policy grounds because it shares the defects of an already rejected proposal.

The third reason that the Court of Appeals offered for not requiring the SEC to consider the alternative of proxy disclosure was more significant. According to the court, the SEC had successfully invoked the NEPA and administrative law principle of judicial deference to an agency's structuring of its proceedings.<sup>239</sup> Noting that the SEC had announced its decision to hold future public hearings to consider the role of socially significant matters in proxy disclosure,<sup>240</sup> the court reasoned that, since "the agency . . . alone is cognizant of the many demands on it, its resources, and the most effective structuring and timing of [its] proceedings . . . judicial review awaits the conclusion of its proceedings."<sup>241</sup> Therefore, reasoned the court, it was proper to defer to the SEC's decision.

The court pointed to a number of Supreme Court cases concerning administrative law and NEPA to support its conclusion that an agency can structure the timing and methods of its proceedings. The administrative law case cited by the court, *Myers v. Bethlehem Shipbuilding Corp.*,<sup>242</sup> involved an employer who sought to enjoin a National Labor Relations Board hearing against him on the basis that the charge was unfounded.<sup>243</sup> The Supreme Court held that judicial relief for a supposed or threatened harm must await the agency's final decision.<sup>244</sup> Rather than supporting the Court of Appeals decision though, the best analysis of *Myers* is that it illustrates constitutional "case or con-

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<sup>239</sup> NRDC v. SEC, 606 F.2d 1031, 1055 (D.C. Cir. 1979).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 1056.

<sup>242</sup> 303 U.S. 41 (1938).

<sup>243</sup> *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43 (1938).

<sup>244</sup> *Id.* at 50-51.

troversy" principles.<sup>245</sup> It is difficult to see how the case could stand for a broad proposition that agencies can structure the timing and methods of proceeding free of court review, especially where a statutory mandate like NEPA is involved.

Similarly, none of the Supreme Court NEPA cases cited by the Court of Appeals supports a principle that agencies can "time" their compliance with NEPA. The two Supreme Court cases involving the timing of compliance were influenced by other overriding considerations.<sup>246</sup> In the first of these two cases, *Aberdeen and Rockfish R.R. Co. v. SCRAP*,<sup>247</sup> the court allowed the Interstate Commerce Commission (ICC) to consider the environmental effects of a general railroad rate increase in an impact statement issued from a general revenue proceeding, while postponing consideration of the environmental effects of an increase on individual commodities rates until future rate hearings.<sup>248</sup> The Court found that the ICC had, in fact, made an environmental impact study on the general rate increase, and that this study was more than adequate.<sup>249</sup> The Court also acknowledged the ICC finding that the railroads were in an economic crisis due to sharply increasing costs and losses that endangered their existence.<sup>250</sup> The agency was not left free to time its compliance with NEPA.

The other Supreme Court case involving the timing of compliance with NEPA was *Flint Ridge Development Co. v. Scenic Rivers Association*.<sup>251</sup> In this case, the Secretary of Housing and Urban Development could not possibly comply with his statutory duty to allow statements by a real estate developer to go into effect within thirty days of filing, and simultaneously prepare an

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<sup>245</sup> It is a principle of Constitutional Law that a court will not render advisory opinions on issues that have not emerged from an adversary clash that will insure full exploration of the parties' conflicting interests. Under this principle, a plaintiff can not sue to prevent a supposed or possible harm. He must demonstrate a specific, objective harm or immediate threat of a specific harm in order to have standing to litigate. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, 1535-44, 1581-93 (9th ed. 1976). See also *Baker v. Carr*, 396 U.S. 186 (1962).

<sup>246</sup> The Court of Appeals mentioned two other Supreme Court NEPA cases that did not involve the timing of compliance with NEPA, but, instead, involved the adequacy of the agency's procedures for considering environmental values. These cases were: *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); and *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>247</sup> 422 U.S. 289 (1975).

<sup>248</sup> *Aberdeen and Rockfish R.R. v. SCRAP*, 422 U.S. 289, 324-26 (1975).

<sup>249</sup> *Id.* at 326-27.

<sup>250</sup> *Id.* at 299-300.

<sup>251</sup> *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

impact statement on the developments.<sup>252</sup> Such a statement could not be drafted, circulated and reviewed properly within that time.<sup>253</sup> The agency, in that case, was allowed to consider environmental impacts of its actions in a later rulemaking proceeding. Again, though, the agency was not free to time its compliance with NEPA.

Furthermore, several other cases, which the Court of Appeals did not cite, have explicitly held that an agency can not interject reasons of convenience or delay to escape timely compliance with NEPA's procedural mandate.<sup>254</sup> For example, the court in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC* held that Congress did not intend the agency's timing of compliance with NEPA to be discretionary, even though Congress did not provide a timetable for compliance.<sup>255</sup> The Atomic Energy Commission (AEC), in that case, was not allowed to postpone amending its environmentally deficient rules because of the agency's desire to provide an orderly transition in agency procedure, or because of a pressing national power crisis.<sup>256</sup>

Other courts also have refused to excuse non-compliance with NEPA for reasons of administrative expedience. In *NRDC v. Callaway*,<sup>257</sup> for example, the dissent unsuccessfully argued that preparing a new impact statement could unreasonably delay a vital defense project.<sup>258</sup> Similarly, the Court of Appeals for the Second Circuit held that "delay is a concomitant of implementation of the procedures prescribed by NEPA,"<sup>259</sup> and, therefore, the Federal Power Commission could not use the spectre of a power crisis to lighten its duty to prepare an independent and sufficient impact statement before granting a license to construct high voltage power lines.<sup>260</sup> Taken together these cases demand strict and

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<sup>252</sup> *Id.* at 788-89.

<sup>253</sup> *Id.* at 789.

<sup>254</sup> See *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422-23 (2d Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Mobil Oil Corp. v. FTC*, 430 F. Supp. 855, 873 (S.D.N.Y. 1977), *rev'd on other grounds*, 562 F.2d 170 (2d Cir. 1977).

<sup>255</sup> *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1119-20 (D.C. Cir. 1971).

<sup>256</sup> *Id.* at 1119-22.

<sup>257</sup> 524 F.2d 79 (2d Cir. 1975).

<sup>258</sup> *NRDC v. Callaway*, 524 F.2d 79, 97 (2d Cir. 1975) (dissenting opinion).

<sup>259</sup> *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 422 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972).

<sup>260</sup> *Id.* at 423.

timely compliance with NEPA, regardless of the agency's other pressing concerns.

Despite the potential breadth of its language, the Court of Appeals holding in *NRDC v. SEC*, that it was proper to defer to the agency's announcement of future proceedings concerning proxy disclosure, should not stand for the proposition that an agency can structure the timing of compliance with NEPA. The court noted that the SEC had already conducted seven years of bona fide proceedings on environmental disclosure, and that the SEC had in the past conducted full hearings when it announced its intention to do so.<sup>261</sup> Furthermore, the court held that there was no obligation to consider the proxy alternative under a "rule of reason" anyway.<sup>262</sup> Thus, the Commission was not allowed simply to excuse itself from considering the proxy alternative for reasons of administrative convenience.

The result of the Court of Appeals review of the SEC's performance under NEPA was a finding that the SEC did adequately consider alternatives to its actions, though it failed to consider a proxy disclosure alternative. The court also found that the SEC properly consulted with CEQ; though it did not accept CEQ's advice. Thus, in contrast to the District Court decision, the Court of Appeals held that the Commission fully complied with NEPA's procedural mandate.

#### *B. Review of the Agency's Decision Not to Adopt Rules*

The court considered the agency's decision not to adopt environmental disclosure rules in a different light than that in which it measured the agency's procedural compliance with NEPA. The issues of reviewability and standard of review over the decision were more complex in this portion of the opinion. In addition, while, as in the procedural issue, the court ultimately found the agency's decision not to adopt rules reviewable, it applied a narrower scope of review to that decision.

The reviewability of the agency's decision not to adopt the proposed environmental disclosure rules was treated at length in the court's analysis.<sup>263</sup> The court acknowledged a presumption of re-

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<sup>261</sup> *NRDC v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979).

<sup>262</sup> *Id.* at 1054.

<sup>263</sup> *See id.* at 1043-47.

viewability of agency action,<sup>264</sup> and found no statute precluding judicial review.<sup>265</sup> It did, however, question whether the decision not to adopt rules was committed to the SEC's discretion. If the decision was so committed, the court said, there would be "no law to apply" and the decision would be unreviewable under the test of *Overton Park*.<sup>266</sup>

The court determined that the answer to the question whether the agency decision was committed to its discretion necessarily turned on "pragmatic considerations."<sup>267</sup> The court said that the issues posed by an agency decision not to regulate a given activity were largely inappropriate for judicial resolution.<sup>268</sup> One such issue mentioned by the court concerned an agency's internal management considerations, such as budget and personnel.<sup>269</sup> The court cited a Supreme Court case, *FPC v. Transcontinental Gas Pipe Line Co.*,<sup>270</sup> in support of this proposition,<sup>271</sup> but it is not clear how that case applies. The case involved an agency decision not to certify a gas pipe line operation,<sup>272</sup> but the agency did not make the decision on the basis of internal management considerations.<sup>273</sup> Rather it decided that the operation would have unfavorable effects on gas conservation and gas prices.<sup>274</sup>

The Court of Appeals may have fashioned a new test by asserting that an agency's internal management considerations are relevant to the issue of reviewability of a decision not to adopt a proposed rule. If so, then agencies choosing not to exercise their regulatory powers "in the public interest" may escape judicial review by demonstrating that their budget and personnel are not adequate to deal with a given problem. Such an approach is questionable, though, since the agency's budgetary and manpower restraints reflect executive and legislative matters, and should be

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<sup>264</sup> *Id.* at 1043.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1043-44. The court, at this point in its analysis, outlined the considerations recognized by *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). See text at notes 127-131, *supra*.

<sup>268</sup> *NRDC v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

<sup>269</sup> *Id.*

<sup>270</sup> *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961).

<sup>271</sup> *NRDC v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

<sup>272</sup> *FPC v. Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 3,11 (1961).

<sup>273</sup> *Id.* at 6-7.

<sup>274</sup> *Id.* at 7, 23-30.

independent of judicial concern with interpreting the law.<sup>275</sup> Yet the court mentioned agency management and budget concerns as part of its doubts about reviewability.

There were two considerations, however, that tipped the scale in favor of reviewability. First, the court recognized that at least a minimal scrutiny over the rationality of the agency's decision to reject likely disclosure alternatives was necessary in order to determine if the SEC fulfilled its procedural NEPA duty to consider alternatives to its present course of action.<sup>276</sup> But the court placed greater emphasis on a second factor favoring reviewability of the agency's decision not to adopt rules, and that factor did not involve NEPA. The court observed that the SEC had held extensive rulemaking proceedings and had compiled a record closely focused on the proposed rules.<sup>277</sup> The court noted that, in two previous cases involving extensive rulemaking proceedings with administrative records focused on proposed rules, other courts had reviewed agency decisions not to adopt rules.<sup>278</sup> The Court of Appeals said that judicial review of the agency's decision where the agency conducted extensive proceedings would not greatly interfere with the agency's budget and planning, since the agency had already decided that considering the proposals merited some energy and time.<sup>279</sup> The court concluded that, in light of the strong presumption of reviewability, the SEC decision not to adopt rules should be reviewable because the Commission had held a rulemaking proceeding and compiled a record for review.<sup>280</sup>

The Court of Appeals decision raises some speculation about the reviewability of agency decisions not to adopt rules. If the SEC had not considered adoption of any disclosure rules, but had simply rejected the NRDC rulemaking petition, the Court of Appeals may have found the decision not to make rules unreviewable in the absence of a rulemaking proceeding. Such a finding would mean that an agency could effectively insulate its decision

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<sup>275</sup> Cf. *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (an agency can not interpose reasons of administrative cost or delay for failure to comply fully with NEPA).

<sup>276</sup> *NRDC v. SEC*, 606 F.2d 1031, 1044 (D.C. Cir. 1979).

<sup>277</sup> *Id.* at 1047.

<sup>278</sup> *Id.* at 1046-47. The court cited *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977); and *National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978).

<sup>279</sup> *NRDC v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

<sup>280</sup> *Id.* at 1047.

not to regulate a given activity by refusing to consider rulemaking. Even if the agency does consider rulemaking, but does so only on the basis of written comments, instead of extensive proceedings producing a record, the Court of Appeals decision suggests that the agency could escape review. The court's decision may affect agencies whose rules are in need of amendment for consideration of environmental values by allowing those agencies to escape NEPA review if they refuse to conduct extensive rulemaking proceedings. Although the court did say that some scrutiny of the SEC decision not to adopt rules would be proper in order to insure that the agency fully considered alternatives to its action,<sup>281</sup> the court did not indicate whether this scrutiny would be appropriate absent a rulemaking proceeding. Its reasoning suggests, however, that this substantive scrutiny of agency decisionmaking under NEPA may only be proper where the agency has conducted substantial proceedings.

After passing on the question of reviewability, the court again undertook an extensive analysis in determining the proper standard and scope of review of the SEC's decision not to adopt rules. The court applied the statutorily prescribed "arbitrary and capricious" standard of review to the SEC's decision based on informal rulemaking.<sup>282</sup> But, the words, "arbitrary and capricious," said the court, did not impose a fixed template of review.<sup>283</sup> The proper scope of review under that standard was instead, as the court noted, a flexible one depending on a variety of factors.<sup>284</sup>

The two most important factors that the Court of Appeals found relevant to determining the proper scope of review were the intent of Congress, and the ability of the court to evaluate the questions posed by the decision it was reviewing.<sup>285</sup> The court noted that the legislative history of the Securities Acts expressed an intent to vest the SEC with very broad discretion in regulating securities disclosure.<sup>286</sup> The court also said that many of the is-

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<sup>281</sup> *Id.* at 1044.

<sup>282</sup> *Id.* at 1049. See APA 5 U.S.C., § 706(2)(A) (1976).

<sup>283</sup> NRDC v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979).

<sup>284</sup> *Id.* at 1050. Here, the court accurately noted the concurrence among academic commentators that the scope of review was flexible. *Id.* at n.25. See text at notes 143-151, *supra*.

<sup>285</sup> NRDC v. SEC, 606 F.2d 1031, 1050-52 (D.C. Cir. 1979).

<sup>286</sup> *Id.* at 1050-51. The court quoted S. Rep. No. 792, 73d Cong. 2d Sess. 10 (1934), which stated that the SEC "is given complete discretion . . . to require in corporate reports only such information as it deems necessary or appropriate in the public interest or

sues in the case were not appropriate for judicial oversight because the SEC decision depended on forecasts involving its expertise in securities. The SEC, remarked the court, had to assess the merits of disclosures using its expert opinion on the degree of investor interest, the probable burdens of disclosures on registrants, and the likelihood that the disclosures would influence corporate behavior.<sup>287</sup> Thus, the court saw the relevant factors as favoring a narrow scope of review.

Another factor which the court found to narrow the scope of review was more noteworthy. The court said that the question of reviewability was not divorced from scope of review, and that a particularly narrow scope was proper where doubts existed about reviewability,<sup>288</sup> as they did in the case at hand. The court cited two cases for its proposition, but these cases provide little support for the court's assertion. One of the cases involved a statute that expressly limited the remedies of aggrieved parties, and thus limited the scope of review.<sup>289</sup> In the other case,<sup>290</sup> the Court of Appeals for the District of Columbia applied the arbitrary and capricious standard of review, but it did not express doubts about reviewability. In fact, that court clearly rejected the agency's contentions that decisionmaking was committed to its discretion, and actually over-turned the agency's decision.<sup>291</sup> Furthermore, the authorities on administrative law do not link the questions of reviewability and scope of review.<sup>292</sup> Thus, the Court of Appeals in *NRDC v. SEC* fashioned a unique factor in assessing scope of re-

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to protect investors."

<sup>287</sup> *NRDC v. SEC*, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

<sup>288</sup> *Id.*

<sup>289</sup> In *Dunlop v. Bachowski*, 421 U.S. 560, 569 (1975), the Court observed that Congress made suit by the Secretary of Labor the exclusive post-election remedy for violation of union election laws.

<sup>290</sup> *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970) *vacated as moot*, 404 U.S. 403 (1972).

<sup>291</sup> *Id.* at 659. *Medical Comm. For Human Rights v. SEC*, involved a shareholder proposal to Dow Chemical Co. management that the company discontinue manufacturing napalm. *Id.* at 661-63. The SEC refused to order management to include this shareholder proposal in the company's proxy statements, reasoning that the proposal was intended to promote a political cause which was outside the allowable scope of proxy function; and the shareholders brought suit against the SEC, alleging that the SEC acted inconsistently with its congressional mandate. The court noted that the purpose of the proxy provisions of the Securities Acts was to provide fair opportunity for corporate suffrage and remanded the case to the agency. *Id.* at 681-82.

<sup>292</sup> Davis, Gelhorn and Schwartz do not recognize a link between reviewability and scope of review.



view. Under the court's analysis, a challenger to agency action must not only cross the threshold question of reviewability, but must clear that obstacle with ease in order to avoid a particularly narrow review.

After stating the reasons for its narrow review, the court briefly articulated exactly what its scope of review would include. The court said that it would review the Commission's factual and policy determinations, asking only that the SEC explain the facts and policies on which it relied.<sup>293</sup> The court might have, but did not, ask the agency to show some empirical basis for its determinations.<sup>294</sup> Furthermore the court could have, but did not, scrutinize the agency's view of its obligation under NEPA, since the agency action may have been arbitrary if the agency had misconceived the law.<sup>295</sup> Instead, though, the court only applied a very narrow review of the SEC's factual and policy determinations.

Using this scope of review, the court upheld the SEC's decision not to adopt the proposed environmental disclosure rules. The court found that the SEC gave rational policy explanations for its refusal to adopt each of the rules.<sup>296</sup> The policy considerations primarily relied upon were those of excessive cost and burden, and low investor interest. The judges deferred to the SEC's expertise in assessing the extent of investor interest in the proposal disclosures,<sup>297</sup> and the cost of disclosure to registrants and the agency.<sup>298</sup> The court noted that the precise quantification of investor interest in any rule might be impossible, and that there was remarkably little hard data on which to estimate the costs and benefits of even traditional disclosures.<sup>299</sup> Furthermore, the court noted, no credible effort to quantify costs or benefits was made by any participants in the rulemaking.<sup>300</sup> Because of the ab-

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<sup>293</sup> NRDC v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

<sup>294</sup> One court has held that an agency must make findings of fact when the facts underlying the agency decision are susceptible of being found (at least, where the record had both formal and informal characteristics). *Industrial Union Department v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974).

<sup>295</sup> A court may remand a case to the agency if the decision of the agency is based on a misconception of the law, even though the agency acted within the permissible scope of its discretion. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

<sup>296</sup> The policy considerations relied upon by the SEC are outlined in *NRDC v. SEC*, 606 F.2d 1031, 1039-41 (D.C. Cir. 1979).

<sup>297</sup> *Id.* at 1039-40, 1052.

<sup>298</sup> *Id.* at 1040, 1058-59.

<sup>299</sup> *Id.* at 1058.

<sup>300</sup> *Id.* at 1059.

sence of any data, the court deferred to the agency's stated reasons and policies behind its decision not to adopt rules. Thus, the Commission survived challenges to its substantive decisionmaking as well as to its procedural duties.

### C. *The Court's Decision and NEPA*

The court's decision was significant to NEPA primarily for what it did not do. The court did not find that the SEC had a duty to determine costs and benefits, the court did not require the Commission to articulate its NEPA responsibilities, and it did not offer its own view of NEPA's effect on the agency. The court's acceptance of the agency's failure to make a credible effort to quantify costs or benefits on the record is perhaps the most significant aspect of its decision.

The court construed the absence of cost and benefit data as a valid reason for the agency to rely on its extrapolative judgment, rather than viewing this absence as part of the agency's procedural failure to develop the record fully. By not finding an SEC procedural duty to inform itself of costs or benefits of disclosure rules, the court's decision contrasts with that of the Second Circuit Court of Appeals dealing with NEPA's environmental impact statement provision.<sup>301</sup> In *NRDC v. Callaway*, the court found an agency impact statement deficient for failure to assess long-term ecological marine damage from dredge dumping.<sup>302</sup> The court held that the impact statement "must go beyond mere assertions' and provide sufficient data . . . to enable a reader to evaluate analysis and conclusions."<sup>303</sup> The dissent in that case unsuccessfully argued that the dearth of information concerning long-term ecological marine damage was relevant to the adequacy of the agency's impact statement.<sup>304</sup> By contrast, in *NRDC v. SEC*, the Court of Appeals saw the dearth of information about costs and benefits of disclosure as a factor favoring narrow review of

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<sup>301</sup> The scientific process of cost-benefit analysis, which involves quantification of factors in decisionmaking, is often done by agencies, but it is not clear whether or when the agency must do this analysis. See text and notes at notes 81-86 *supra*. The court decision in *NRDC v. Callaway*, 524 F.2d 79 (2d Cir. 1975), suggests that there is an agency duty to provide data for evaluation of factors in decisionmaking even where it will be difficult for the agency to obtain the data.

<sup>302</sup> *NRDC v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975).

<sup>303</sup> *Id.* at 93.

<sup>304</sup> *Id.* at 95.

the agency's decision.<sup>305</sup>

The court's decision is not necessarily inconsistent with existing NEPA case law, however, if the court rested its opinion on the belief that the SEC could not make a credible effort at estimating the costs or benefits of disclosure. The court did not say that the costs or benefits could not possibly be measured, but it did say that there were inherent uncertainties in gathering such information.<sup>306</sup> Other courts have used this rationale in deferring to the agency's decision in NEPA cases.<sup>307</sup> In *Sierra Club v. Lynn*,<sup>308</sup> for example, an impact statement was held sufficient even though the agency asserted that certain factors in the analysis were imprecise and unquantifiable.<sup>309</sup> Another court has similarly held that NEPA does not demand mathematical dollar and cents weighing of costs and benefits, and has acknowledged that the ability to forecast within a complex system can become a guess at best.<sup>310</sup> In that case, an agency was excused from making an in-depth study of the long-term effects of oil exploration on the Gulf of Mexico.<sup>311</sup> It is difficult, if not impossible, to determine from NEPA cases when a court will demand a quantified analysis of costs and benefits. The answer seems to be, though, that a court will use its own judgment as to whether a factor in the agency's analysis is quantifiable.<sup>312</sup> In light of these cases, the decision in *NRDC v. SEC* did not add new dimensions to the law if it rested on the impossibility of gathering cost and benefit data.

It is possible, however, that the case has greater significance. In one sentence, the court said that the stringency of review applied in the impact statement area may not be feasible for the other provisions of NEPA.<sup>313</sup> The court did not elaborate on this statement, did not cite legal support for the idea, and did not describe what effect this had on its review. Possibly, the effect was that the court never asked the SEC to show that it even attempted cost/benefit analysis because the court applied a narrower review

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<sup>305</sup> *NRDC v. SEC*, 606 F.2d 1031, 1058 (D.C. Cir. 1979).

<sup>306</sup> *Id.*

<sup>307</sup> *Sierra Club v. Morton*, 510 F.2d 813, 825 (5th Cir. 1975); *Sierra Club v. Lynn*, 502 F.2d 43, 61-62 (5th Cir. 1974).

<sup>308</sup> 502 F.2d 43 (5th Cir. 1974).

<sup>309</sup> *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974).

<sup>310</sup> *Sierra Club v. Morton*, 510 F.2d 813, 827 (5th Cir. 1975).

<sup>311</sup> *Id.* at 825.

<sup>312</sup> This would be analogous to the law outside of NEPA. See note 277, *supra*.

<sup>313</sup> *NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

for rulemaking than it would have for impact statements. If this is the case, then the duty of a federal agency to study fully the environmental costs and benefits of its actions would be limited to those cases where the agency has taken "major Federal action significantly affecting the quality of the human environment."<sup>314</sup> Thus, an omission of cost/benefit analysis would not be a fatal flaw in agency rulemaking with only an indirect, detrimental effect on the environment.

The Court of Appeals declined to examine, not only the SEC's omission of a cost and benefit analysis, but also the agency's view of its responsibility under NEPA. An agency's action may not stand if the agency has misconceived the law, even though the agency acts within its permitted scope of discretion.<sup>315</sup> Thus, the Court of Appeals could have examined the Commission's view of NEPA as a relevant factor in reviewing the agency's actions. The court did not do so, however, and it also did not offer its own view of the Commission's authority and responsibility under NEPA. It is not an impossible task, nonetheless, to ascertain the views of the Court and the Commission concerning NEPA's effect on the SEC.

While not explicitly stating its view of NEPA's effect on the SEC's authority and responsibility, the court did acknowledge the SEC's view of its authority without criticism.<sup>316</sup> The Commission maintained that its authority was limited by the objectives of the Securities Acts.<sup>317</sup> These acts, in the SEC's view, were designed to require disclosure of financial information in a narrow sense only.<sup>318</sup> Furthermore, the court did not take issue with the SEC's conclusion that NEPA did not authorize the Commission to promulgate disclosure rules solely to aid the environment.<sup>319</sup> The SEC did not qualify this contention with any considerations of practicality or cost of disclosure, and so it would appear that the

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<sup>314</sup> "[M]ajor Federal actions significantly affecting the quality of the human environment" require the preparation of an environmental impact statement. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

<sup>315</sup> SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). Furthermore, court review of agency findings of law is more stringent, since courts maintain primacy in interpreting questions of law. B. SCHWARTZ, ADMINISTRATIVE LAW 588 (1976).

<sup>316</sup> NRDC v. SEC, 606 F.2d 1031, 1039 (D.C. Cir. 1979).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> The Commission's view was cited by the District Court. See NRDC v. SEC, 432 F. Supp. 1190, 1201 (D.D.C. 1977).

Commission believed that it had no duty to act solely to aid the environment, regardless of practicability.

The court seems to have accepted the SEC's view of its duty towards the environment by rejecting the CEQ disclosure proposal for its inadequate grounding in securities law.<sup>320</sup> The CEQ proposal would have required disclosure of already existing environmental data gathered in connection with a corporation's reports to government agencies.<sup>321</sup> While this proposal would have aided the environment by making the data public, it would not have served the investors' financial interests. By upholding the SEC's rejection of this proposal because it lacked grounding in securities law, and by not objecting to the SEC's contentions, the court implicitly accepted the Commission's conclusion that NEPA did not authorize it to take affirmative action to aid the environment wherever practicable.

If agencies have no affirmative duty to aid the environment, then they should have, at least, a duty to refrain from harming the environment wherever practicable because NEPA mandates careful consideration of actions with environmental impact.<sup>322</sup> This duty would be meaningless, however, to the SEC because the Commission's security regulation activity has no direct impact on the environment. The Commission does not license or regulate its registrants except to the extent that they deal in the selling and trading of securities. This regulatory role contrasts with the activities of agencies such as the Nuclear Regulatory Commission or the Federal Power Commission, which license activities, such as power plants, having direct and major environmental impacts.<sup>323</sup> If a federal agency, like the SEC, has no negative impact on the environment, and if it has no duty to aid the environment wherever feasible, what then is the meaning of NEPA to such an agency?

Apparently, in *NRDC v. SEC*, the answer lies in a middle route taken by the SEC. The Commission adopted disclosures that it thought would aid the environment, and would serve to protect

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<sup>320</sup> *NRDC v. SEC*, 606 F.2d 1031, 1058 (D.C. Cir. 1979).

<sup>321</sup> See text at notes 185-186, *supra*.

<sup>322</sup> Even where an agency does not have to prepare an environmental impact statement, it must carefully consider the effects of its actions on the environment. See *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 93 (2d Cir. 1975); and *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

<sup>323</sup> The direct and major impact of the NRC's licensing activity on the environment has been recognized in *NRDC v. U.S. NRC*, 539 F.2d 824, 841 (2d Cir. 1976).

traditional investor interests as well.<sup>324</sup> The Commission's rule that a registrant must disclose material expenditures necessary to bring the company into compliance with environmental law<sup>325</sup> serves two purposes simultaneously. From a financial viewpoint, the rule provides an investor with knowledge of what a company must spend to avoid the potentially crippling penalties for non-compliance with environmental standards. From an environmental standpoint, the rule provides an investor with information about the degree of a company's environmental problems when that company is threatened with non-compliance penalties. This result may be the most practical for partially serving the purposes of NEPA while not disrupting the agencies' traditional operations, but it falls far short of the position urged by NRDC.

The essence of NRDC's argument was that NEPA gave explicit meaning to the SEC's authority to require disclosures "in the public interest."<sup>326</sup> The SEC specifically rejected this argument,<sup>327</sup> and the Court of Appeals did not fault the Commission for its finding. In fact, the Court of Appeals never even discussed NRDC's contention that NEPA expanded the definition of "public interest." Had the Court of Appeals accepted the NRDC contention, NEPA would have had a new impact on the many federal agencies with mandates to assert their authority "in the public interest."<sup>328</sup> But the court failed to recognize the NRDC's argument and, in so doing, quelled a potentially major influence of NEPA on the interpretation of statutory mandates of federal agencies.

## V. THE POTENTIAL OF CORPORATE ENVIRONMENTAL DISCLOSURE

Although the Court of Appeals did not find that NEPA gave explicit meaning to the SEC's duty to require disclosure "in the public interest," the Court expressed no doubts about whether the SEC could adopt any of the environmental disclosure rules if

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<sup>324</sup> See Securities Release No. 5386, 38 Fed. Reg. 12,100, 12,100 (1973).

<sup>325</sup> *Id.* A registrant must report "the material effects that compliance with Federal, State, and local provisions . . . relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries."

<sup>326</sup> The District Court agreed with NRDC. See *NRDC v. SEC*, 389 F. Supp. 689, 695 (D.D.C. 1974).

<sup>327</sup> See *NRDC v. SEC*, 432 F. Supp. 1190, 1201 (D.D.C. 1977).

<sup>328</sup> The FPC, the ICC and the FCC are but a few of the federal agencies having "public interest" mandates. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 42-44 (1976).

it chose to do so. As long as the SEC is clothed with broad authority to require such disclosure as it deems "necessary or appropriate in the public interest or for the protection of investors,"<sup>329</sup> it could expand its role of providing information to the public. It is true that the SEC has traditionally viewed its mission as limited to protection of the investor's dollar interest in a company, but what is "necessary or appropriate in the public interest" is potentially broader than what is necessary "for the protection of investors." The SEC could find it "in the public interest" to rule that some corporate environmental conduct constitutes "material" information to potential investors or shareholders.<sup>330</sup>

The background of SEC enforcement actions based on violations of the Federal Corrupt Practices Act<sup>331</sup> indicates that the Commission is not solidly locked into traditional notions of materiality.<sup>332</sup> While not every corporate violation of law is usually "material," it is evident that the SEC has come to regard illegal political contributions as material in and of themselves.<sup>333</sup> Former SEC Commissioner, A. A. Sommer, Jr., explained that

the Commission felt that the integrity of the nation's political processes . . . were so important, and should properly be important to investors as such, . . . that . . . transgressions of that law [the Federal Corrupt Practices Act] should be the subject matter of disclosure. After all, it was the investors' money that was used in a manner inimical to the political processes of our country.<sup>334</sup>

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<sup>329</sup> See note 28, *supra*, and text at notes 55-59, *supra*.

<sup>330</sup> Section 19 of the Securities Act of 1933, gives the SEC broad power to make rules: The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers. . . . 15 U.S.C. § 77 S(a) (1976).

<sup>331</sup> The Federal Corrupt Practices Act, 2 U.S.C. §§ 431-456 (1976). One of the major provisions of the Act limits the contributions that corporations and others can make to Federal political campaigns. See 2 U.S.C. §§ 441a *et seq.*

<sup>332</sup> Note, *Disclosure of Corporate Payments and Practices: Conduct Regulation through Federal Securities Laws*, 43 BROOKLYN L. REV. 681, 712-21 (1977).

<sup>333</sup> *Id.* at 713.

<sup>334</sup> *Id.* In the 1960s, speculation in real estate securities caused the SEC to broaden its disclosure policy. The SEC required disclosure of certain information helpful in assessing "the integrity of management." The Commission stated that evaluations of management "quality" were essential to an informed investment decision, and that the quality of management was always a material factor. This rationale has been the basis for broadening disclosure policy in the "corrupt payments" area. See Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 913 (1977). Pollution of the environment by a company also bears relation to the "quality" of management, but the SEC has not found a

The SEC could find it equally material when investors' money is used in a manner inimical to the environment,<sup>335</sup> and for that reason could promulgate disclosure rules making significant corporate environmental conduct material. In order for that to happen, though, the Commission would have to recognize that the integrity of our environment is as important as the integrity of our political processes.

The integrity of the environment should be "materially" important to the investor. When he breathes polluted air, or drinks polluted water, his very bodily integrity is violated.<sup>336</sup> An individual's interest in preserving himself against unwarranted physical violations is one of the most basic and fundamental interests recognized by the law.<sup>337</sup> Serious corporate pollution of the environment is ultimately a violation of the investors' most basic interests - life and health. These violations should be "material" to an investor or shareholder.

The Securities Act defines "material" information to include matters "as to which an average prudent investor ought reasonably to be informed before purchasing the security registered."<sup>338</sup> Given the investor's interest in maintaining his environment, he "ought reasonably to be informed" before purchasing a security that a company has polluted ground water wells with pesticides implicated in causing fertility and sterility.<sup>339</sup> An investor "ought reasonably to be informed" before purchasing a security that a

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significant enough relation between pollution and management quality to require disclosure of environmental information.

<sup>335</sup> President Roosevelt said in his message to Congress recommending passage of the Securities Acts that people who manage corporations are "trustees" acting for others. See text at note 22, *supra*. When such "trustees" use the investors' money to harm their environment, the trustees have violated the trust. Such violations, whether or not financially significant, should constitute "material" information to the shareholders. See text at notes 338-341, *infra*.

<sup>336</sup> The extent of pollution of our environment should not be underestimated. CEQ has reported that most municipalities do not have drinking water that meets the standards of the Federal Water Pollution Control Act. Randolph and Toth, *Water, Water Everywhere, But is it Safe?*, Boston Globe, Jan. 5, 1980 at 3, col. 2.

<sup>337</sup> The interest in preserving one's physical integrity is at the heart of tort law on assault, and is the basis of certain due process cases under the Constitution. See *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967); W. PROSSER, J. WADE, & SCHWARTZ, *Cases and Materials in Torts*, 29-33 (6th ed. 1976); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977); *Rochin v. California*, 342 U.S. 166, 174 (1952).

<sup>338</sup> 17 C.F.R. § 230.405(l) (1979).

<sup>339</sup> Hooker Chemical Co. illegally discharged such toxic wastes from its pesticide and fertilizer plant at Lathrop, in San Joaquin Valley, according to the Environmental Protection Agency. *CHEMICAL ENGINEERING*, Dec. 31, 1979, at 19.



company has not safely disposed of over one million tons of chemical process wastes.<sup>340</sup> An investor "ought reasonably to be informed" that a company has dumped over 67,000 tons of asbestos tailings into a fresh water lake.<sup>341</sup> Such corporate pollution should constitute "material" information to the investor because "he ought reasonably to be informed" of corporate activities which threaten his environment, and ultimately his very health.<sup>342</sup>

Some of these harms to the environment may be the subject of "material" disclosure within the existing meaning of the term, but the term still has a predominantly financial focus. In March of 1977, the SEC filed a complaint against Allied Chemical Co. for failing to disclose that it was subject to material, potential *financial* exposure resulting from its discharge of toxic chemicals into the James River in Virginia.<sup>343</sup> While such an enforcement action would appear to put companies on notice that they have to disclose much of their environmentally destructive activity, this is not so. The focus of "materiality" is still financial, and so a corporation can not be faulted for disclosing only the nebulous financial impacts to itself of its pollution.<sup>344</sup> For purposes of protecting the investors' dollars, it should be adequate for a corporation merely to state that it is subject to a certain, potential amount of liability for violating pollution laws. It is certainly inconceivable that a chemical company, for example, would have to describe in detail the volume and the kind of chemicals it was dumping, the location of the dumping, or the likely effects on the regional populace. Furthermore, much of a company's pollution does not have to be reported at all, since it does not often have "material" consequences to the company. This is because, as the

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<sup>340</sup> Sixty-six million tons of chemical waste were generated by the fifty-three largest chemical manufacturers in 1978 alone. That equals almost 1.25 million tons per company. Unfortunately, a House Subcommittee has concluded that many of the disposal facilities for such wastes would be illegal under hazardous waste regulations of the EPA. *CHEMICAL ENGINEERING*, Dec. 13, 1979, at 16.

<sup>341</sup> In Duluth, Minnesota, residents must drink bottled water because of the waste dumped into Lake Superior by the Reserve Mining Co.. Randolph and Toth, *Water, Water Everywhere, But is it Safe?*, Boston Globe, Jan. 5, 1980, at 3, col. 2.

<sup>342</sup> The investor might also like to know when a company's industrial emissions contribute to the problem of "acid rain." Seven hundred United States and Canadian scientists gathered in Toronto in November of 1979 to discuss the acid rain problem. It is particularly acute in Canada, where 48,000 lakes are threatened with oxygen death. Dumanoski, *Acid Rain Knows No National Borders*, Boston Globe, Nov. 19, 1979, at 1, col. 1.

<sup>343</sup> See *NRDC v. SEC*, 432 F. Supp. 1190, 1196 n.12 (D.D.C. 1977).

<sup>344</sup> See text at notes 59-60, *supra*.

SEC observed, environmental laws do not exist concerning many forms of pollution.<sup>345</sup> In addition to these shortcomings of "materiality," corporate failure to disclose material pollution has been a largely barren field for SEC enforcement actions.<sup>346</sup> Thus, the traditional notion of "materiality" has provided an inadequate means of informing an investor of significant harm to his environment.

If the SEC were to promulgate rules incorporating significant corporate pollution within the notion of "materiality," not only would the investor gain a greater awareness of the consequences of his investment, but our environment could be helped as well. The SEC, the Congress and many commentators have recognized the usefulness of disclosure as a regulatory tool. The Commission has repeatedly said that disclosure publicity deters questionable practices and elevates standards of business conduct;<sup>347</sup> commentators such as Brandeis and Loss have endorsed disclosure as a salutary measure;<sup>348</sup> and Congress has made disclosure the backbone of much of its regulatory legislation, such as the Freedom of Information Act,<sup>349</sup> the Truth in Lending Act,<sup>350</sup> the Interstate Land Sales Full Disclosure Act,<sup>351</sup> and the Consumer Credit Protection Act.<sup>352</sup> While no one has proven or quantified the effect of disclosure as a cure for social ills, there has long been a strong undercurrent in American political thought that the free flow of information is vital to a strong society.

The possible requirements of a disclosure rule can not fully be explored within this article, but such a solution might call for disclosure of illegal environmental activities such as chemical dump-

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<sup>345</sup> Securities Release No. 5704, 41 Fed. Reg. 21,632, 21,633 (1976).

<sup>346</sup> For the years, 1976-1979, the Federal Securities Law Reporters (CCH), reveal no SEC actions against companies for failure to report "material" environmental pollution. It will be interesting to see if the SEC proceeds against Hooker Chemical Co. concerning disclosure of Hooker's chemical waste dumping at Love Canal, New York. The United States Department of Justice instituted a \$124 million suit against the company in late 1979. . . . See CHEMICAL ENGINEERING, Dec. 31, 1979, at 19. The question the SEC will have to ask is, "Should Hooker Chemical have disclosed its waste dumping activities before the law suit, and if so, did the company make such a disclosure?"

<sup>347</sup> See text at note 49, *supra*. See also Stevenson, *The SEC and the New Disclosure*, 62 CORNELL L. REV. 50, 61 (1976).

<sup>348</sup> See text at notes 52-53, *supra*.

<sup>349</sup> 5 U.S.C. § 552 (1976).

<sup>350</sup> 15 U.S.C. §§ 1601-1667e (1976).

<sup>351</sup> 15 U.S.C. §§ 1701-1720 (1976).

<sup>352</sup> Pub. L. No. 93-495, §§ 302-05, 307, 401-15, 503, 88 Stat. 1511 (1974) (codified in scattered sections of 15 U.S.C.).

ing and oil spills.<sup>353</sup> It also might call for distillation of existing environmental pollution data,<sup>354</sup> to be accompanied by a standardized addendum explaining the known adverse effects of an operation's products or pollutants on human health and the environment.<sup>355</sup> In addition, it could indicate whether the operations' pollutants are de minimus, or in major violation of environmental standards. It is possible that none of these options would be feasible, but it is difficult to believe that some kind of workable and environmentally beneficial disclosure standards could not be created. The Commission can not take the Janus-like position that disclosure deters unethical business dealing, but would not influence corporate environmental conduct. The question that remains is whether the SEC can and will make creative use of its potential to influence the environmental practices of business.

## VI. CONCLUSION

Almost a decade ago, The Natural Resources Defense Council (NRDC) sought to expand the meaning of disclosure "in the public interest" in securities law through the vehicle of NEPA. The SEC rejected NRDC's contention that corporate environmental conduct had a place in the disclosure scheme, and obtained a final victory over NRDC in the Court of Appeals for the District of Columbia in April of 1979.

The Court of Appeals decision not only quashed an immediate expansion of the SEC's role in providing information to the investing public, but also made imprints on the developing law of NEPA. In examining the SEC's duty to consider alternatives to its action under NEPA, the court has suggested that agencies are somehow free to time their compliance with NEPA. The court's language could give agencies much greater freedom in dealing

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<sup>353</sup> NRDC's proposed rules would have covered both legal and illegal pollution, but NRDC did not propose disclosure of illegal pollution activity only. The SEC rejected its own proposal that companies file a list of environmental agency compliance reports indicating non-compliance. Securities Release No. 5704, 41 Fed. Reg. 21,632, 21,633-34 (1976). Such reports, however, would not include secret illegal activities, such as chemical dumping, unless those activities were reported to the environmental agency monitoring non-compliance.

<sup>354</sup> This is the CEQ proposal. See text at notes 185-186, *supra*.

<sup>355</sup> This proposal would avoid precise quantification of pollutants and their effects, which constitutes much of the expense of cost-benefit analysis. The "potential" adverse effects of various classes of pollutants are well known. See R. JAIN, L. URBAN & G. STACEY, ENVIRONMENTAL IMPACT ANALYSIS, 168-316 (1977).

with NEPA, but the decision should be read in light of other facts. The court itself noted that the SEC had conducted timely and extensive proceedings to meet its NEPA obligations, and would continue to do so. Furthermore, the decisions of other courts would not support a proposition that agencies can time their compliance with NEPA.

The decision of the court in *NRDC v. SEC* may affect NEPA in other ways as well. What the court did not say is as important as what it did say. The court tacitly accepted the SEC's contention that NEPA did not give explicit meaning to its "public interest" mandate. The decision implies that the many agencies with "public interest" mandates do not have new duties of environmental consideration, despite NEPA's mandate that the laws of the United States shall be interpreted in accordance with its policy. The court also did not elaborate on NEPA's effect on securities disclosure, but it appears that the court accepted the SEC's interpretation that NEPA required disclosure only of information that would protect the investor's dollars as well as his environment. This means that NEPA has little or no effect on non-environmental agencies that have no negative impact on the environment, even though NEPA was meant to affect all Federal agencies.

What NEPA offered the Commission was an imaginative means of using its authority in a socially valuable way. The SEC declined to accept the opportunity. What remains to be seen is whether, and to what extent, the SEC will find it "material" that corporate managers are using an investor's money to destroy his environment. For at least the time being, the answer is that an investor has no right to know how other people are using his dollars to degrade his environment.